DRAKE GENERAL PRACTICE REVIEW
EMPLOYMENT LAW CASE UPDATE
2017-18

Table of Contents

SUPREME COURT CASES

Artis v. District of Columbia, No. 16–460 (USCC 1/22/2018)

(https://www.supremecourt.gov/opinions/17pdf/16-460_bqm2.pdf)

After termination the Plaintiff filed in federal court asserting a Title VII violation, and also claims based on DC whistleblower, false claims, and common law theories. The district court dismissed the Title VII claims and then also the pendant jurisdiction claims. The District Court did not address the merits of the pendant claims but rather "declined to exercise supplemental jurisdiction over her remaining state-law claims. 'Artis will not be prejudiced,' the court noted, 'because 28 U. S. C. §1367(d) provides for a tolling of the statute of limitations during the period the case was here and for at least 30 days thereafter.'" Slip op. at 5. This case turns on whether that is really so.

The tolling provision states the state law filing deadlines "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U. S. C. §1367(d). The Plaintiff refiled 59 days after the federal dismissal. The lower courts took the view that this was 29 days too late – i.e. the tolling was for at most 30 days. Plaintiff had had nearly two years left on her state SOL at the time she brought the federal claim, but the federal claim took two and a half years to resolve. The lower courts took the view that her state SOL had run while the federal claim was pending and so all she had left following the federal dismissal was the additional 30 days set out in §1367(d). The Plaintiff argued that the state SOL did not run at all during the pendency of her federal claim, i.e. was tolled, and that thus she had whatever remained on her state SOL *plus* 30 days. She argued she had filed in plenty of time. The lower courts disagreed, but the Supreme Court found that the Plaintiff was correct.

On the statutory interpretation issue the Court relied on the plain meaning of "toll" to be mean "suspend" and was thus unconcerned with policy or history. Accordingly the court held "that §1367(d)'s instruction to 'toll' a state limitations period means to hold it in abeyance, i.e., to stop the clock. Because the D. C. Court of Appeals held that §1367(d) did not stop the D. C. Code's limitations clock, but merely provided a 30-day grace period for refiling in D. C. Superior Court, we reverse…" Slip op. at 2.

The Court went on to reject the argument that tolling a *state* SOL by a federal statute was unconstitutional because beyond Congress' power.

***Digital Realty Trust v. Somers*, No. 16–1276 (USCC 2/21/2018)**

(https://www.supremecourt.gov/opinions/17pdf/16-1276_b0nd.pdf)

Sarbanes-Oxley protects Whistleblowers who report misconduct to the SEC, any other federal agency, Congress, or an internal supervisor. The question in this case is whether Dodd-Frank, and its much longer statute of limitation and better remedies, protects the same group or only those who make reports to the SEC. The Court, without dissent, found that under Dodd-Frank a report to the SEC must be made for there to be protection.

Like *Artis* much of the case turned on what the Court thought to be plain language. Dodd-Frank defines "whistleblower" to mean a person who provides "information relating to a violation of the securities laws to the Commission." 15 U. S. C. §78u– 6(a)(6). But a whistleblower is protected for, *inter alia*, making disclosures that are required or protected under Sarbanes-Oxley. The issue then becomes whether a Sarbanes-Oxley report made to someone other than the SEC receives Dodd-Frank or only SOX protection. The Court's analysis read the provision word-by-word. Under this approach only a Dodd-Frank "whistleblower" receives Dodd-Frank protection even for a disclosure also covered by SOX. And a Dodd-Frank whistleblower, by definition, must report to the SEC. "When a statute includes an explicit definition, we must follow that definition…." Slip op. at 9. The Court thus limited the protection as defined: only those who report to the SEC. This interpretation was bolstered by broader language in the same law that did not require reporting. ""[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning." Slip op. at 10. This difference in whistleblower protection in the same bill further reinforced the limitation, and it withheld against all policy-based argument to the contrary. Indeed, the Court opined that the purpose of the more generous procedures and remedy (double backpay) in Dodd-Frank was precisely to encourage whistleblowers to come to the SEC, thus maximizing the chance that corrective action could be taken. All justices concurred with only the usual in-fighting over when to use a legislative history to interpret a clear provision.

***Encino Motor Cars v. Navarro* No. 16–1362 (USCC 4/2/2018)**

(https://www.supremecourt.gov/opinions/17pdf/16-1362_gfbh.pdf)

Once again the Court takes up the burning question of wages paid to auto service advisors. The FLSA has an exemption for "any salesman, parts-man, or mechanic primarily engaged in selling or servicing automobiles at a covered dealership." For many years DOL rules and handbooks had included "service advisors" in this exemption. Such advisors sell maintenance and repair contracts, but not cars. In 2011 the DOL passed a rule taking away the service advisor exemption, but according to the 2016 USSC opinion in this same case the administration failed to give adequate reasons for the change. Thus back in 2016 the Court instructed the statutory salesman exemption must be construed without giving any weight to the regulation, and remanded for this. The case now works its way back to the Court to address that enduring mystery: Are service advisors primarily engaged in

selling or servicing automobiles for the purposes of the FLSA exemption. Answer: Yes. So they are exempt. The issue is resolved, and we can at last sleep at night. For anyone but car dealerships the bulk of the analysis leading to this conclusion is of scant interest. For those wondering if "or" is ordinarily used in the disjunctive and when to invoke instead the "distributive canon" this is the case for you! Otherwise, not so interesting.

Epic Systems Corp. v. Lewis **No. 16–285 (USCC 5/21/18)**

(https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf)

In this case the Plaintiff's again engage in a bootless attempt to get statutory procedural rights to survive an arbitration agreement. These plaintiffs seek to bring a FLSA class action despite the existence of arbitration agreements mandating separate individual proceedings before an arbitrator. There are two main issues. First, whether the FAA savings clause, that allows setting aside arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract", applies here. The Court disposed of this on the ground that the savings clause applies to defenses that apply to "any" contract – that is it does not permit singling out arbitration agreements. And such singling out can take place where the attack is on a fundamental attribute of arbitration. "[B]y attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes." Slip op. at 7. This means the attack is not one which would apply to "any" contract, and is not within the compass of the savings clause. The second key issue was whether the NLRA's protection of mutual aid and protection means that the Arbitration Act cannot bar FLSA class actions. The argument was that the §7 catch-all protecting the right to organize, and to take collective action for mutual aid and protection means that the right to come together and file class actions is protected by the NLRA, thus overriding the FAA. The Court disposes of this issue on issues of statutory interpretation, primarily the rule that two statutes should be construed so as to preserve as much of both as possible. That is done by limiting the NLRA to collective action similar to union organizing etc. and construing it as not encompassing class action procedures which the NLRA does not mention, and which were newly minted when the NLRA was passed. The Court also cites the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Slip op. at 15. The Court explains "[i]t's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer." Slip op. at 15. With the assistance of this runaway mixed metaphor (where rampant elephants "seat the board"), the Court holds that FAA agreements to arbitration prevent individuals from joining or maintaining class actions under the FLSA, the NLRA notwithstanding. "The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum." Slip op. at 2.

Janus v. AFSCME **No. 16–1466 (USCC 6/27/18)**

(https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf)
In this case the Court strikes down on first amendment grounds mandatory fees for public employees who are nonmembers of the union. The Plaintiff worked for the State of Illinois as union covered child support specialist. He refused to join the union because he opposed many of its positions. Illinois state workers, however, had an agency-shop arrangement requiring him to pay reduced dues. This reduced dues is called an "agency fee." An agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration and pursuing matters affecting wages, hours, and conditions of employment…Excluded from the agency-fee calculation are union expenditures related to the election or support of any candidate for political office." Slip op. at 3. This modification was made to comply with Supreme Court precedent specifying that "nonmembers may be charged for the portion of union dues attributable to activities that are germane to the union's duties as collective-bargaining representative, but nonmembers may not be required to fund the union's political and ideological projects." Slip op. at 3; *citing Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977). "[T]he nonmembers were told that they had to pay for '[l]obbying,' '[s]ocial and recreational activities,' 'advertising,' '[m]embership meetings and conventions,' and 'litigation,' as well as other unspecified '[s]ervices' that 'may ultimately inure to the benefit of the members of the local bargaining unit.'" Slip op. at 4. Employees in a represented unit are not obligated to join the union but whether they join or not that union is deemed to be their sole permitted representative. "Only the union may negotiate with the employer on matters relating to pay, wages, hours, and other conditions of employment…And this authority extends to the negotiation of what the IPLRA calls 'policy matters,' such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and nondiscrimination policies." Slip op. at 2.

The Plaintiff brought suit claiming the forced fee constituted "coerced political speech." The claim was foreclosed by *Abood* and every lower court so ruled. The USSC now overrules *Abood.*

The Court started with the proposition that "[c]ompelling individuals to mouth support for views they find objectionable violates [c]ardinal constitutional command[s], and in most contexts, any such effort would be universally condemned." Slip op. at 8. The Court then moved to the proposition that "Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns." Slip op. at 9. These two premises then has previously led the Court to the conclusion that "occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." Slip op. at 9. The Court then turns to the compulsion at issue, and applied the intermediate "exacting" standard for free speech cases.

Turning to *Abood* the Court found its first justification for the compelled speech to be "labor peace." This justification was insufficient for a lack of any causal link. "The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true." Slip op. at 12. The Court cites to numerous state and federal systems where agency fees are forbidden and yet unions serve as exclusively bargaining representatives. As for "free riders" the Court analogizes to

groups such as seniors and asks, in effect, can the government force all seniors to subsidize the AARP because that groups purports to speak for all seniors? Clearly not. Further the Court suggests a less restrictive arrangement whereby the nonpaying members are required to pay what has been termed a "fair share" fee.

Of alternative arguments the weirdest is when unions argue that the First Amendment was not intended to protect the speech of public employees. To deal with this – plaintiff lawyers take note – the decision emphasizes the protection for public employee speech. The main alternative argument, however, was to assert that under the *Pickering* test "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs the interests of the" employee" in this case. Slip op. at 22. The unions argued that under this test the agency fees were justified. The most interesting basis for rejecting this argument was that "Pickering is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different." Slip op. at 24-25. The Court did not decide that *Pickering* is inapplicable to compelled speech cases but rather found the situations were so different that *Pickering* was not convincing without significant adjustment. The typically employer-friendly members of the Court then spend the rest of the analysis rather incongruously finding the employee to be protected and chopping down justifications in favor of the state.

***Mount Lemon Fire District v. Guido*, No. 17-587 (USCC 11/6/2018)**

(https://www.supremecourt.gov/opinions/18pdf/17-587_n7ip.pdf)

The question in this case is narrow: does the ADEA have a numerosity requirement for governmental employers? The short answer is no.

The ADEA, like Title VII, originally did not cover government. When Title VII was amended to add this coverage the term "person" was amended to include government. When the ADEA added government it was by defining the term "employer." The difference is that "persons" are prohibited from discriminating by Title VII only if they meet the definition of "employer" and the Title VII definition of "employer" includes the 15-employee numerosity requirement. On the other hand, the ADEA also prohibits discrimination by "employers' but defines "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees" and specifies that "The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State…" 29 U.S.C. §630(b). In finding no numerosity requirement for government the Court reads the plain text of the ADEA, that is, the term employer includes all persons who employ 20 or more employees but "also means" agents of such persons and government. "First and foremost, the ordinary meaning of 'also means' is additive rather than clarifying. As the Ninth Circuit explained, 'also' is a term of enhancement; it means 'in addition; besides' and 'likewise; too.' Slip op. at 4. Since the 20 or more language was not repeated in the "also" provisions the Court took the plain meaning to be no such numerosity requirement is imposed for government. Naturally, the difference in wording between Title VII and the ADEA "also" caused the Court to reject the argument that it should analogize to Title VII.

IOWA APPELLATE COURT CASES

Whitwer v. Civil Service Comm'n of Sioux City, 897 NW 2d 112 (Iowa 6/9/2017)

I overlooked this case last year and so is included in this year's update. The Plaintiff worked as a firefighter and so was covered by civil service procedures. He plead guilty to domestic abuse assault and was placed on a no contact order. The day after the plea he was placed on administrative leave and a disciplinary hearing was scheduled. Before the hearing the Plaintiff entered into a last chance agreement whereby in lieu of termination he was suspended and agreed, among other things, to abide by the no-contact order and consent to immediate termination if he violated that order. He entered into the agreement with the understanding that if he did not he would be fired for the plea. After 13 months he violated the no contact order, was convicted of it, and then terminated. He tried to appeal the termination to the civil service commission. "[T]he Commission declined to determine whether Whitwer was properly terminated because of the waiver-of-appeal provision in the last chance agreement. Although Whitwer claimed that he was under duress and suffering from depression when he signed the agreement, the Commission determined it had no authority to hear the appeal." 897 N.W.2d at 116.

After a hearing in the district court the plaintiff was reinstated by the district court. The main difficulty the district court had with this process was that whether to offer a last chance agreement was solely in the discretion of the human resource officers. The civil service commission would not be involved. In the view of the district court such a process is as easily manipulated as termination itself, and the intent of the law in protecting firefighters from arbitrary termination is undermined. The district court thus ruled the "Commission must be permitted to make such a determination prior to the offering of a last chance agreement or it must be permitted to approve a last chance agreement in order to perform one of its essential purposes. If Defendant Commission is not allowed to do so, the intent of the legislature in passing the civil service commission legislation would be defeated." *Id.* at 117. The Iowa Supreme Court disagreed.

Relying primarily on federal precedent the Court found that last chance agreements are valid and enforceable subject only to the usual contract principles. These principles answered the objection that allowing such agreements undermined the goals of the civil service laws. As the Federal Circuit explained "it is implicit in the agreement here that the agency must abide by it in good faith. Thus, the agreement itself serves as a check on arbitrary agency action. If an agency acts in bad faith or takes other arbitrary and capricious action, as a breaching party it would not be able to enforce the agreement." *McCall v. U.S. Postal Serv.*, 839 F.2d 664, 667-68 (Fed. Cir. 1988). The Iowa Supreme Court agreed, and applied general contracting principles including the covenant of good faith and fair dealing to the last chance agreement. The Iowa Supreme Court further did "not accept that a last-chance agreement becomes arbitrary simply because the municipality retains discretion whether to offer the agreement"

since "this ignores the fact that the employee has comparable discretion to reject the agreement, if and when offered." 897 N.W.2d at 122. Applying contract principles the court found a knowing and voluntary waiver, notwithstanding having no attorney present during the negotiations. Also the Court found the requirement to be sufficient for termination where "first responders often have to deal with volatile in-home situations, including incidents of domestic violence. Thus, full public confidence in the ability of first responders to perform these functions is particularly important." *Id.* at 123. The Court gave this parting shot: "We do not foreclose the possibility that in a different case in the future, such as a case involving a significant lapse of time or a *de minimis* or unrelated breach, attempted enforcement of the last-chance agreement might be contrary to public policy or might violate the duty of good faith and fair dealing." *Id.*

***Lee v. State*, 906 N.W.2d 186 (Iowa 1/12/2018)**

Here we have the fourth go around in the "Jarndyce v. Jarndyce" of Iowa employment law. This time it's all about them fees – well and the expenses. With the permission of the parties the court exercised its discretion to award the fees itself thus preventing *Lee* franchise from equaling the *Rocky* movies.

First the Court took up, *de novo*, what expenses should have been awarded. Groping it's way to the 21st century the Court allows recovery of the cost of computerized legal research under two conditions: (1) the party must show that the computer-assisted legal research reasonably relates to the issue at hand and (2) the party must also show that the charges for computer-assisted legal research are the type of costs normally billed to a paying client in the relevant market.

On fees the Court found that use of current rates, rather than historical hourly rates, was appropriate for such a protracted case since the use of higher current rates compensates for delay in payment. The 40% reduction based on lack of success was overturned because "the district court used a division process that went awry by engaging in an arbitrary numbers game…" *Id.* at 200. The district court identified 5 issues, found the defense prevailed in 2 (40% of the issues), and reduced the fee request by 40%. The district court did not consider things such as whether common questions of law and fact existed among the claims by the two plaintiffs against the four defendants. The "cash register" approach could not survive review. In exercise of its discretion the Supreme Court considered the vindication of the public interest achieved, but also the fact that only injunctive relief was obtained. On balance the Court reduced the request by 35% rather than 40%.

***Fenceroy v. Gelita*, 908 N.W.2d 235 (Iowa 2/23/2018)**

In this 4-3 decision the Iowa Supreme Court holds that "[w]hen an employer raises a *Faragher-Ellerth* affirmative defense and relies upon an internal investigation to support that defense, the employer waives attorney-client privilege and nonopinion work-product protection over testimony and documents relating to the investigation." 908 N.W.2d at 238.

After 38 years at Gelita the Plaintiff left employment but then filed a claim of racial harassment with the ICRC. Upon receipt of the charge the

Employer hired an attorney to develop of strategy of defense. The attorney conducted an investigation by interviewing Gelita employees. She then drafted a statement summarizing the evidence, and the employee signed it. It was revealed that some incidents of racial harassment had occurred and as a result several employees were disciplined.

The Employer subsequently filed its response with ICRC. In asserting its *Faragher-Ellerth* based defense that the Plaintiff had unreasonably failed to take advantage of its complaint procedures the Employer included the post-employment investigation and its results as proof that the Employer had taken reasonable steps to prevent and correct harassment. When suit was filed the Employer again asserted the affirmative defense that the Plaintiff had unreasonably failed to take advantage of any preventative or corrective opportunities provided and that the Employer had exercised reasonable care to prevent and promptly correct any harassing behavior.

The Plaintiff then gave notice of taking the deposition of the Employer's counsel and the expected motion for protective order resulted. The defense meanwhile filed a motion for summary judgment which included the post-employment investigation as a ground for showing it had exercised due care. The district court denied the motion for protective order. On interlocutory appeal the Iowa Supreme Court now takes up whether employers can assert attorney client privilege to protect internal investigations which it uses in asserting an affirmative defense.

Citing to other jurisdictions the majority had little trouble finding that if a defendant wants to use the reasonableness of an attorney-conducted investigation as part of its affirmative defense then it thereby waives the privilege. "The only way that Plaintiff, or the finder of fact, can determine the reasonableness of the Defendant's investigation is through full disclosure of the contents of the investigation." *Id.* at 244. This waiver is qualified however. The Court cautions that "the *Faragher-Ellerth* defense must not only be pled, but the employer must then *rely* on the attorney's investigation into plaintiff's discrimination allegations in proving the defense. When the reasonableness of the investigation into the allegations is relied upon as a defense, the contents of the investigation are placed into issue and become subject to disclosure." *Id.*

What this qualification means is that the company does not waive the privilege for the investigation so long as it does not attempt to prove it satisfied the "reasonable steps to prevent and correct" prong through the adequacy of any attorney-conducted investigation. But if, as here, the defendant relies on the adequacy of the investigation to satisfy the reasonable efforts prong then it waives the privilege related to that investigation. Here "Defendants plainly relied on Horvatich's investigation to support their affirmative defense in their motion for summary judgment. The district court, therefore, did not abuse its discretion in finding defendants waived attorney-client privilege over the investigation." *Id.* at 246. This said the Court allows the withdrawal of a waiver, and so here permitted the defense, on remand, to retract the waiver if "they may make a new record before the district court that clearly and unequivocally establishes the investigation will not be used to support the defense." *Id.*

Upon similar reasoning the Court found waiver of the work-product privilege. Discovery could be had of nonopinion work-product generated during the at-issue investigation although "[o]f course, an attorney-

investigator's mental impressions, conclusions, opinions, and legal theories remain sheltered from discovery." *Id.* at 247.

Finally, the court did "not reach the question of whether the presence of a union representative during an internal investigation waives attorney-client privilege, as defendants have not claimed privilege over any communications made in the union representative's presence." *Id.* at 249.

***Jahnke v. Deer & Co*, No. 17–0638 (Iowa 5/18/2018)**
https://www.iowacourts.gov/courtcases/403/embed/SupremeCourtOpinion

The legal analysis in this case is more interesting to the field of conflicts of law than employment discrimination. The Plaintiff worked as a temporary expatriate for Deere & Co at its Harbin Works in China. He was removed from this job and brought back to Waterloo. This was "discipline for Jahnke engaging in unreported sexual relationships with two female, Chinese employees who were within his business span of control." Slip op. at 2. Jahnke brought suit under the ICRA claiming discrimination based on age, sex and national origin. The defendants argued that since all the events giving rise to the cause of action happened in China, then, well, what happens in China stays in China. The Court agreed.

After some lengthy discussion the Court arrives at the conclusion that the ICRA does not apply extraterritorially because it doesn't say that it does. The question then becomes whether this is an exterritorial case since the assignment was temporary and both employee and employer are Iowa based.

The Court found that what counts is the locus of the employment relationship at the time that the discriminatory acts (here the discrete act of the demotion) took place. "At the time of the alleged discriminatory employment action, Jahnke lived and worked in China for the Deere subsidiary that operated in China under Chinese laws. Jahnke was operating under an employment contract that was to be performed in China. It required Jahnke to live and work in China in order to meet his employment obligations." Slip op. at 16. Further any decision-making took place either in China or, in unusual cases, in Moline, Illinois. Never in Iowa. "The only connection to Iowa in this situation occurred after the alleged discriminatory conduct occurred when he was assigned to Waterloo, Iowa, upon repatriation back to the United States. The Iowa legislature has not indicated or specified an intent or interest to protect nonresidents in those instances where they perform work outside of Iowa from alleged unfair employment practices that took place outside of Iowa." Slip op. at 23. "The mere filing of paperwork in Ankeny, Iowa, and the residence of corporate executives in Iowa do not establish an employment relationship in Iowa in any functional way" and thus suit in Iowa was dismissed. Slip op. at 25.

***Morman v. IWD*, No. 16-1333 (Iowa 6/15/2018)**
https://www.iowacourts.gov/courtcases/502/embed/SupremeCourtOpinion

This is the oldest of the "Wahlert Trio" filed on June 15, 2018. The issue in this case is whether the statutory requirement that complaints be filed with the Iowa Civil Rights Commission (ICRC) within 300 days of the discriminatory act may be tolled through application of the discovery rule or equitable estoppel. Not surprisingly the Court finds tolling and estoppel are available. The Court finds, however, that the Plaintiff did not satisfy the doctrines.

A long time employee of IWD, while working as an unemployment ALJ, filed an application for employment as a deputy workers' compensation commissioner. The Worker's Compensation Commissioner was Chris Godfrey. Godfrey was a gubernatorial appointee who headed a division within IWD which was headed by Teresa Wahlert. Godfrey forwarded to Wahlert the recommendation that Erin Pals be hired, and that Mormann be the second choice. Reasons given by Godfrey for not hiring Mormann were all age-neutral. Mormann was told he was not hired in a letter of March 7, 2014.

In September Wahlert gave a deposition in an unrelated suit brought by Godfrey. She indicated in the deposition that she did not agree with making Mormann second choice, although they never got to that point of disagreement in the actual hire decision. Wahlert testified she was worried because Mormann had reportedly discussed retirement. The deposition was taken under seal, but became public on March 18, 2015. Mormann filed a complaint of age discrimination with ICRC on May 4, 2015. The issue in this interlocutory appeal is timeliness of that complaint.

The big legal question in the case was whether the charge filing period is subject to tolling in the first place. The Court has little trouble finding tolling applies. Not a lot of trouble but plenty of paragraphs. The Court's analysis travels far and wide sweeping in all the deeps of space, and all the mysteries of time. Back to 1875 we go, out from Gulf Coast to Pacific Coast to the breaking swells of the Atlantic. The Court considers the beneficial policies underlying the law, and the directive to construe the law broadly and concludes that tolling doctrines, like the discovery rule and estoppel do apply. Almost as an afterthought the Court cites to the binding agency regulations saying exactly this. This regulation passed "long ago" in authorized by Iowa Code §216.15(12): "The commission shall establish rules to govern, expedite, and effectuate the procedures established by this chapter and its own actions thereunder." It is in the adjacent subsection that the 300 day limitation period for filing with the *agency* is set out. The regulations, and the long legislative inaction following, was additional support for the conclusion the Court had already made.

Turning to the discovery doctrines the Court states "Equitable tolling generally involves two doctrines, the discovery rule and equitable estoppel." Slip op. at 28.

For the discovery rule the focus is on what the plaintiff knew or should have known in the exercise of reasonable diligence. The amount of knowledge required to end tolling is not great. "When a plaintiff is on notice of a prima facie case of discrimination, the discovery rule is not available to toll the running of the filing requirements in civil rights statutes." Slip op. at 39. Here Mormann knew back in March 2014 his age, his qualification, his non-selection and critically the age of the preferred candidate. "As a result, the district court did not err in refusing to apply the discovery rule to toll the running of the filing limitation in this case." Slip op. at 40.

For estoppel the Court notes first of all that "even when a party has knowledge of a prima facie case, misrepresentations by the employer that the employer knows or should have known would lull the employee into inaction may provide a vehicle to toll the running of the filing limitation

under the equitable estoppel doctrine." Slip op. at 40. But estoppel takes more than failure to admit discrimination. "[T]he 300-day limitation cannot be tolled simply because the defendant omits to state that age discrimination was the true reason for dismissal…. Instead, in order to state a claim for equitable estoppel in the context of a filing limitation, the plaintiff must show an affirmative misrepresentation that the employer knew or should have known would delay the filing of a timely claim." Slip op. at 42. Since Mormann did not meet this standard the dismissal stood.

Notably, the Court took "no position on if and when statements related to potential retirement may be considered evidence of age discrimination." Slip op. at n. 5, p. 40.

***Walsh v. Wahlert*, No. 17-0202 (Iowa 6/15/2018)**
https://www.iowacourts.gov/courtcases/382/embed/SupremeCourtOpinion

The second case in the "Wahlert Trio" of June 15 is also brought by a former unemployment Administrative Law Judge, this one the chief. Walsh had been appointed by Governor Culver to the non-merit position of Deputy Director at IWD. Perhaps smelling change in the air Walsh applied for the merit job of Chief Administrative Law Judge, and received that job prior to Culver leaving office. Two years later the Branstad administration changed the scope of workers supposedly exempt from the merit system, apparently overlooking the Intergovernmental Personnel Act of 1970, the Social Security Act, and Unemployment Insurance Letter 12-01 which latter specifies "Requiring adjudicators to be merit-staffed governmental employees is necessary to meet the impartial hearing requirement of Section 303(a)(3), SSA." Instead the Department of Administrative Services (DAS) based the change on solely reinterpretation of state law, and on a new AG opinion. Pursuant to this decision Walsh was informed by DAS that his position had been identified as one to be reclassified. The letter was delivered to him by the IWD human resource manager on April 5. "The letter advised Walsh that if he believed his position did not meet the definition of confidential employee under the new administrative rule, he could appeal the determination." Slip op. at 3.

Walsh met with the HR manager and told him that the reclassification was contrary to federal law. Walsh testified that he was told the matter was on "hold." He then went on vacation, and meanwhile the deadline to appeal through civil service had run. After being told he was reclassified and that things weren't really on "hold" Walsh contacted the US Department of Labor, from whom IWD receives the majority of funding upon certain conditions. Walsh then met with Wahlert, explained the legal situation and Wahlert referred Walsh to IWD counsel Ryan Lamb. Lamb later contacted DOL and then informed Walsh that his position could not be reclassified so long as he heard cases. Shortly thereafter Walsh received a new position description which excluded hearing cases. Walsh made multiple complaints including emails to the Governor, to a state senator, and to the DOL. A week after this, on June 20, the change in duties was rescinded.

On July 15 Walsh was laid off pursuant to what IWD called a reduction in force necessitated by budget cuts. Prior to July 15 Walsh, who was in management, was unaware of budget issues. Walsh subsequently applied to be a Deputy Worker's Compensation Commissioner (with Godfrey as Commissioner-yep the Godrefy who sued Wahlert). Walsh alleged Wahlert attempted to

interfere in his attempts to find another job. He was hired as a Deputy Workers' Compensation Commissioner.

Walsh filed a noncontract grievance with PERB over the layoff, but voluntarily dismissed. He then brought suit alleging whistleblower and common law wrongful discharge claims. These were dismissed by the district court. The whistleblower claims was dismissed on exhaustion issues for failure to pursue the civil service remedy. The common law wrongful discharge claim was dismissed on the theory that such a claim is not available to merit-covered workers but only to at-will workers.

On the whistleblower exhaustion claim the standard is whether "the available administrative remedy is adequate and if the legislature, expressly or impliedly, intended the administrative remedy to be exclusive." Slip op. at 14. The Court found no express requirement of exclusivity and refused to find an implied one "in light of the unequivocal legislative declaration that a whistleblower may bring a civil action to enforce Iowa Code section 70A.28." *Id.* The Court bolstered this conclusion with the observation that this provided for symmetrical whistleblower protection for merit and non-merit.

On the common law wrongful discharge claim the Court found that "a civil service statute that provides a comprehensive framework for the resolution of such claims provides the exclusive remedy." Slip op. at 17.

***Ackerman v. State*, No. 16-0287 (Iowa 6/15/2018)**
https://www.iowacourts.gov/courtcases/139/embed/SupremeCourtOpinion

The final case of the "Wahlert Trio" takes up the issue of whether a contract covered employee can bring a claim of wrongful discharge in violation of public policy. In a 5-2 vote the Court rules that the tort is *not* limited to at-will employees.

Susan Ackerman was again another Administrative Law Judge with unemployment appeals. After Walsh was terminated (see above) his chief ALJ slot was left vacant, with the functions handled by two lead workers and direct oversight from Wahlert. Ackerman was subpoenaed by the legislature and testified claiming that pressure was brought on IWD Administrative Law Judges by Director Wahlert and the co-defendant lead workers to issue decisions favorable to employers. A few months later Ackerman was suspended and then fired for alleged misconduct.

She sued claiming many things including whistleblower and common law wrongful discharge. The wrongful discharge claim was dismissed **not** on pre-emption by the whistleblower law or by the civil service laws but on the theory that only at-will employees may bring common law "public policy" wrongful discharge claims. The Court of Appeals reversed finding that the tort of wrongful discharge is not limited to at-will workers. The Supreme Court granted further review and affirmed.

The majority recognized that past cases had characterized wrongful discharge in violation of public policy as an exception to the at-will employment doctrine. But "our prior characterization of the retaliatory discharge tort as an exception to the at-will employment doctrine does not confine its common law development or serve as a limitation into the future." Slip op. at 9. The majority thus forged on into whether it is

good policy to allow the tort to be used by those with contract coverage. First, the Court noted that unlike breach of contract claims the public policy exception was created exactly to vindicate public policy. And such policies apply to contract and non-contract alike. Next the Court emphasized that a discharge in violation of public policy created both a contract and tort issue. The "duty to refrain from retaliatory discharge is independent of the duty to uphold the bargained-for terms of employment." Slip op. at 11. "Nowhere in our law does a contractual employee surrender, by virtue of signing an employment contract, the right to bring a claim for tortious conduct that harms not only the employee, but also the state's clear public policy." Slip op. at 12. The court found it "incongruous for some employers to be subject to deterrent damages for wrongfully discharging an employee, while other employers are immunized from deterrent damages simply because they wrongfully terminated a contract, rather than an at-will, employee. The rationales for awarding punitive damages—punishment and deterrence—are no less compelling when an employer conditions a contract employee's employment on a violation of a clearly established public policy." Slip op. at 15-16. The majority refused to discuss the *Walsh* issues on the ground of failure to preserve error.

The dissent rather sensibly points out that a state civil service covered worker like Ackerman is barred from maintaining the tort action under *Walsh* and therefore the issue of letting contract workers in general bring wrongful discharge claims should be left to another day.

In 2017 criminal insurance fraud charges against Ackerman based on her time with IWD were dismissed by Polk County Judge Robert Hanson. Judge Hanson found ALJ Ackerman had been "subjected to retaliatory, selective, and/or vindictive treatment by the state." But he dismissed based on failure to prosecute in a speedy fashion. Thus the state was unable to challenge the observation, essentially *dicta*, of vindictive treatment.

For fans of logic the Court in footnote one discusses the "fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q." Slip op. at 8. This is based on the classical categories of Statement (P=>Q), Converse (Q=>P), Inverse (~P=>~Q) and Contrapositive (~Q=>~P). So the converse is the order flipped, the inverse is the signs negated, and the contrapositive is both operations (negated and then the order flipped). The fallacy of the inverse is that just because P=>Q ("if I'm a judge then I am a lawyer") it does not follow ~P=>~Q ("if I'm not a judge then I am not a lawyer"). The fallacy of the converse likewise is from the fact that just because P=>Q ("if I'm a judge then I am a lawyer") it does not follow that Q=>P ("If I'm a lawyer then I am a judge" – God forbid!). The contrapositive is a different beastie. The statement and contrapositive are logical equivalents. Whenever P=>Q ("if I'm a judge then I am a lawyer") then it always follows that ~Q=>~P ("if I'm not a lawyer then I'm not a judge" – hey, that's right). In fact in mathematics we can prove a statement by taking its contrapositive and proving that to be true – it's called "proof by contraposition." Contraposition can be decidedly useful in statutory analysis – if you can get a judge to understand it. By the way the converse and the inverse are contrapositives of one another and are therefore logically equivalent. Thus the fallacy of the inverse and the fallacy of the converse are the same thing – chew on that.

***Deeds v. City of Marion*, No. 16-1666 (Iowa 6-22-2018)**

https://www.iowacourts.gov/courtcases/482/embed/SupremeCourtOpinion

The plaintiff appeals the grant of summary judgment in a disability discrimination case. The Plaintiff has MS which was asymptomatic at the time at issue. He applied for a firefighter job with the City of Marion and was sent for a medical exam. Iowa law requires the Municipal Fire and Police Retirement System of Iowa (MFPRSI) to set the standards for entrance physical examinations. The Unitypoint physician learned that the plaintiff had had active MS symptoms in the last year and determined he was not medically qualified. She based this on the National Fire Protection Association (NFPA) standards since the MFPRSI standards do not mention MS. The form she provided to the City contained no further details about the Plaintiff's medical condition. The fire Chief rescinded the offer without knowing any details at all and had no idea why the medical report came back the way it did. The job offer was rescinded and the plaintiff brought suit for failure to hire. The Plaintiff's theory was that the physician discriminated by consulting NFPA, which exclude from service any firefighter candidate with MS who has experienced symptoms during the three years preceding an examination for fitness. The City had never adopted the NFPA protocol and the applicable MFPRSI protocol makes no reference to NFPA standards. The Court of Appels rejected the claim that the physician's reliance on NFPA constituted discrimination by the City. The Supreme Court granted further review.

The Court started with the general rule that "Employers generally are entitled to rely on a physician's opinion that the employee or prospective employee is medically unqualified for the job." Slip op. at 15. The key here was that the Employer did not know why the opinion disqualified the plaintiff nor did the plaintiff challenge that opinion, or even tell the Employer what caused the disqualification. Yet the Employer is only required to accommodate "known" disabilities. "The burden was on Deeds to give the City notice of his disability; after all, Deeds knew his MS was the physician's reason for his disqualification. Yet Deeds kept his disability a secret when talking to Chief Jackson on the phone. The City was not required to read Deeds's mind, and the City was never told another physician had cleared Deeds to work as a firefighter with no restrictions." Slip op. at 19. The Court refused to find a duty to inquire, at least in cases such as this where it is a failure to hire based on an independent medical opinion. "We will not require cities to challenge an independent medical opinion that an applicant for a firefighting position is unqualified when the applicant himself did not ask the city to do so or seek any accommodation" Slip op. at 21.

After the ICRC complaint was filed the City requested the medical results and offered to pay for an individualized assessment. Since this was the first the City knew of the MS, and the plaintiff refused the offer, the Court found it was the plaintiff who caused the breakdown in the interactive process of accommodation. "Neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability." Slip op. at 22.

The Court rejected the claim that since the Employer knew the plaintiff was medically disqualified it should be imputed with knowledge of the disability. "While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts."

Slip op. at 26. The problem for the plaintiff is that a firefighter job is physically demanding. This means "Persons may fail the medical examination required to be a professional firefighter for many reasons that do not constitute a disability…" Slip op. at 26. The Court did note that "We are not confronting a situation in which the City knew Deeds had MS but did not know MS qualified as a disability under Iowa law. The City was unaware of his MS." Slip op. at 28.

The Court rejected liability premised on the idea that the doctor's knowledge could be imputed to the city on an agency theory. Here the critical factor of control of the physician's examinations by the Employer was lacking, and so agency could not be found on the facts.

Turning to Unity Point the Court took up whether the medical provider could be liable on an aiding and abetting theory. The disposition in a nutshell was that you cannot aid an employer in an illegal act if you cannot establish that the Employer did anything illegal. Since the failure to hire was not shown to be illegal the medical examination did not aid and abet anything illegal. Finally, the Court followed the supposed precedent of *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997), and held "the actions of the clinic and its doctors are not covered by the ICRA when (1) the clinic plays an advisory role in the employer's hiring decision and (2) the advice being sought was an independent medical judgment." Slip op. at 35.

The dissent quite correctly pointed out that *Sahai* was a plurality decision and thus not precedential. Only after this case was decided in 2018 did the *Sahai* rule become precedent. *See Audobon-Exira v. Illinois Central Gulf RR.*, 335 N.W. 2d 148, 151 (Iowa 1983*) (discussing opinion in Weitl v. Moes*, 311 N.W.2d 259, 273 (Iowa 1981))(Opinion support by four votes and two concurring in result only fell "outside of the rule of stare decisis and is not binding as precedent.")

[Iowa Court of Appeals Decisions]

***Remmick v. Magellan Health Care*, No. 16-0954 (Iowa App. 9-27-2017)**

http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/Recent_Opinions/20170927/16-0954.pdf

A woman with depression sued her employer for workplace harassment, for retaliation, and discriminatory discharge. Summary judgment was granted and the Court of Appeals affirmed. The Court resolved the non-harassment disability claims on the ground that the Plaintiff was not qualified even with accommodation. The Plaintiff had applied for SSDI and her psychiatrist had opined that she was incapable of sustained competitive employment and also found no workplace accommodations would enable her to do her job. Her restrictions were inconsistent with her job, and were not the sort that could be accommodated. The Plaintiff tried a creative argument that disability harassment had caused a more severe emotional reaction and this in turn made it so the Plaintiff could not be accommodated. She argued it was unfair to find against her for inability "when the person cannot complete the essential functions of the job because of the violations of the disability laws…" Slip op. at 13, n. 5. The Court rejected the argument holding that the Plaintiff's "status as a qualified employee does not depend on the cause of her disability, but rather on the extent of her disability." *Id.* In the end the extreme nature of the incapacitation doomed the failure to accommodate claim. On harassment the Court found the conditions not to be intolerable. Key, of course, was the use of the objective standard under which the Court ruled that the alleged conduct was "rude, unprofessional, and offensive, but even in the aggregate, the actions are not so severe or pervasive as is necessary to meet the demanding standard of 'extreme conduct.'" *Slip op.* at 22. As for the supervisor's conduct the Court found the Employer's actions to be prompt and adequate as a matter of law. On retaliation the movement to another assignment, which was switched back at the end of the same day, was not severe enough to be an adverse employment action. Slip op. at 23-24. On some interest is that the Court of Appeals seemed to give significant consideration to the *screening decision* of the ICRC.

***Manahl v. State*, No. 16-2154 (Iowa App. 9-27-2017)**

http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/Recent_Opinions/20170927/16-2154.pdf

A former chief of the weights and measures bureau of the Iowa Department of Ag brings suit claiming wrongful discharge in violation of public policy. He was dismissed in district court and the Court of Appeals reverses in part. The State claimed the Plaintiff did not meet his supervisor's expectations for managing staff time and scheduling annual gas tank inspections. After about six weeks on the job the Plaintiff accused an oil company of possible consumer pricing fraud, and the company management complained to an industry lobbyist about this. The Plaintiff continued to pursue the matter and drafted a cease and desist letter which he shared with his supervisor. The supervisor "advised Manahl that the allegations concerning mislabeling and pricing violations fell into a 'gray area' of the law and asked him to delete such accusations from the letter…" Slip op. at 4. As this issue faded another one with the same company arose, including a TV interview by the Plaintiff, leading to complaints directly to the Secretary of Agriculture. While this conflict with the oil company continued to escalate, along with involvement of and complaints to upper management, the Plaintiff also experienced problems with managing his staff. The oil company issue culminated in a meeting of the Plaintiff's supervisor with the oil company executives, and an industry lobbyist. Two weeks later the Plaintiff was fired for unsuccessful completion of his probationary period. After summary judgment was granted the Court of Appeals reversed in an analysis that had a "focus on causation." Slip op.

at 12. The Court applied the "determining factor" analysis, saying, "The employee's protected conduct does not need to be the main reason behind the adverse employment decision, but it must be the factor that makes a difference in the outcome." The Court was unwilling to find, as a matter of law, that performance was the reason for the discharge. "While the department may not have been fully satisfied with Manahl's performance, Manahl still deserves a chance to have a trier of fact assess whether the aggravation that Manahl's enforcement efforts caused fuel-industry representatives, which they forcefully communicated to his bosses, was the straw that broke the camel's back." Slip op. at 17. Although the State relied on timing the Court of Appeals noted, "[o]n the same day as the firing, Moline sent the watered-down letter to Hasken, [the oil company executive]. And although the letter did not include the apology Hasken had requested, Hasken was nevertheless satisfied." Slip op. at 19. This too supported the reversal of summary judgment.

Once again the Courts engage in a rather befuddling causal distinction. A factor that "makes a difference in the outcome" is just another way of saying "but for" cause. If the same outcome is the result then the factor doesn't make a difference. If a different outcome would result without the factor – i.e. no termination – then the factor has "made a difference in the outcome." And if we can say that "but for" the factor the termination would not follow, then we are saying that if the factor is removed the outcome would make a difference. The classification is a logical one, not one of degree, and logically they are the same thing. The court then also cites to a case using the phrase "final straw" – not a classification of degree, or of logic, but of time. I see little hope of the Courts ever getting a sensible approach to this issue.

***Johnson v. Mental Health Institute*, No. 16-1447 (Iowa App. 1-10-2018)**

https://www.iowacourts.gov/static/media/cms/161447_Johnson_v_Mental_Health_Inst_55D745384326B.pdf

Starting a trend where every 2018 employment law case from the Iowa Court of Appeals was issued in a month starting with "J" is this grant of summary judgment in a race discrimination and retaliation case. The harassment case was dismissed as untimely below and the Court of Appeals does not deal with the issue.

The Plaintiff worked as a residential treatment worker. The Plaintiff had several instances of discipline based on attendance. She then had a confrontation with a supervisor/nurse over following policy on showers. The Plaintiff complained about being picked upon and mentioned a doll hung by its neck in the nurse's station. She later alleged the doll was racist, was brought in by the supervisor and was meant to be her. An internal investigation was inconclusive on the doll but found no discrimination. The Plaintiff complained about the investigation to DHS, and mentioned race. Five days later she was suspended again with absenteeism as the stated reason. A day after the suspension DHS forwarded the complaint email to the Director of Nursing. A meeting ensued, again allegation of harassment by the supervisor/nurse, and again an ostensible attendance-based suspension followed. During the suspension the Plaintiff posted social media posts which were reported to management by at least six employees who were concerned with threatening overtones. The Plaintiff was placed on paid leave over the posts and again investigation – including

someone from DAS - ensued. The Plaintiff was fired over the posts. Notably the posts included reference to race and discrimination.

The case was dismissed on summary judgment on the idea that the Plaintiff did not meet her *prima facie* element of showing satisfactory work. The Plaintiff conceded that she had attendance issues but asserted this was not enough to stop her from satisfying the *prima facie* case. The Court found that "Johnson has the affirmative burden to establish that she was performing her job satisfactorily—or, at the summary judgment level, to at least present evidence sufficient to create a fact question regarding whether she was.." but that "Johnson has not presented any such evidence—either by disputing MHI's facts or providing her own material facts." Slip op. at 14. The Court for this reason, and very little else, upheld the dismissal. Not discussed is the notion that poor performing workers are also protected from racial discrimination. This is why a rigid application of the elements of a *prima facie* case in such situations makes little sense. Indeed, the "qualification" prong as such is only used by many courts in failure to hire cases *not* discharge cases. The protection for bad actors was definitively established in *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976)where the United States Supreme Court faced a plaintiff who was stealing cans of anti-freeze. McDonald was White and he claimed that he was fired for stealing anti-freeze but black employees were not. His claim was dismissed below on the ground that he did steal the antifreeze and theft is good reason for termination. The USSC reversed. "We cannot accept respondents' argument that the principles of *McDonnell Douglas* are inapplicable where the discharge was based, as petitioners' complaint admitted, on participation in serious misconduct or crime directed against the employer. The Act prohibits all racial discrimination in employment, without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination. …It may be that theft of property entrusted to an employer for carriage is a …compelling basis for discharge …but this does not diminish the illogic in retaining guilty employees of one color while discharging those of another color." Surely this also applies to attendance? Thus the case should have moved to the question of comparable employees of a different race (or who had not complained) and merely the fact of attendance violations should not have resolved the situation. The focus at the qualified stage should thus be whether the worker was "otherwise" qualified else we never get to the point of looking at similarly situated individuals. *See e.g. McGinnis v. Union Pacific RR,* 496 F. 3d 868 (8th Cir. 2007).

On retaliation the Court, with almost no discussion except about the level of causation required, found that a causal link between the protected activity and the termination was not shown. The Court, rather unhelpfully, writes the causal standard required that "Johnson must show her engagement in a protected activity was a 'motivating factor' in MHI's decision to terminate her employment" but adds about the dismissal for lack of cause only "we agree." Slip op. at 17. Judge MacDonald wrote separately to address the Facebook posts. Citing to cases on unreasonable forms of opposition he explained "[t]o the extent the substance of any of Johnson's posts could be considered protected activity within the meaning of the Iowa Civil Rights Act, the non-protected posts and threats serve as an independent and legitimate non-discriminatory reason justifying the termination of her employment." Slip op. at 20.

Further review has been denied.

***Hyten v. HNI Corp.*, No. 16-1454 (Iowa App. 1-10-2018)**

https://www.iowacourts.gov/static/media/cms/161454_Hyten_v_HNI_Corporation_158CF04392AFC.pdf

This case is most notable for Judge McDonald's use of mid-20th century British slang.

The Plaintiff brought suit claiming retaliatory discharge for her claiming Workers' Compensation Benefits. She had filed for benefits, was on light duty, and received surgery. At one point she was approached by the factory manager about "milking it." She had had attendance issues throughout her employment and in the end was fired for stated reason of attendance. The case went to the jury and resulted in a defense verdict. On appeal the Plaintiff claimed error in the exclusion of evidence about the delay in payment, the safety of the post-injury work assignment, and the waiver of a notice defense by the company.

On the first and third issues, which pertain to lack of notice of the WC claim, the Court found the offer of proof severely lacking. As for the assignment the Plaintiff was allowed to testify that she thought it was retaliatory and the Court found no prejudice to substantial rights.

On the ultimate issue the Court writes that "Hyten does not really dispute that the company terminated her employment pursuant to an established attendance policy… Hyten's claimed evidentiary errors are thus a mere subterfuge. The defect in this case was the lack of any evidence, even considering the excluded evidence, casting doubt on the employer's legitimate reason for the termination of employment." Slip op. at 7. Naturally it is not good when the Court calls the issues you raise on appeal a "subterfuge." In the end the Court affirmed the jury whom had "sussed this out." Slip op. at 7.

"Suss" is a shortening of "suspect" and to "suss out" means to "puzzle out, figure out." To "suss out" is a slang term first appearing in writing in the September 28, 1966 British youth magazine *Queen*. "Suss" meanwhile is British police slang attested in the 1953 novel *Crime Is My Business*, although it may date to as early as the 1920's. "Sussed out" started appearing in the USA in the 1990's.

***Jensen v. Champion Window.*, No. 17-0656 (Iowa App. 1-10-2018)**

https://www.iowacourts.gov/static/media/cms/170656_Jensen_v_Champion_Window_4FDAFA434A3AD.pdf

Once again the Iowa Appellate Courts are faced with a choice of law issue. The Plaintiff sues for a public policy wrongful discharge. The Plaintiff tried suing everywhere and just keeps on losing. His federal court action was dismissed because the federal claims had no merit and the court refused to exercise supplemental jurisdiction over state claims. Then he filed in Nebraska state court. These claims were dismissed on the grounds that "the law Jensen cited to support his claims did not contain a private right of action, his newly asserted claims were precluded by the federal district

court's dismissal, and the claims were otherwise time barred." Slip op. at 2. He then tried Iowa.

After a first motion to dismiss the Iowa district court dismissed part of the claim but kept the Iowa wrongful discharge claim intact. The Defendant then moved to dismiss this common law claim on the ground that Nebraska law, not Iowa law, governed. The district court agreed and the Plaintiff appeals the dismissal.

On appeal the Court assumed, without deciding, that tort rather than contract choice of law doctrines applied. These doctrines turn the choice of law on which state has the most significant relationship to the occurrence and the parties. The "contacts" to be assessed include the place of injury, the place of any wrongful conduct, where the parties are domiciled, and where the relationship (here employment) is "centered." The "principles" governing assessment of the contacts include policies of the fora, justified expectations, policies of the interstate system, the policies of the field of law, and administrative issues like predictability. Slip op. at 5. Here the Plaintiff never lived, worked, or visited Iowa. His only contact with Iowa was that he was asked to sign a lead certification for a project in Iowa, and it was his refusal to do so that he claims as the protected conduct. With the employment relationship and all other contacts centered in Nebraska the case came down to policy. The Court concluded that "[t]he relevant policies of Nebraska in controlling the employer/employee relationships of its citizens outweigh the policy interest of Iowa in ensuring proper lead abatement procedures are followed." Slip op. at 6. Further the certainty factor favored Nebraska employers and employees knowing that Nebraska law applies to them. The Court found that Nebraska law applied and that thus the dismissal of this third lawsuit was correct. The Plaintiff's experience in a nutshell: So. Much. Losing.

***Spencer Convenient Healthcare v. McGregor*, No. 17-0389 (Iowa App. 1-10-2018)**

https://www.iowacourts.gov/static/media/cms/170389_SPENCER_CONVIENT_HEALTHCARE_D75A01CD5CF9A.pdf

This is a breach of contract case where the employer sued to enforce its non-compete contract and was countersued for breach of the employment contract. On breach of employment contract the Employer argued that the worker breached first by quitting. The district court tried the case in equity and found for the worker, awarding damages on the breach of employment contract claim, and finding this breach by the employer voided the non-compete clause. On appeal the Court of Appeals reviewed the matter *de novo*. Citing to unemployment law the Court applied the rule that in order to find a quit there must be intent to quit and an overt act of quitting. Here the worker was contemplating quitting, but only because she'd heard the employer did not want her back. "And at the time she was terminated by John, McGregor had not taken any overt act to officially end her employment with SCH." Slip op. at 9. This being the case no quit was established. Thus it was the *Employer* who breached the contract and the Employer conceded that if this were so then it could not enforce the non-compete. The Court found that the breach included the failure to pay off student loans, as the Employer had promised. But the Court determined that "income taxes and the penalty to which McGregor was subjected as a result of liquidating her retirement account to pay off her student loan were not

foreseeable results of SCH's breach." Slip op. at 12. Being unforeseeable these damages were not recoverable in a contract case under the rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854).

***Short v. Elliott Equipment Company*, No. 16-1795 (Iowa App. 1-24-2018)**

https://www.iowacourts.gov/static/media/cms/161795_Short_v_Elliott_Equipment_Co_7532C4A2248CF.pdf

This is a Iowa Wage Payment Collection case turning on whether a commission was owed. The case was tried in District Court to the Court who entered judgment for the unpaid wages and fees for the Plaintiff. Liquidated damages were denied on the basis that the Court agreed with the Employer that it was a good faith dispute over the commission. The defense only appeals. The Court of Appeals found substantial evidence to support the nonpayment of wages. The issue was commission on a sale started before the Plaintiff quit, but not completed until significant effort was expended afterwards. The Court of Appeals found that the record supported the conclusion that "[a]lthough Elliott Equipment maintained that it was its policy that a salesperson complete the entire 'sales process' before paying a commission, the facts belie its assertion." Slip op. at 10. On fees the Court used the Employer's liquidated damages argument against it: "Although Elliott Equipment implies the case did not demand the hours spent by Short's attorney based on the size of the award at issue, the company characterizes this case as 'a bona fide dispute over whether the employee fulfilled the job duties required to earn the commission, and whether a commission was earned at all.'" Slip op. at 13. Quoting from the Iowa Supreme Court the Court also explained that "While Elliott Equipment appears to take umbrage with the vigorous manner this case was tried, …[t]he risk of stonewalling an employee's claim for unpaid wages fairly rests on the party best equipped to financially bear it—the employer." Slip op. at 13 [internal quotations omitted]. Following up on the slang usage theme note that "umbrage," from the same root as "umbrella," is from a middle French word meaning "shade." Thus when you think someone has "thrown shade" on you then you may "take umbrage" at their remark. The more figures of speech change the more they stay the same.

***Algreen v. Gardner*, No. 17-0104 (Iowa App. 6-20-2018)**

https://www.iowacourts.gov/courtcases/1065/embed/CourtAppealsOpinion

Waiting patiently for the next available "J" month the Court of appeals issued no employment law decisions between January and June. This June decision is only tangentially an employment law case. The Plaintiff having won a 91A unpaid wages case now tries to get the money. The Employer went out business, transferred the assets, and asserts the blood from a turnip defense to execution. The Plaintiff now brings suit under the Uniform Fraudulent Transfer Act (UFTA), Iowa Code chapter 684, and also tries suit against the former owner through a "pierce the veil" approach. The Plaintiff loses on both on *de novo* review in the Court of Appeals. The District Court found indicia of fraud that were, however, explained by context. That context was a sale that was negotiated and completed over a year before judgment was entered in the 91A case. "The sale was to a legitimate third party and was for substantial value. The conclusion that Gardner divested himself of his business worth $1.8 million to avoid the possibility of paying a $20,000 wage claim is not supported by the record and defies common sense." Slip o. at 8. Upon the piercing the veil theory

the Court found no evidence of undercapitalization. "[T]here is a legitimate reason the corporate entity had no capital at the time of trial—it was no longer in business. There is no longer any corporate undertaking requiring capital." Slip op. at 12. The same reasoning explained the lack of employees. As far as corporate formalities, and comingling "the evidence does show Gardner used corporate funds to pay certain personal expenses. This is certainly improper but also certainly not atypical for a closely-held owner-operator business. Given the lack of any other evidence in favor of imposing liability on Gardner for GCI's judgment debt, we do not think this single fact, standing alone, warrants the extreme remedy of imposing personal liability…" Slip op. at 13.

***McIntosh v. City of Riverdale*, No. 17-1480 (Iowa App. 7-5-2018)**

https://www.iowacourts.gov/courtcases/2008/embed/CourtAppealsOpinion

Realizing that July is the last "J" month on the 2018 calendar the Court of Appeals went into full-on panic mode and issued a whole budget of employment law decisions in July. First up: the notice required to terminate a city clerk.

On February 6 the council voted to remove the city clerk. The next day it sent her a certified mail notice. She was advised of her right to request a hearing and this she did. She was told on February 15 that March 7 was the anticipated hearing date, and this was confirmed in a letter of February 23. At the February 21 meeting the council scheduled the hearing for March 7. On March 1 the minutes of the February 21 meeting were published. The agenda was posted March 2. The hearing was held as scheduled, the clerk was removed and now she brings a writ of certiorari. She alleged the City violated the Code by improperly publishing the notice. She claimed this improper notice violated her due process rights. The Court observed that neither Iowa Code §372.15 governing removal of clerks nor §362.3 governing publication of notices in the newspaper were violated. On §362.3 the Court observed "notice of a hearing is only required to be published if such official publication is required by the city code." Slip op. at 4. But the municipal code, and §372.15, "only require that a 'public hearing' be granted upon a request from an individual removed from city office. The provisions do not call for notice of the hearing of any kind." Slip op. at 5. The Court pointed out numerous other Code sections that specifically refer to §362.3 newspaper notices, and inferred that the lack of such reference here meant no such requirement was imposed. Thus the one week in advance newspaper publication of §372.15 did not apply. The Court quickly disposed of the due process claim noting that she had adequate notice and did appear to defend with counsel and several witnesses.

***Olson v. Durant Comm. Sch. Dist.*, No. 17-1235 (Iowa App. 7-5-2018)**

https://www.iowacourts.gov/courtcases/1646/embed/CourtAppealsOpinion

This is a grant of summary judgment to a school district in an education disability discrimination case. Although the Court grants summary judgment the case is of primary note in employment cases because the Court uses a much more workable concept of what a "prima facie" case is for cases other than failure to hire: "proof that the plaintiff suffered an adverse action

under circumstances from which an inference of unlawful discrimination arises….An inference of discrimination arises where there is some evidence of a causal connection between a plaintiff's disability and the adverse . . . action taken against the plaintiff." Slip op. at 8. Also notable the Court states in footnote 2 that the ICRA does not make it illegal to retaliate for "engaging in an activity protected under Iowa Administrative Code chapter 281-41, concerning special education." Slip op. at 6.

Further review is pending.

***McCullough v. Emeritus Corp.*, No. 17-0274 (Iowa App. 7-5-2018)**

https://www.iowacourts.gov/courtcases/2055/embed/CourtAppealsOpinion

Although not an employment law case this decision deals with the common employment law issue of arbitration. Specifically the issue is when a defendant waives a right to arbitration through litigation conduct. The Court held that under federal law "waiver through litigation conduct is clearly a matter for the court to decide." Slip op. at 6. Under State law the contract can provide that the arbitrator is to decide the issue of waiver. These contracts did not, so the issue was for the Courts even under state law.

Waiver by litigation conduct occurs where the defendant "'(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts.'" Slip op. at 7. Here the defendant knew of the agreement it drafted but continued to litigate in court. "They filed an answer to the suit, asserting various affirmative defenses, but they did not mention the arbitration agreement. …plaintiffs were prejudiced because they incurred substantial expense and engaged in significant effort as a result of defendants' early litigation activities." Slip op. at 7-8. "[T]he defendants never raised the existence of the arbitration agreement in their answer. They never moved to amend the answer to raise this issue. Second, after they produced the arbitration agreement, the defendants continued to litigate this case. The defendants designated experts, sought additional time to designate experts and disclose opinions, resisted the plaintiffs' motion to compel, and participated in the hearing on the motion to compel before they demanded arbitration." Slip op. at 8. So defendants before you do anything check to see if an arbitration agreement you want to enforce applies, move to enforce, and delay everything else.

Further review was denied.

***Christie v. Crawford County Mem. Hospital*, No. 17-0906 (Iowa App. 7-18-2018)**

https://www.iowacourts.gov/courtcases/1757/embed/CourtAppealsOpinion

In a case that would surely have been dismissed in federal court on the "good faith" defense the Court of Appeals reverses the grant of summary judgment. The Plaintiff, a gay man, worked as a paramedic. After referring to his supervisor as a "fat f..k" a couple times he was fired. He then grieved and was reinstated with conditions. These included that he treat co-workers and patients with respect, and that if he didn't do so he would be fired. Some months after reinstatement he filed a charge with the ICRC complaining of the termination and unequal pay. He based the charge on information he'd gotten that the CEO had made derogatory comments about

the Plaintiff's sexual orientation. Following his charge the Plaintiff also reported a paramedic to IDPH for failure to have proper licensure. About four months later the Plaintiff was helping to move a heavy women down stairs. It was reported that he called her fat and referred to how he would injure his back. Investigation was done and the Plaintiff was fired for insubordination. Lawsuit followed claiming termination based on sexual orientation, in retaliation for the ICRC charge, and in retaliation for reporting the co-worker to IDPH. Summary judgment was granted and the Plaintiff appeals.

Citing to *McDonnell Douglas* the Court quickly got to the fighting issue of pretext. The Court very quickly found sufficient evidence for the jury based on the fact that the decision maker had previously called the Plaintiff " 'fag' and stating he "does not like [Christie's] kind." Slip. op. at 6. Even though someone else had conducted the investigation the decision was made by someone where there is evidence of animus. This was enough to get to the jury. As I noted my belief is that the 8th Circuit would deep six this case on the idea that the investigation was "independent" and outside sources of information were consulted in "good faith" and thus regardless of animus no reasonable person could find discrimination.

On retaliation the Court refuses to be swayed by the negative comments alone. "Regardless of whether his derogatory comments were a triggering factor in his termination, a genuine issue of material fact remains as to whether his filing of an ICRA complaint was a 'significant factor' in his termination." Slip op. at 8.

Similarly on the IDPH complaint there was evidence that the decision maker was so mad over it that he wanted to fire the Plaintiff and two others. The Court noted "[a]lthough the causation standard is high, it generally presents a question of fact." Slop op. at 10. The Court emphasized the issue is one of reasonable inferences and reversed the grant of summary judgment.

***Rehm v. Artic Glacier West Point*, No. 17-1601 (Iowa App. 7-18-2018)**

https://www.iowacourts.gov/courtcases/2400/embed/CourtAppealsOpinion

In this disability discrimination case the defendant wins a grant of summary judgment. The entire case came down to whether the Plaintiff produced a jury issue on being disabled. Following a wrist break the Plaintiff experienced difficulty in performing some of his job tasks such as lifting twenty pound bags of ice and using a sledgehammer to break up ice. "The evidence Rehm was unable to perform his particular job at Arctic Glacier does not show he was substantially limited in a major life activity. … Rehm did not show he was unable to perform different jobs that would not require him to lift heavy bags of ice or use a sledgehammer." Slip op. at 5.

Further review is pending. The substantial issue identified by the Plaintiff is whether the Court erred by not considering impacts on major life activities other than working.

***Wyngarden v. State*, No. 16-1945 (Iowa App. 7-18-2018)**

https://www.iowacourts.gov/courtcases/2048/embed/CourtAppealsOpinion

The Plaintiff worked as a juvenile court officer for the Iowa Judicial Branch. He brings suit claiming certain discipline, including a three-day suspension, was based on age discrimination. Summary judgment was granted, reversed, trial was had, but the district court directed verdict on defense. The Court of Appeals reverses again.

The Court analyzed the claim under "two methods" the *Price Waterhouse*, and the *McDonnell Douglas* methods. On *Price Waterhouse*, the Court found "several statements supervisors made to him which could be seen as sufficiently discriminatory to support an inference the discriminatory attitude of his supervisors was a motivating factor in the adverse employment action taken against him." Slip op. at 12. These included repeated references to retirement. Based on this the Court found the *Price Waterhouse* method satisfied. The Court went on to look at the burden shifting. Here the *prima facie* case is "(1) he was a member of a protected class, (2) he performed his work satisfactorily, and (3) he suffered an adverse employment action." Slip op. at 7. As usual the Court gets tangled up in #2. The Court found, other than for the reasons given for the suspension, that the job performance was satisfactory. For this reason the Court reversed the directed verdict under this method of proof as well.

On evidentiary issues the most interesting issue was to find error in excluding a witness' opinion that management was targeting the Plaintiff.

In a footnote the Court remarked "We would like to point out the State's argument on this ground is somewhat circular. The State claims Wyngarden was not performing his work satisfactorily due to the stated reasons for the three-day suspension, which is the basis for Wyngarden's assertion of adverse employment action. However, one of the elements of a claim of age discrimination is adverse employment action. If having adverse employment action absolutely precluded a person from showing they were performing their job satisfactorily, no person receiving adverse employment action would be able to show they had been subjected to age discrimination." Slip op. at n. 7, p. 15. This difficulty is exactly why first of all the qualification prong is greatly modified in a termination case. *See Davenport v. Riverview Gardens School Dist.*, 30 F. 3d 940 (8th Cir. 1994)(should not conflate prima facie case with ultimate issue); *Lake v. Yellow Transport*, 596 F.3d 871 (8th Cir. 2010) (Plaintiff "is not required to disprove ….reason for firing him at this stage of the analysis….If he were, the *McDonnell Douglas* burden-shifting analysis would collapse into the second element of the prima facie case").

Note that in general "once a trial on the merits has occurred, the issue of whether the plaintiff established his prima facie case is moot, and the question then becomes whether the plaintiff produced sufficient evidence to allow the jury reasonably to find that the defendant intentionally [discriminated]." *EEOC v. Koehler Co.*, 335 F.3d 766, 773 (2003) *accord Morgan v. Arkansas Gazette,* 897 F.2d 945, 948 (8th Cir.1990); *Cardenas v. AT&T*, 245 F.3d 994 (8th Cir. 2001); *Kovacevich v. Kent State University*, 224 F. 3d 806 (6th Cir. 2000); *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir.1997); *Hybert v. Hearst Corp.,* 900 F.2d 1050, 1054 (7th Cir.1990); *Daigle v. Liberty Life Ins. Co.,* 70 F. 3d 394 (5th Cir. 1995); *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478,

75 L.Ed.2d 403 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."). "This is so because the trial court's duty after trial on the merits, like our duty on appeal, is to simply study the record with a view to determining whether the evidence is sufficient to support whatever finding was made at trial." *Id.* at n. 7, p. 774.

***Reed v. State*, No. 17-0053 (Iowa App. 7-18-2018)**

https://www.iowacourts.gov/courtcases/1372/embed/CourtAppealsOpinion

Walter Reed worked for the DOT as a civil rights coordinator. After two years of satisfactory work a new supervisor was hired. Some issues arose ostensibly over how Reed ran his meetings and Reed eventually filed a civil rights complaint. Two months later he was fired. He brought suit for retaliation **but** did not specifically plead that the filing of the complaint was his protected activity.

In Court the matter went to the jury on some claims. But "Reed's assertion that he was fired in retaliation for filing a civil rights complaint [t]he court found … was not pled and was never properly asserted. Accordingly, the court declined to address it." Slip op. at 4. Relying on the idea of notice pleading the Court of Appeals reversed. "Although Reed pled a retaliatory discharge claim, he did not cite the civil rights complaint or allege his termination was in retaliation for the filing of the complaint. The State seizes on this omission, arguing Reed could not be permitted to add the filing of his civil rights complaint as a protected activity for the first time in resisting summary judgment. Reed counters that he had no obligation to plead retaliatory discharge based on the filing of the civil rights complaint, particularly where the State was on notice of the complaint and responded to it before his termination. Reed has the better argument." Slip op. at 8. Critical in this was that the *defendant* listed the filing of the civil rights complaint prior to termination as an undisputed fact. Reed then "used the State's undisputed fact of his filing of the civil rights complaint to generate a fact issue on the State's contention that he (1) did not engage in protected activity, (2) did not establish a causal connection between the protected activity and his termination, and (3) did not establish that the asserted reasons for his termination were pretextual." Slip op. at 10-11. In a fact intensive review the Court also found that the Court should not have granted summary judgment on the claim that Reed's questioning of the hiring of a white civil rights administrator was also causally related to his discharge.

On evidentiary issues the Court found it prejudicial error to exclude evidence that Reed's successor had had similar difficulties but was not fired. "[T]he jury was instructed to determine whether the reasons for Reed's firing were pretextual or arose from discriminatory intent. The question was central to both the discrimination and retaliation claims. The exclusion of evidence relating to [the successor]'s performance prevented the jury from gaining a complete picture of this critical issue." Slip op. at 23. Also it was error not to permit evidence that Reed had objected to the hiring of a White person whom he viewed as unqualified. "The prejudice to Reed again flowed from the jury's inability to glean the complete picture." Slip op. at 26.

Application for further review is pending.

***Eden v. Van Buren County*, No. 17-0631 (Iowa App. 7-18-2018)**

https://www.iowacourts.gov/courtcases/2036/embed/CourtAppealsOpinion

Plaintiff worked as a dispatcher for the Sheriff. The Plaintiff was fired for reasons she claims were false. She claims that the reasons given by the Sheriff for termination were not the true ones. She claims that the Sheriff thus falsified the documents wherein he gives the reasons for termination. This alone she argues gives rise to her cause of action. The Court of Appeals wasn't buying it. "Eden's assertion the sheriff relied on pretext to justify her discharge is not the same as showing the employer's action infringed on her performance of a statutorily protected activity… Eden's counsel acknowledged at oral argument Eden was not terminated for participating in a protected activity but nevertheless insists the sheriff acted improperly by misrepresenting his reasons for firing her. Stated differently, Eden essentially contends the county breached a covenant of good faith and fair dealing when it fired her. Iowa does not recognize a breach of good faith and fair dealing as an exception to at-will employment." Slip op. at 6. And with that "Boom!" goes dismissal.

***Galey v. EAB*, No. 17-1199 (Iowa App. 7-18-2018)**

https://www.iowacourts.gov/courtcases/2322/embed/CourtAppealsOpinion

In this unemployment case the Court answers a couple questions that may have application elsewhere. The Claimant worked as service technician for the Wapello Rural Water Association, and spent the great majority of his work time driving to service locations. He could also be on call while off duty. He had a first offense OWI while driving his own vehicle on his own time. He told the Association Board that he might lose his license over this, and the Association Board voted that once he lost his license he would be terminated. He subsequently told the Association Board he had lost his license and he was terminated in accord with the Association Board's prior vote. He applied for unemployment benefits at a time during which he was charged with an OWI in Wapello County. Since UI cases go much faster than OWI cases there had been no disposition of the OWI case at the time of hearing. He was nevertheless disqualified, essentially on the idea that the license loss would be based on an affidavit filed by an officer of a positive test. He appealed. While the case was pending in Polk County District Court, where his basic contention was lack of evidence of his having driven drunk, he then plead guilty to OWI in Wapello County. The EAB detected this and subsequent to the Wapello County Court entering sentence on the plea, which was also *subsequent* to the filing of briefs in Polk County, the EAB and the Association made a motion to remand the matter for consideration of additional evidence, namely, the Wapello County plea and sentence. The motion was granted, the EAB considered the new evidence, and entered a decision accordingly. The district court appeal was reactivated, and the Claimant lost in district court and appealed.

On appeal the first issue was the remand. Of most interest was the Claimant argument that after-the-fact evidence of misconduct was not relevant. The EAB responded that after-the-fact *reasons* for termination

are not relevant, but that it may consider *any evidence* no matter when extant, that tends to show that the Claimant did or did not commit the act which was an *actual reason* for the termination. For example, consider a claimant who denies sexual harassment but is fired anyway, and then who admits it during the unemployment hearing. The admission would not be excluded just because the claimant had lied to the employer about it. The Court agreed with the EAB without much exposition: "Galey's subsequent act of pleading guilty was not new conduct considered by the agency; rather, the plea and sentence verified the reasons already cited by the employer." Slip op. at n. 1, p. 8.

On the question of off-duty off-premises misconduct the Court explained:

> The disqualification statute does not mandate misconduct be committed on the employer's time or property—the misconduct need only be "in connection with the individual's employment." See Iowa Code § 96.5(2). When it is not possible to complete one's job duties without a driver's license, as is the case here, the loss of an employee's license due to a deliberate act, such as OWI, can be job-related misconduct. This is true regardless of whether the employee was off duty or in a personal vehicle at the time of the deliberate act.

Slip op. at 11. Further review has been denied.

EIGHTH CIRCUIT CASES

All 8th circuit cases since last years update. More significant cases are indicated with an arrow.
When a number ending in "pdf" follows an Eighth Circuit cite this number can be used to determine the URL for the case by http://www.ca8.uscourts.gov/opndir/YY/MM/NUMBER. Thus for a case decided on 4/30/18 with case number 971234P.pdf the URL would be http://www.ca8.uscourts.gov/opndir/18/04/971234P.pdf.

Standards For A Discrimination Plaintiff To Survive Summary Judgment And Present A Submissible Case

Bunch v. University of AR Board etc., (8th Cir. 07/24/2017) (162538P.pdf) ([Riley, Author, Loken, Benton) - Section 1981, 1983, ADA, and ADEA claims brought by this pro se litigant were barred by sovereign immunity. The Title VII claims failed because her failure to come to work, due to medical reasons, during her probationary period was a legitimate reason for her discharge. She was too new to be eligible for FMLA and had not produced a relevant comparitor. The only other comparitor had taken some leave during her probationary period, but the Plaintiff did not know if it was unpaid or paid, and she herself had been allowed to exhaust accrued paid leave before her termination.

Faidley v. United Parcel Service, (8th Cir. 5/11/18) (161073P.pdf) (*en banc,* Loken author) – In this Iowa case the Plaintiff alleges failure to accommodate his various limitations based on work-related injury. The district court dismissed on summary judgment and a panel of the Court of Appeals mostly affirmed. The Panel affirmed the finding that the Plaintiff failed to raise an issue on whether he was qualified to work as a delivery driver since that job required 9.5 hours of work a day, and the Plaintiff could only do 8 hours of driving. But according to the Panel he did generate an issue on his qualification to work as a feeder driver which was less strenuous. The Panel ruled this way on the feeder job even though one was not open at the time. The Panel adopted the standard that considers as

"available positions that the employer reasonably anticipates will become vacant in the fairly immediate future.

Rehearing *en banc* was granted with nine judges hearing the matter. In a 6-3 vote the panel was reversed. First the full court reaffirmed that working overtime, that is in excess of 8 hours a day, was an essential job function. Slip op. at 10. The *En Banc* court turned the case on the fact that the physician in deposition stated that the Plaintiff "wasn't going to be able to work in a job more than 8 hours." Slip op. at 12. This same physician's clarification in deposition that he crafted the 8-hour limitation for the package car position was not considered because the Plaintiff "failed to present this evidence to the district court, so it is not part of the summary judgment record on appeal." Slip op. at n. 7, p. 12. Also the Plaintiff had indicated in a form he'd submitted to the Employer that he was not capable of doing any UPS job without an accommodation (presumably to the 8 hour limitation). The Court agreed with the idea that positions available for transfer/accommodation include those the Employer reasonably anticipates will become vacant in a short period of time. But the Court ruled that does not come into play because the Court found no genuine factual dispute that the Plaintiff was not qualified to do the feeder job.

Rooney v. Rock-Tenn Converting Company, (8th Cir. 1/9/2018) (163631P.pdf) (Gerrard, Author, Colloton and Benton) – In this discharge case the Plaintiff alleges religious (non-Jewish) and sex discrimination. He appeals the grant of summary judgment arguing first of all that the Court departed "from the rubrics of review when it expanded the 'legitimate non-discriminatory reasons for adverse action' beyond" the reasons given at the time of discharge. The Court of Appeals points out that the articulation of reasons is not a burden imposed at the time of discharge, but is done through the introduction at trial of admissible evidence. "Title VII does not impose a legal obligation to provide an employee an articulated basis for dismissal at the time of firing, and an employer is certainly not bound as a matter of law to whatever reasons might have been provided." Slip op at 8. The Court then applied the rule that "[e]vidence of a substantial shift in an employer's explanation for a decision may be evidence of pretext, but an elaboration generally is not." Slip op. at 9. The termination focused on problems with a single account, and the articulation included similar problems with others. This is not a substantial shift and did not give rise to a finding of pretext. The remainder of the analysis deals with attempts to prove pretext, including the "super-personnel" quote. "The evidence must do more than raise doubts about the wisdom and fairness of the employer's opinions and actions–it must create a real issue as to the genuineness of the employer's perceptions and beliefs…The instances pointed to by Rooney–that Collom was aggressive towards him, she denied him permission to conduct a project review with a client during an open house, and she should have consulted his Outlook calendar instead of asking him to keep her advised of his schedule–fall well short of creating such an issue." Slip op. at 12.

Morgan v. Michael Robinson, (8th Cir. 02/02/2018) (171002P.pdf) (Shepherd, Author, Benton, Kelly) – In this free speech retaliatory termination case the defendant appeals, *via* the qualified immunity conduit, a *denial* of summary judgment. The Plaintiff ran for office as Sheriff, while working for the Sheriff he sought to displace (always tricky). The wanna-be lost, and was fired. The Sheriff claimed that campaign statements criticizing aspects of the sheriff's office operation and promising to

correct them violated the department's rules of conduct. He fired the Plaintiff and was sued for retaliatory termination. The statements involved the state of the communication system, employee morale, and the reassignment of the K9 unit away from the Plaintiff as supposed retaliation. The Court affirmed the refusal to dismiss first of all finding the speech protected. Since counsel conceded the speech was as a citizen and on matters of public concern the Court spent little time analyzing this step although, it did say "For reasons that will become clear later in this opinion, we pause only long enough to verify that this is a legally sound concession." Slip op. at 7. In weighing the required showing of disruption the Court emphasized that "a stronger showing of disruption may be necessary if the employee's speech more substantially involved matters of public concern." Slip op. at 9. Against the matters of serious public concern the Sheriff offered mostly subjective feelings of unease caused by the Plaintiff's presence. "[T]he cited statements are extremely general in nature, and none of them point to a single concrete incident of disruption…[I]ntra-office comments about 'turmoil' and 'difference[s] of opinion on how business should run' seem likely to be made any time an employee runs against his or her employer in an election. Other employees in the office may inevitably feel torn between the incumbent and the challenging employee given their personal relationships with each other. And this is especially true in a smaller county. Accordingly, these comments provide no 'adequate justification for treating the employee differently from any other member of the general public.'" Slip op. at 12. The Court found the Sheriff failed to show adequate justification for his actions and thus did not need to use the *Pickering* balancing test. The Court closed out analysis by finding that the right in question was clearly established, and then writing in black and white for future cases: "To the extent that there remains any ambiguity, we hold that a public employee cannot be terminated for making protected statements during a campaign for public office where that speech has no demonstrated impact on the efficiency of office operations." Slip op. at 15.

Hales v. Casey's Marketing Company, (8th Cir. 04/03/2018) (163770P.pdf)(Wollman, Author, with Shepherd, Circuit Judge, and Goldberg, District Judge) – In this Iowa case the Plaintiff loses her harassment case on lack of severity, and her termination case on procedural grounds. The Plaintiff worked at Caseys when she was 18. A customer came in and started hitting on her making inappropriate remarks. He asked whether she had a boyfriend, and if she worked there often. "He also made comments about her appearance. The customer told Hales about where he lived, where he worked, what kind of vehicle he drove, that there was a dashboard camera on his vehicle, and, using a sexually suggestive tone, that he liked to film things." Slip op. at 2. The Plaintiff used her smoke break as an excuse to go outside and avoid the jerk. She told a co-worker where she was going and the co-worker suggested that it would be better just to tell him to leave. The Plaintiff said she could take care of herself and went outside. The customer/jerk followed her. He blocked the entrance and talked to the Plaintiff about how his girlfriend "calls him when it's raining outside to tell [him] how wet she is, [but that] that's his job…" Slip op. at 2. The Plaintiff told him to "back off." He said "What are you going to do about it?" She brandished her cigarette, and walked into it, then he went inside to complain about getting burned. The Employer reviewed the footage and terminated the Plaintiff. She filed under state and federal law. But she waited to file her state claim while awaiting the EEOC rts. She then filed, but late on the state claim. She argued the timing excused the late filing. Citing Supreme Court precedent the Court held that dismissal was

proper and that in such cases "a plaintiff should file suit and then ask the court to stay proceedings until the administrative efforts . . . and voluntary compliance have been completed." Slip op. at 6. The retaliation claim was also dismissed on procedural grounds because, basically, the Plaintiff alleged late receipt of the retaliation RTS but had very little evidence of this. On harassment the Court found the single incident insufficiently serious to be objectively harassing. On the way to finding this it assumed without decided that Casey's could be liable for an environment created by a customer. On the merits the Court was extremely summary, citing to the fact that a single incident must be "extremely serious" to be harassing and then saying, *in toto:* "During the incident at Casey's, the customer never touched or overtly threatened Hales. Although Hales claims she felt threatened, she has failed to make a sufficient showing that the customer's conduct was so severe or pervasive as to affect a term, condition, or privilege of her employment." Slip op at 6-7. The Court also upheld the exclusion of evidence relating to the Plaintiff's previous sexual assault and related therapy. This evidence was not probative on whether there was an *o*bjectively harassing environment. The Court held that Title VII does not "require courts to delve into a plaintiff's personal background when assessing the objective severity of harassment." Slip op. at 9.

Groenewold, v. Kelley, (8th Cir. 04/24/2018) (164019P.pdf) (Wollman, Author, Loken, Melloy) – Here a state worker has his First Amendment retaliation & due process claims dismissed based on qualified immunity. On the First Amendment claim the Court found that complaints bearing on budgetary issues were within Plaintiff's duties as director of a research center his speech was not protected. "Because his speech stemmed from his professional responsibilities and was made in furtherance of those responsibilities, it was not protected under the First Amendment." Slip op. at 9. On post-termination due process the Plaintiff argues he did not use the available procedures because the same decision maker would be involved and it would be pointless. "He did not avail himself to that process, however, and therefore only speculates that the outcome would have been adverse to his position, which is insufficient to excuse his voluntary failure to exhaust his administrative remedies." Slip op. at 11. Substantive due process claims were also dismissed because the Plaintiff could not satisfy the condition that the termination be wholly unsupported by a basis in fact.

Mahn v. Jefferson County, (8th Cir. 06/07/2018) (161731P.pdf) (Benton, Author, Wollman, Colloton) – The Plaintiff brought a First Amendment "patronage claim" and was dismissed on summary judgment. The Plaintiff worked as a deputy circuit clerk. The Plaintiff alleged that when the Clerk did not run for reelection he called the Plaintiff in and told her to vote for his fellow Democrat. The Plaintiff insisted she would vote as she sees fit. The Clerk's son worked as election commissioner, and the Plaintiff believed he let the Clerk know how she had voted. She alleges she was called into the Clerk's office and told "I know how you voted" and "this could cause [sic] you your job." Slip op. at 3. She was thereafter fired. On appeal the case looks like it is on track to resolve a legal issue over whether to follow *McDonnell Douglas* or *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). "One case holds that the type of evidence the plaintiff presents determines which test applies: 'The so-called mixed motive analysis under Mt. Healthy is only used if a complainant has comes forward with evidence that directly

reflects the use of an illegitimate criterion in the challenged decision…But another case holds that the type of claim—not the type of evidence—invokes *McDonnell Douglas* or *Mt. Healthy*. In *Jones*, this court noted that *Mt. Healthy* applies to First Amendment cases, while *McDonnell Douglas* applies in Title VII cases." Slip op. at 6. In the end the Court decides either way *Mt Healthy* applies. It is a First Amendment case, and the Plaintiff alleges direct evidence. The problem now is that even if *Mt. Healthy* applies the defense can still win its affirmative same decision defense on summary judgment. "The key inquiry at summary judgment is whether Defendants can show—with all reasonable inferences drawn in [the plaintiff's] favor—that they had a lawful reason to terminate her, that they would have used that lawful reason to terminate her even if her political affiliation had not been a factor, and that there is no genuine dispute of material fact on these issues." Slip op. at 7 (*quoting Reyes-Orta v. Puerto Rico Highway & Transp. Auth.*, 811 F.3d 67, 77 (1st Cir. 2016). The evidence that the Plaintiff had pre-existing performance issues was not sufficient to meet this standard since the employer must show "show that the record would compel a reasonable jury to find that the adverse action would have occurred anyway, not merely that such action would have been warranted anyway…[and w]ithout evidence showing Mahn's performance would have indisputably caused her termination, Howard and Reuter were not entitled to summary judgment…" Slip op. at 8. Dismissal against the Clerk's son was affirmed. While "a state actor can—in some situations—be subject to § 1983 liability for retaliation where that actor improperly influenced the decision-making process….[Plainiff] has not presented any evidence that [the son] improperly influenced the decision-making process." Slip op. at 12.

Moses v. Dassault Falcon Jet Corp, (8th Cir. 07/03/2018) (164343P.pdf) (Smith, Author, Kelly, Erickson) – In this fairly routine case an age and disability claim alleging retaliatory discharge, harassment, and failure to accommodate is dismissed on summary judgment for various reasons. The claim of discharge in retaliation for filing a charge was dismissed for failure to exhaust. The Plaintiff had brought a harassment claim, obtained an RTS, and was subsequently discharged. But he did not file a second charge alleging retaliatory discharge. Instead he argued that the discharge was part of a continuing violation with the ongoing harassment. Under the circuit precedent the Plaintiff had not exhausted his federal claim of retaliatory termination. His state law termination based on disability claim survived the exhaustion issue but was lost almost entirely on a physician's opinion that the Plaintiff "was unable to perform the essential functions of his job and that]no known modifications of the essential functions' existed for [his] position." Slip op. at 11-12. Given that "No other physician opined contrary" to this, and that the Plaintiff presented "no evidence that his disability was the reason for his termination" the disability termination claim was properly dismissed. Failure to accommodate turned entirely on the physician's no accommodation possible opinion. Discharge based on the claim of retaliation for seeking accommodation was dismissed because "DFJ could legitimately terminate Moses if he was unable to perform the essential functions of his job. Undisputed medical evidence—Dr. Carle's IME—supports DFJ 's determination that Moses could not do his job with or without accommodation. Therefore, Moses's ADA retaliation claim necessarily fails…" Slip op. at 17. So apparently to be protected against retaliation for asking for accommodation you better be right that there was a duty to accommodate. Harassment was dismissed on the usual ground of not being bad enough, and further a lack of a link to age or disability.

Lindeman v. Saint Luke's Hospital, (8th Cir. 08/09/2018) (173067P.pdf)(Shepherd, Author, Colloton and Stras) – The Plaintiff brought a disability claim claiming disability animus in his termination, and failure to accommodate. On termination he points to evidence that other employees also disclosed the name of the patient and received no discipline, and to his satisfactory performance followed by quick progression through the disciplinary process. The other workers who had breached confidentiality were not shown to be at the same point on the discipline ladder, and had not just been warned about confidentially as the Plaintiff had been. This prevented them from being similarly situated. While the Plaintiff had positive past reviews followed by protected conduct and then by negative action the Court found that the fact that the supervisors involved were different prevented the case from going to trial. "[A]ny potential inference of discrimination is weakened substantially by another rational explanation for the change—the shifting expectations of different supervisors." Slip op. at 6. The Court thus seemingly rules that if non-discrimination is a "rational" alternative inference then trial cannot be had. The Plaintiff did not exhaust remedies on failure to accommodate since he did not mention it in his administrative charge.

Eggers v. Wells Fargo Bank, (8th Cir. 08/13/2018) (164376P.pdf) (Smith, Author, Murphy, Colloton) – A 61 year old was terminated from Wells Fargo because "Section 19," a federal law, prohibits a bank from employee someone who has been convicted of any criminal offense involving dishonesty ora breach of trust. That said persons can apply for waivers, and banks can sponsor waivers. After implementing a new background check procedure the Bank found out that Plaintiff had a 1963 fraud conviction. The bank offered leave time to obtain a waiver, but Plaintiff refused. He was fired and *then* he applied for a waiver. He got it. "Wells Fargo offered to reinstate Richard to his prior position in the Home Mortgage division. He refused the reinstatement offer and opted to sue the bank…" Slip op. at 3. He claimed discrimination by "(1) refusing to sponsor Section 19 waivers and by (2) failing to provide job applicants and employees with pre-screening notice of the opportunity to obtain waivers." Slip op. at 3. Two years later, and after Eggers had died, the bank moved for summary judgment and it was granted. Widow Eggers appeals. The Plaintiff attacked the disqualification as a sweeping and overbroad and thus a disparate impact. "Here, federal law—not company policy—triggers disqualification from employment." Slip op. at 8. This leaves the two waiver arguments. These failed for a simple reason: "Eggers failed to present any statistical evidence of a disparate impact…" Slip op. at 9.

Scudder v. Dolgencorp, (8th Cir. 08/17/2018) (172941P.pdf) (Shepherd, Author, Colloton, Stras) – In this USERRA case Plaintiff brings a failure to reemploy claim. Summary judgment was granted in part on the theory that there was no application for reemployment. Such an application "should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer." Slip op. at 5. Here the Plaintiff's application listed the National Guard as a prior employer and stated he was "let go from Dollar General after returning from Afghanistan injured and no one from the corporation would ever contact [him] back." Slip op. at 6. This was sufficient to put the employer on notice that he was returning from uniformed service, even though not everyone injured in Afghanistan was necessarily in the military. "Because Scudder applied directly to Dollar General—indicating on his application that he was previously employed by

Dollar General and was seeking a position with Dollar General following his return from military service—we conclude he did just enough to create a submissible case on whether he submitted an application for reemployment under USERRA." Slip op. at 6. The Court also refused to find that the Plaintiff's SSDI application judicially estopped the claim. Similar to the ADA also USERRA requires an employer to make "reasonable efforts . . . to accommodate . . . a disability incurred in, or aggravated during, such service." Slip op. at 9. Since the SSA does not take into account accommodation the SSDI application does not prevent the USERRA case.

Sharbono v. Northern States Power Company, (8th Cir. 09/06/2018) (164532P.pdf) (Colloton, Author, Smith, Murphy) – In this ADA case the Employer prevails for having engaged in the interactive process of accommodation. The Plaintiff suffered a foot injure long ago and could not wear steel-toed boots. The Employer then changed its policy based on its understanding of OSHA standards. Workers were now required to wear steel-toed boots stamped as compliant. The Plaintiff offered alternatives but they were not stamped complaint. He thus had to wear steel toed boots and it eventually got to be too much for him. The company refused a waiver request citing to OSHA standard 1910.136, but later tried to help the Plaintiff find another job at the Company. He was told at the time that he was also eligible for disability retirement, and he chose this option. The next month while reviewing the retirement application the company arranged for another medical appointment, and learned an orthotics company should be able to make a shoe that fits the bill. Unfortunately the orthotics company would not stamp the boot as compliant unless OSHA observed the fabrication. So in the end the Plaintiff was not able to keep working. The Circuit Court found that the efforts to accommodate were sufficient to prevent trial on whether the company engaged in a good faith interactive process of accommodation. Of most interest the Plaintiff argued the regulation did not actually require a stamp. "But Sharbono never disputed the company's interpretation of the regulation during the interactive process, and the employer made good faith efforts to secure a boot that met the performance standards for safety footwear and bore the ASTM stamp. Under the circumstances, that Northern did not attempt to demonstrate that some other boot would be 'as effective' as a boot that conformed to the performance standards is insufficient to show a lack of good faith in the interactive process ." Slip op. at 7.

Naguib v. Trimark Hotel Corporation, (8Th Cir. 09/11/2018) (171560P.pdf) (Smith, Author, Murphy, Colloton) – Here claims of discrimination and retaliation in a discharge were defeated mostly by timing. When the Plaintiff took vacation her replacement discovered the Plaintiff had been rounding hours down. The Plaintiff had been the Executive Housekeeper and would receive a bonus for keeping payroll down. A month long hotel-wide investigation ensued. The Plaintiff was fired as a result. Three others who did the same thing, but to a lesser degree, were disciplined. The workers in question were compensated for their lost time. The Circuit Court concluded "Naguib has not met her burden to demonstrate that Millennium's stated reasons for firing her were pretextual because she has not discredited Millennium's version of events." Slip op. at 7. Timing also hampered her claim of retaliation for her deposition testimony in another case since three years, and a new general manager, intervened. These prevented the conduct of the old general manager from constituting direct evidence of retaliation. Her other asserted direct evidence was about religion. She alleged the new general manager asked her to get notes from Muslim employees so they could wear head scarves. This provided no

"specific link" to religion since "the company never instituted that policy, the company policy allowed for religious attire, and, rather than refusing to carry out Neufeld's alleged request, Naguib merely responded by saying she would not ask for notes until a company policy was officially rolled out…" Slip op. at 6.

Faulkner v. Douglas County, Nebraska, (8th Cir. 10/12/2018) (171387P.pdf) (Beam, Author, Smith, Colloton) – Summary judgment was granted on claims of age, sex, and disability discrimination in termination of employment. Sex discrimination was dealt with succinctly: "Faulkner listed seven men in her complaint who were allegedly similarly situated to her but treated more favorably by DCDC. However, the record indicates that six of them were not similarly situated to Faulkner, and one was treated the same." Slip op. at 5. In particular, one comparator had not injuries, five had no medical restriction, and the only one who, like Plaintiff, had a medical condition preventing performance of essential job function was, like Plaintiff, terminated. Similarly on age the only listed comparator was released without restrictions. On disability all agree the Plaintiff was disabled, and that she was unable to do the essential functions of her correctional officer job without accommodation. The case thus boiled down to reasonable accommodation. The Court made clear that "if Faulkner cannot show there was a reasonable accommodation available, DCDC is not liable for failing to engage in the good-faith interactive process." Slip op. at 6. Naturally in this summary judgment case the Court must mean if the Plaintiff cannot generate a genuine issue of fact on whether there was an accommodation possible then she was properly dismissed. In any event, the Plaintiff's first suggested accommodation was to a position that required less inmate interaction. The problem is that it is a job environment full of contingency and "the record is clear that officers assigned to lobby and night shift positions must still be able to perform the essential physical duties of a correctional officer, including the ability to restrain offenders or stop disturbances with use of force." Slip op. at 7. Next, permanent assignment to light duty would violate the CBA and is thus *per se* unreasonable. The Court specifically limited any suggestion in *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011 (8th Cir. 2000) that failure to engage in the interactive process will always defeat summary judgment. The Court found it unnecessary to even go into the interactive process where "the allegedly prima facie evidence of bad faith in this case is rebutted by the incontrovertible evidence that Faulkner could not have been reasonably accommodated." Slip op. at 8.

Non-Summary Judgment/Verdict Review Cases

Loos v. BNSF Railway Company, (8th Cir. 08/03/2017) (153355P.pdf) (Gruender, Author, Wollman, Arnold) - The Plaintiff appeals summary judgment on his claim of retaliatory dismissal under the Federal Railroad Safety Act. The Plaintiff had a history of attendance problems. He missed a day to testify in a DOL hearing pursuant to subpoena. The Employer authorized the absence to testify but, shortly after the hearing, it sent an investigation notice relating to the day of work he missed to testify. In a related meeting, a supervisor asked for a copy of the subpoena and said "this could be bad for you." He subsequently missed work, including days for his OTJ injury which were unexcused for lack of medical documentation. He was terminated for attendance, and brought a claim for, among other things, retaliation under the FRSA. Interesting an FRSA claim

uses the concept of a "contributing factor" defines as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Slip op. at 8. The problem for the Plaintiff was that the absences he tried to excuse occurred when he had not medical documentation, thus undercutting any inference of retaliation. The remark about the subpoena was the FRSA version of a stray remark: "In order for Jaeb's statements to constitute evidence of retaliatory motive on the part of BNSF, there must be "proof that a supervisor 'perform[ed] an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action . . . if that act is a proximate cause of the ultimate employment action." Slip op. at 12. Here the supervisor who made the remark was not sufficiently involved in the final decision to terminate to give rise to a reasonable inference of retaliation. An interesting discussion of the causal link in FRSA cases appears in BNSF Railway Co. v. LABR, (8th Cir. 8/14/17) (163093.pdf). There a claim for OTJ injury lead to discovery of falsification of the plaintiff's job application and medical questionnaire. The ALJ ruled that the filing of an injury report "set off a chain of events" which led to termination and was therefore improper retaliation. The Court of Appeals reversed saying that the requirement was "proximate" cause. "Of equal importance, the ALJ's ruling that BNSF's motive was irrelevant to the contributing factor inquiry is contrary to this court's controlling decisions... Absent sufficient evidence of intentional retaliation, a showing that protected activity initiated a series of events leading to an adverse action does not satisfy the FRSA's contributing factor causation standard." BNSF v. LABR, slip op. at 6.

Rush v. State Arkansas DWS, (8th Cir. 12/8/17) (Per Curiam - Before Wollman, Beam and Shepherd) – The Plaintiff sent an unverified letter to the EEOC which was stamped received on June 6, 2016. It complained of December 9, 2017 discrimination. On June 21 the EEOC commenced investigation, and on June 30 the Plaintiff was notified that she hadn't filed a verified charge, and was sent the appropriate form. It was not filed when, on July 26, the EEOC dismissed and issued the RTS. On July 28 the Plaintiff mailed a verified charge (231 days after the date of incident). The *pro se* petition attached a copy of the unverified charge. The Petition was dismissed for failure to exhaust EEOC remedies because the charge was not verified. The District Court further found the Petition too sparse to state a claim and dismissed for that reason, noting that normally it would permit amendment to cure but given the failure to exhaust the Court would not do so. In objecting to the magistrate judge's order the Plaintiff included a copy of the verified charge. The district court nevertheless adopted the magistrate's decision. The Circuit Court, in a brief decision found that administrative remedies were exhausted, and remanded for amendment of the Petition.

Winfrey v. City of Forrest City, Arkansas (8th Cir. 02/16/2018) (171604P.pdf) (Shepherd, Author, Gruender and Melloy) – A very brief decision upholding dismissal of *pro se* petition on the ground that Plaintiff alleged retaliatory discharge but alleged no protected conduct. In deposition the Plaintiff stated he was fired for "standing up" for people who were having issues getting their money out of the city. In response to the motion for summary judgment he filed an affidavit now complaining of race discrimination. "Submitting a new claim via an affidavit at the summary judgment stage is an attempted surprise which the Federal Rules of Civil Procedure are designed to prevent." Slip op. at 3.

Aerotek, Inc. v. NLRB, (8th Cir. 02/21/2018) (164520P.pdf) (Shepherd, Author, Gruender, Melloy) - The main issue in this salting case under the NLRA was whether the NLRB could impose the remedy it ordered. The case involved application for employment who specified that they will look to organize workers (hence "salts") who were not hired. No one had much difficulty affirming the Administrative Law Judge finding that the employer had discriminated in hiring against the Salts. The issue then became whether the Board had discretion to issue the remedy that it did. Specifically the Board majority had allowed full backpay even though the ALJ had tolled backpay, and denied reinstatement. On the date of tolling the Complainant had approached an Aerotek client about staffing electricians directly through the union thereby cutting out the middleman. The ALJ found this disloyalty should cut out backpay, the NLRB majority disagreed, and the Eighth Circuit sided with the ALJ. The Board applied a "unfit for further service" standard to assess Complainant's actions, which was intended to excuse "natural human reactions" to discrimination. The Court of Appeals found this standard did not excuse what happened. "Johnson's behavior is not the type of reactive, emotive conduct the 'unfit for further service' standard is designed to forgive... Instead, it is reflective of a design to drive the employer out of the area... The unmistakable conclusion to be drawn from Johnson's course of conduct is that he was acting in his role as a competitor to Aerotek—and not as an aggrieved discriminatee." Slip op. at 13. The Court thus found an abuse of discretion by the NLRB.

McPherson v. Megan J. Brennan, Postmaster (8th Cir. 04/30/2018) (172098P.pdf) – A petition alleging age discrimination in hiring by Postmaster is reinstated after being dismissed for failure to state a claim. The district court had found that the Plaintiff failed to allege he possessed the qualifications that the job description lists for the position. While this is true, the "allegations indicated that the criteria the USPS relied upon in evaluating qualification for the position differed from the criteria set forth in the job description, as the individual selected for the position did not meet the stated criteria…" Slip op. at 2. The Petition was thus reinstated for pleading a *prima facie* case as required by *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

Auer v. City of Minot, (8th Cir. 07/19/2018) (171535P.pdf)(Stras, Author, Colloton, Shepherd) – Although a summary judgment case the most interesting issues are otherwise. First, the Plaintiff sought to draw an adverse inference based on the City's failure to produce an adequate response to her electronic discovery requests. "Precisely because deciding a case based on hypothesized evidence is strong medicine, Federal Rule of Civil Procedure 37(e)(2)(A) expressly states that an adverse presumption requires a finding that electronically stored information was lost because one party 'acted with the intent to deprive another party of the information's use in the litigation.'" Slip o. at 4. Here the Plaintiff alleged "that incriminating voicemails, emails, and other electronic communications were lost because the city failed to properly search some computers, tablets, and phones; waited too long to search others; and generally failed to take basic steps necessary to find and preserve files…" Slip op. at 4. This at most shows negligence. And while intent can be shown indirectly "without even circumstantial evidence that city personnel had knowledge that relevant files were being lost (if indeed they were), the record cannot support a finding that the city 'inten[ded] to deprive' Auer of information." Slip op. at 5. Also of interest the Plaintiff asserted that she suffered reputational harm without due process when the City filed

affidavits in support of its summary judgment motion. The Court rejected this claim reasoning that this theory "would make it all but impossible for a public employer to effectively defend itself in litigation. Public employers would face the difficult choice of either withholding evidence to avoid the risk of impugning the plaintiff's reputation or facing potential liability for using it. Nothing requires public employers to make such a choice." Slip op. at 8. Finally, on more usual summary judgment issues, the Court finds that complaints about discrimination based solely on having the Plaintiff's performance compared to her male predecessor's was not "reasonable" and therefore not protected. "[T]he mere fact that Auer's predecessor happened to be male does not transform an ordinary professional interaction into discrimination or harassment. Moreover, and more to the point, it would be unreasonable to think it did." Slip op. at 6.

Lyons v. Conagra Foods Packaged Foods (8th Cir. 08/09/2018) (173134P.pdf) (Wollman, Author, Smith, Loken) – This FLSA case is particularly notable for the fact that the caption is just shy of three times longer than the opinion. Once again it's a doffing and donning case. (Etymology: "Do on" = "don," "do off" = "doff"). "Employers must pay their employees a minimum wage for hours worked, but may exclude 'any time spent in changing clothes or washing at the beginning or end of each workday' if the time is excluded 'by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.'" Slip op. at 18. Prior to 2012 there is no doubt the parties had a long standing custom or practice of non-payment. In 2012 there was some back and forth about it, but in the end the new 2012 CBA did not address the issue. The Court held, as a result, "we do not view ConAgra as unilaterally imposing a custom or practice, but rather as continuing a custom or practice that was in effect under the 2008 Collective Bargaining Agreement…" Slip op. at 18. The Plaintiffs also complained about not being paid for two to five minutes to check out tools and no more than a few minutes to check them in. ""[T]he *de minimis* doctrine allows employers to disregard otherwise compensable work when only a few seconds or minutes of work beyond the scheduled working hours are in dispute." Slip op. at 22. Citing to the 7th Circuit the Court held the factors in a *de minimis* inquiry are ""[1] the amount of time spent on the extra work, [2] the practical administrative difficulties of recording additional time, [3] the regularity with which the additional work is performed, and [4] the aggregate amount of compensable time." Slip op. at 22. The Court found this "tool time" compensation issue was a *de minimis* concern.

Melgar v. OK Foods, (8th Cir. 08/29/2018) (172612P.pdf) (Melloy, Author, Gruender, Grasz) – In this FLSA settlement the defendants agreed to pay $87,500 in attorney fees. The district court wouldn't approve it and reduced the award to 22K. The Circuit court reversed. The Circuit Court assumed without deciding that the district court has a duty to exercise some level of review of the attorneys' fee award. However "where the parties have already agreed upon the fees to be paid, any required review need not be a line-by-line, hour-by-hour review of the attorneys' fees," instead "[w]e are reluctant to say an agreement reached after a full-day mediation, presided over by a magistrate judge, is unreasonable." Slip op. at 6. And although the ratio of fees to recovery, the district court's concern, is important it is not the sole determining factor. "In light of the need to focus on multiple factors and not just one, and in light of the strong likelihood that the parties' agreement is reasonable, we find that any required review by the district court is light and the award in this

case is not outside the range of what would be approved" Slip. op at 6. Hence the case has a fairy tale ending: The attorneys got their full fees.

Giles v. St Luke's Northland-Smithville, (8th Cir. 11/08/2018) (172856P.pdf) (Per Curiam) – Although a summary judgment case this is not a summary judgment case. The Employer moved for summary judgment. The Plaintiff filed a late response which, however, asked for more time. This request, which was nine days after the deadline was denied. Summary judgment was granted, without the Plaintiff's response, and the Plaintiff moved for reconsideration. This was treated as a rule 60(b) motion and the Court of Appeal thus addressed the four factors: "(1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) whether the movant acted in good faith; and (4) the reason for the delay, including whether it was within the reasonable control of the movant." Slip op. at 4. The Plaintiff won on the first three. There was no prejudice alleged, the delay was not long. As to good faith, "[w]hile we do not condone Giles's counsel's cavalier approach to litigation, we are persuaded that it did not exhibit an intentional flouting or disregard of the court and its procedures." Slip op. at 5. But the final factor is the most important and the Plaintiff missed this one by a lot. "[C]ounsel does not claim that he was unaware of the response deadline, or that he somehow inadvertently missed it. Rather, he readily admits that he initially failed to timely respond because he prioritized other matters. And when he finally responded nine days late, it was not to ask for leave to file a prepared response out of time. It was to request even more time to prepare a response and to accommodate a busy work schedule and personal travel." Slip op. at 5-6. And while counsel said he'd misunderstood an agreement to take longer to finish deposition as an extension of his deadline the fact is "neither a mistake of law nor the failure to follow the clear dictates of a court rule constitutes excusable neglect [and i]t is generally held that 'excusable neglect' under Rule 60(b) does not include ignorance or carelessness on the part of an attorney." Slip op. at 6. And finally the Plaintiff never did file a response, but just kept asking for more time. "We find it particularly troubling that even in the motion to reconsider, Giles still sought additional time to prepare a response. In other words, Giles has never attempted to show why Saint Luke's is not entitled to summary judgment." Slip op. at 6.

EEOC v. North Memorial Health Care, (8th Cir. 11/13/18)(Loken, Author, with Erickson and Grasz) (172926P.pdf) – The Plaintiff cannot work Fridays for religious reasons. She applied for and was offered a job as an "Advanced Beginner" program for nurses transitioning from non-hospital to hospital practice. The union contract required her to work every other Friday night, and when she worked in this program she had to work with a preceptor. She offered to work while finding her own substitutes, and the Hospital refused because it knew Friday shifts were notoriously difficult to switch out, and a schedule alteration would impair the work with a preceptor. The job offer was rescinded. The Plaintiff applied for other jobs without the conflict, was not hired, and file a religious discrimination case. The EEOC brought suit on her behalf claiming that the Hospital retaliated for the request for accommodation by rescinding the offer. The EEOC did not allege "disparate treatment" discrimination based on a failure to accommodate. Only retaliation was alleged. The Court of Appeals found no protected opposition from requesting accommodation. "Sure-Ondara did not complain that North Memorial unlawfully refused to

accommodate. She requested an accommodation, and it is undisputed on this record that North Memorial's non-discriminatory practice was to consider such requests on a case-by-case basis. After she made the request and no mutually acceptable accommodation was reached, Sure-Ondara's Title VII remedy as an unsuccessful job applicant was a disparate treatment claim under § 2000e-2(a) for failure to reasonably accommodate." Slip op. at 7. The Court thus held that "when an employee or applicant requests a religious accommodation, and the request is denied by an employer such as North Memorial that accommodates reasonable requests that do not cause 'undue hardship,' there is no basis for an opposition-clause retaliation claim under § 2000e-3(a). Rather, the employee or applicant's exclusive Title VII remedy is an unlawful disparate treatment or disparate impact claim under § 2000e-2(a)(1)." Slip op. at 9.

Baouch v. Werner Enterprises, Inc., (8th Cir. 11/14/2018) (171661P.pdf)(Beam, Author, with Smith, Colloton) – The employer implemented a payment for drivers who had to spend nights away from home on a regular basis. The Employer represented to the IRS, in that the Payments at issue were reimbursements for travel expenses that employees were reasonably expected to incur. This was to avoid employment and income taxes. Now the employees claim that the money cannot count as wages under FLSA purposes, meaning they have been underpaid. The Employer now claims that the Payments are not reimbursement for reasonable travel expenses, but rather are wages, since they actually compensate the class drivers for services rendered. The seeming contradiction between the Employer's position in Court with its representations made to the IRS is the Plaintiffs' focus. The Court refused to apply judicial estoppell because although "the representations to the IRS regarding these reimbursements for purposes of establishing an accountable plan, and the discussion of how to calculate these same per diem Payments for the purpose of a regular rate determination under the FLSA are close, and discussion of these Payments, and their purpose, in each situation could be confusing [but d]espite the similarity, it was reasonable for the district court, viewing the statutory schemes in play and the facts of this case, to hold that Werner is not estopped in these circumstances, nor beholden to earlier representations in a legally binding way." Slip op. at 7.

On the merits the Court applied the rule that "[p]er diem payments that vary with the amount of work performed are part of the regular rate. Since the Employer "tied the Payments to the miles driven, i.e., work performed…" Slip op. at 11. "[N]o matter that Werner's Payments were established to reimburse expenses the company reasonably expected its employees to incur, for purposes of the FLSA, we must further look to how these Payments were calculated for guidance. Because these Payments for the experienced drivers are based upon the amount of work performed (miles driven) they are part of the drivers' regular rate." Slip op. at 12-13. Of prime importance was that total pay–Payments plus applicable taxable wage to participating drivers was "suspiciously close" to the taxable wage paid to non-participants. Slip op. at 14. "We additionally agree with the district court's highlighting of other factors that led to the conclusion that these Payments

function as wages including 1) that the form and purpose suggest they were intended to act as remuneration for work performed, 2) the Payments were unrestricted in that the employees could spend the Payments in any manner and were not required to report expenses or provide receipts, and 3)Werner introduced the Payments as a means to attract new employees by maximizing take home pay. Each of these factors additionally establish that the Payments were remuneration for employment rather than reimbursement for expenses." Slip op. at 15.