DRAKE GENERAL PRACTICE REVIEW
2018-19 EMPLOYMENT LAW UPDATE
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SUPREME COURT CASES

***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.

***Schein v. Archer & White Sales*, No. 17-1272 (USCC 1/08/2019)**, (https:// www.supremecourt.gov/ opinions/ 18pdf/ 17-1272_7148.pdf) – In this arbitration case the Court again hold that questions of arbitrability are to be resolved by the arbitrator so long as the provision so provides. The agreement in this case had exempted out injunctions, and as the Plaintiff had brought suit, in part, for an injunction it appeared not to be arbitrable. The lower courts so held, notwithstanding the fact that the provision referred arbitrability questions to arbitration. The lower courts had reasoned that when the claim for arbitration was "wholly groundless" then the Courts can decide it in the first instance in all

cases since this enables courts to block frivolous attempts to transfer disputes from the court system to arbitration. The Supreme Court reversed. First, the Court reiterated the holding that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable" evidence. Second, the Court rejects the "wholly groundless" standard on reasoning no more subtle than the statute doesn't say so. "The short answer is that the Act contains no 'wholly groundless' exception, and we may not engraft our own exceptions onto the statutory text." Slip op. at 7.

New Prime Inc. v. Oliveira, **No. 17-340 (USCC 1/15/2019)**, (https:// www.supremecourt.gov/ opinions/ 18pdf/ 17-340_o7kq) – In this arbitration case the Court addressed the "contract of employment" exception in the Federal Arbitration Act. That exception states that the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Under this provision the employment contracts of certain transportation workers are not subject to arbitration. The Plaintiff in the case was a trucker working as an independent contractor. The defense claimed the FAA exception does not apply to independent contractors. The first issue for the Courts was whether the exception should be subject to arbitration. The USSC found that the issue of whether the act applied was predicate, and thus to be determined by the Courts not the arbitrator. On the merits the Court interpreted the phrase "contracts of employment" according to the understanding back in 1925, when the FAA was passed. The Court held that "[w]hen Congress enacted the Arbitration Act in 1925, the term 'contracts of employment' referred to agreements to perform work." Slip op. at 15. As a result the contracts here fell into the exception even though they were for an independent contractor.

Lamps Plus v. Varela, **No. 17–988(USSC 4/24/2019)** (https:// www.supremecourt.gov/ opinions/ 18pdf/ 17-988_n6io.pdf) – This arbitration case deals with an attempt to bring a class action in arbitration. Previously the Court had ruled that silence regarding class arbitration was not sufficient to allow class claims in arbitration. This is because in the Court's view class arbitration sacrifices the principal advantage of arbitration and makes the process "slower, more costly, and more likely to generate procedural morass than final judgment." Slip op. at 8. Thus the Court has held that "courts may not infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so." Slip op. at 8. The Court had previously held that silence was not enough to allow class claims to be brought in arbitration, and now rules that ambiguity is also not enough. The Court refused to apply the doctrine of *contra proferentem* because that is a rule of default construction of a contract – to construe ambiguity against the drafter – and is not designed to discern actual intent. "Like the contract rule preferring interpretations that favor the public interest, … *contra proferentem* seeks ends other than the intent of the parties." Slip op. at 10. Resolving ambiguity under a rule of construction that is not concerned with the actual intent of parties is not "an affirmative contractual basis for concluding that the party agreed to" arbitrate the class claim, and neither is the mere existence of an ambiguous provision.

Franchise Tax Board of California v. Hyatt, **No. 17-1299 (USCC 5/13/2019)**, (https:// www.supremecourt.gov/ opinions/ 18pdf/17-1299_8njq.pdf) – This case is only very tangentially related to employment law, but represents a sea change in

the law of federal jurisdiction, and so is worth a mention. *Nevada v. Hall*, 440 U. S. 410 (1979) held that sovereign immunity does not bar suits brought by an individual against a State in the courts of another State unless the forum state chooses to grant immunity as a matter of comity. *Franchise Tax Board* overrules *Nevada v. Hall* and finds that a State is immune to private suits brought in courts of other States as a matter of federal Constitutional law.

***Fort Bend County Texas v. Davis*, No. 18-0525 (USCC 6/3/2019)**, (https://www.supremecourt.gov/ opinions/ 18pdf/18-525_m6hn.pdf) – In an unsurprising, and unanimous, decision the Court finds that the charge filing period of Title VII is not jurisdictional. After years of litigation the defense asserted that a claim of religious discrimination – the only one to survive summary judgment – was not the subject of a timely filed charge. The issue now before the Supreme Court is whether the Title VII charge filing period is "jurisdictional" and thus can be raised at any stage of a proceeding; or whether it is a procedural prescription that can be forfeited if not timely raised. The Court commences analysis by explaining the difference in effect between a jurisdictional requirement, and a nonjurisdictional, although mandatory, requirement. The latter is mandatory no less than a jurisdictional one, but it must be timely raised. The Court finds that Title VII's requirements speak to a party's procedural obligations, but "[l]ike kindred provisions directing parties to raise objections in agency rulemaking… follow procedures governing copyright registration, … or attempt settlement, … Title VII's charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts." Slip op. at 9-10. The Court thus found that the defense was one that was subject to forfeit if not timely raised. Plaintiffs should take caution, however, in that the Court describes the requirement as "mandatory" and so leaves open the possibilities that it is not subject to equitable defenses such as estoppell. The Court made this point explicitly in the earlier case of *Nutraceutical Corp. v. Lambert*, https://www.supremecourt.gov/ opinions/ 18pdf/ 17-1094_bq7d.pdf (USSC 2/26/2019). There a district court ordered decertification of a class and the plaintiffs then had 14 days to ask for review. They missed the deadline but the Circuit Court allowed the appeal based on tolling. The Court explained that the rule was not jurisdictional and that "[i]t therefore can be waived or forfeited by an opposing party. …The mere fact that a time limit lacks jurisdictional force, however, does not render it malleable in every respect. Though subject to waiver and forfeiture, some claim-processing rules are 'mandatory'— that is, they are 'unalterable' if properly raised by an opposing party." *Nutraceutical*, slip op. at 3-4. This is exactly the category the *Fort Bend* Court put the Title VII charge into. In *Nutraceutical* the Court observed that "[w]hether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility." *Nutraceutical*, slip op. at 4. Thus in footnote 5 of *Fort Bend* the Court explains "[t]he Court has 'reserved whether mandatory claim-processing rules may [ever] be subject to equitable exceptions.'" *Fort Bend,* slip op. at 7, n. 5. Iowa has found such tolling under state law for charge filing, *Mormann v. Iowa Workforce Development,* 913 NW 2d 554, 566-570 (Iowa 2018), but for the federal courts one should stay tuned.

IOWA APPELLATE COURT CASES

***Deeds v. City of Marion*, 914 NW 2d 330 (Iowa 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.")

***Good v. IDHS*, No. 18-1158 (Iowa 3/8/2019)**

https://www.iowacourts.gov/courtcases/4816/embed/SupremeCourtOpinion

In this public accommodations case the Court dodges the constitutional issue. The Iowa DHS has a regulation that prohibits Iowa Medicaid coverage of surgical procedures related to "gender identity disorders." As an initial matter the Court ruled that "The DHS is an agency that furnishes Medicaid services through its implementation and oversight of the Iowa Medicaid services that MCOs provide. Therefore, it is a public accommodation under the ICRA." Slip op. at 14. The heart of the analysis on whether the rule violated the ICRA was straightforward. "[T]he rule expressly excludes Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria of transgender individuals. After the DHS amended the rule to bar Medicaid coverage for gender-affirming surgery, the legislature specifically made it clear that

individuals cannot be discriminated against on the basis of gender identity under the ICRA." Slip op. at 16. A unanimous Court then affirmed the finding that the rule violated the ICRA, and so avoided the constitutional issue that had garnered a good deal of *Amicus* attention.

Subsequently in *Good v. DHS*, No. 18-1613 (10/23/2019)(Vaitheswaran, Potterfield and Mullins) the Court addressed the claim for nearly a half-million dollars in fees. The request was made under the ICRA and Iowa version of the equal access to justice act (Iowa Code §625.29). "DHS resisted, arguing section 216.16 did not apply because the Plaintiffs did not bring their case under ICRA procedures and section 625.29 did not apply because two exceptions to the fee-shifting provision prevented the Plaintiffs from recovering fees and costs." Slip op. at 5. Reading the plain language of the statute the Court of Appeals finds that just because agency action is challenged as being inconsistent with the ICRA does not convert a judicial review action into a civil rights case. And the statute plainly only allows fees to be recovered in an action brought pursuant to an issued right-to-sue letter. On the equal access to justice claim the Court relied on the exception for proceedings in which "[t]he action arose from a proceeding in which the role of the state was to determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent or to adjudicate a dispute or issue between private parties or to establish or fix a rate." Iowa Code §625.29(1)(d). The Court explained that in *Colwell v. Iowa Dep't of Human Servs.*, 923 N.W.2d 225, 232(Iowa 2019) the Supreme Court "determined the exception was met when the party appealing to DHS asked it to determine whether he was entitled to reimbursement payments under a statute." Slip op. at 10. Since Good had asked the agency "to determine whether they were entitled to medical assistance payments for specific procedures," this was sufficiently similar to *Colwell* to find that holding controlling, and fees were denied.

***Seeberger v. Davenport Civil Rights Comm'n*, No. 16-1534 (Iowa 5/1/2019)**

https://www.iowacourts.gov/courtcases/1252/embed/SupremeCourtOpinion

This case of limited applicability deals with an award of attorney fees under a City ordinance. The fees had been in awarded in a housing discrimination case. The housing provisions of the Ordinance were in Division III, and had its own remedial provision. This did not include fees before the agency. Meanwhile more general remedial provisions in Division II included agency level fees. The lower courts allowed fees based on that division. Reasoning that the more specific provision would be unnecessary if the Division II provision applied to housing discrimination, the Court struck the fee award. "We will not expand the relief allowed in that provision in the guise of interpretation. To do so would violate our mandate that fee-shifting provisions in ordinances must be clearly expressed within the terms of the ordinance, not implied." Slip op. at 15. The Court found that a local agency could not award fees under a federal law. While it is possible for a local agency to enforce the ICRA, here the agency did not purport to award fees under the state act. There was left, then, no basis for the fee award for the agency proceedings.

***Iowa State Education Association v. State of Iowa*, No. 17-1834 (Iowa 5/17/19)** https:// www.iowacourts.gov/ courtcases/ 4443/ embed/ SupremeCourtOpinion;

***AFSCME Iowa Council 61 v. State of Iowa,* No. 17-1841 (Iowa 5/13/19)** https:// www.iowacourts. gov/ courtcases/ 4440/ embed/ SupremeCourtOpinion
***UE Local 893/IUP v. State of Iowa,* No. 17-2093 (Iowa 5/13/19)** https:// www.iowacourts.gov/ courtcases/ 3956/ embed/ SupremeCourtOpinion

These three cases all coming out the same day have more to do with constitutional law than labor or employment law. In these cases various labor unions challenge aspects of the recent public bargaining overhaul.

On the equal protection challenge to allowing public safety position more rights than others the Court found a rational basis in *AFSCME v. State*. The Court found that the legislature could reasonably conclude that the goal of keeping labor peace with unions comprised of at least thirty percent public safety employees, and the greater risks faced by emergency first responders, justified the classification. Nor were the legislative classifications impermissibly overinclusive or underinclusive. The *ISEA* case considers many of the same issues in less detail. Of some interest the *ISEA* case dealt with the dues payroll deduction provision which allows such checkoffs for charitable purposes but not for union dues. The Court upheld this based on the idea that charitable deductions have no effect on the employer-State relationship but more union dues could. Justice Appel concurred but on the basis not that it saved costs, since removing the checkoff was costly. He cited the basis that the Legislature could rationally conclude "to weaken unions by making it more difficult for them to collect dues." Slip op. at 17.

In *UE Local 893* the unions had sought a declaratory order from PERB concerning the meaning of certain provisions in the bill. Under that bill bargaining is limited to "base wages and other matters mutually agreed upon." 2017 Iowa Acts ch. 2, § 6 (codified at Iowa Code § 20.9(1) (2018)). Also, an arbitrator may not consider "[p]ast collective bargaining agreements between the parties." Id. § 13 (codified at Iowa Code § 20.22(8)(b)(1)). The Supreme Court held "that 'base wages' means the floor level of pay for each job before upward adjustments such as for job shift or longevity. The term 'past collective bargaining agreements,' in the context of a law that limits the arbitrator's potential award to a certain percentage increase in base wages…allows the arbitrator to consider the existing collective bargaining agreement but not ones that came before." Slip op. at 3-4.

***Slaughter v Des Moines University*, No. 17-1732 (Iowa 4-5-2019)**
https://www.iowacourts.gov/courtcases/3045/embed/SupremeCourtOpinion

Although an education discrimination case, this case does seem to establish a principle applicable to all discrimination cases brought under the ICRA. The Plaintiff claimed a failure to accommodate and a failure to engage in an interactive process of accommodation. The Court affirmed summary judgment on the ground that the Plaintiff had not shown that a reasonable accommodation was possible. This would be so even if the Defendant had not engaged in an interactive process. "We need not decide whether DMU should have done more to engage in the interactive process with Slaughter. To avoid summary judgment, Slaughter had to make a facial showing that a reasonable accommodation existed that could have enabled her to meet the medical school's academic requirements. She made no such showing." Slip op. at p. 26-27. The upshot seems to be that the Court will not recognize a breach of duty to engage in interactive process claim unless there is some

showing that the process could have yielded a possible reasonable accommodation.

***Hawkins v Grinnell Regional Medical*, No. 17-1892 (Iowa 6-7-2019)**
https://www.iowacourts.gov/courtcases/4878/embed/SupremeCourtOpinion

In this case the Employer successfully challenges a jury verdict on the grounds of hearsay. The Employer argued that the Plaintiff was fired for incompetence. The Plaintiff offered as an exhibit various cards of well-wishes from co-workers and colleagues. Some of these cards referred to mistreatment of staff, age discrimination against the Plaintiff, and the like. The offending remarks were all brief and summary, as one would expect in a card. Nevertheless, the Court found error in the admission since they were offered to prove the truth of the asserted matter. The Court found error was not harmless in part because although there was live testimony on the Plaintiff's competence the cards were not merely cumulative. "Other statements contained in exhibit 173 urged GRMC should be held responsible for Hawkins losing his job and correct the injustice it created by firing Hawkins. Statements in exhibit 173 also indicated Hawkins was doing the right thing for the staff at GRMC by holding GRMC responsible for its actions against Hawkins. Finally, some statements in exhibit 173 opined that GRMC committed discrimination against Hawkins because of his age and cancer." Slip op. at 9. These were not cumulative and so the verdict was set aside and the case remanded for new trial.

Of more interest to the Employment bar the Court launches on a summary of the *McDonnell Douglas* test and how it fits in with *Price Waterhouse* and the 1991 CRA. According to the Iowa Court the SCOTUS in *Price Waterhouse* "established that when a Title VII plaintiff proves that a discriminatory factor played a motivating part in the employer's decision (i.e., there were mixed motives), the employer may avoid liability by presenting evidence that it would have made the same decision in the absence of the discriminatory motive." Slip op. at 11. Then "Two years after Price Waterhouse, Congress enacted the Civil Rights Act of 1991, which modified Title VII by codifying the motivating-factor standard and same-decision framework…" Slip op. at 11. Actually, the 1991 CRA was a rebuke of *Price Waterhouse*. In *Price Waterhouse* the Court found that an adverse employment action was not illegal unless it is proven that "but for" the illegal motives the adverse action would not have occurred. It was because of this that the same decision defense in *Price Waterhouse* goes to liability, not damages. As summarized by the EEOC, "[i]n *Price Waterhouse*, the Court provided that, even where a plaintiff demonstrates that an employer was motivated by discrimination, the employer can still escape liability by proving that it would have taken the same action based upon lawful motives….[The 1991 CRA] in response to *Price-Waterhouse*, provided that where the plaintiff shows that discrimination was a motivating factor for an employment decision, the employer is liable for injunctive relief, attorney's fees, and costs (but not individual monetary or affirmative relief) even though it proves it would have made the same decision in the absence of a discriminatory motive." *EEOC, The Civil Rights Act of 1991* https://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html. Thus the 1991 CRA provides that a *violation* is proven where the Plaintiff establishes discrimination was a motivating factor, and individual monetary relief can be awarded only if the Defendant fails to disprove that discrimination was a "but for" cause of the adverse action, that is, if the Defendant fails to prove it would have made the "same decision" in the absence of discrimination. The *Hawkins* decision is thus patently incorrect

to the extent that it finds the 1991 codified *Price Waterhouse* or that it "incorporate[ed] the Supreme Court's interpretation of Title VII as including a same-decision defense." Slip op. at 14. This distinction is important because in *Hawkins* the Court adopts a *Price Waterhouse* analysis but does not seem fully cognizant of what that analysis is.

The *Hawkins court explained* "[t]hough we have interpreted the 'because of' language in the ICRA as requiring the plaintiff to show protected status as a motivating factor, we have not interpreted the language as alleviating liability from an employer that engages in the prohibited conduct but demonstrates it would have made the same decision in the absence of the impermissible motivating factor." Slip op. at 14-15. After the all too familiar process of reviewing all precedent since the adoption of the Code of Hammurabi, the Court rules that:

> Although we have said it only in *dicta*, we believe that under the ICRA an employer should be entitled to the same-decision affirmative defense because we have adopted the motivating-factor test for causation in ICRA discrimination cases. This will allow an employer to avoid damages liability when the employee proves by a preponderance of the evidence that the discrimination was a motivating factor in the employer's actions.
>
> Therefore, in discrimination and retaliation cases under ICRA, we apply the *Price Waterhouse* motivating-factor standard in instructing the jury and the defendant is entitled to an instruction on the same-decision defense recognized in *Price Waterhouse* if properly pled and proved.

Slip op. at 18. This quote is self-contradictory. In *Price Waterhouse* the Court ruled that a violation only occurs if the defense fails to prove it would have made the same decision anyway. If the Employer proves it would have made the same decision then no liability attaches under *Price Waterhouse* - because no violation appears. Thus the plurality in *Price Waterhouse* wrote "[w]e conclude…an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." *Price Waterhouse* at 242. The Court thus observed that "[a] court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a 'but-for' cause of the employment decision." *Id.* at 249 (discussing constitutional cases with a burden on defense of showing by a preponderance of the evidence that it would have reached the same decision). Consequently, under *Price Waterhouse* a conclusion that the illegal motive was a but-for cause is still required for liability. It's just that rather than the Plaintiff having to prove the positive (it was a but-for cause), all the plaintiff has to show is it was a factor and then the defendant has to prove the negative (it was not the but for cause because we would have made the same decision). The portion of the *Hawkins* quote that says the same decision defense "will allow an employer to avoid damages liability" where a motivating factor is shown, is inconsistent with the idea that "we apply the Price Waterhouse motivating-factor standard in instructing the jury." A *Price Waterhouse* instruction would say that once the Plaintiff shows motivating factor the Employer can avoid *all* liability if it proves that it would have made the same decision. A 1991 CRA instruction, based on the portion of *Hawkins* that refers to "damages liability," would be that once a motivating factor is shown then a violation is established and the Employer can avoid monetary and individual affirmative relief by showing

the same decision defense. The difference, of course, is costs and those all-important attorney fees. Which instruction will it be? Time will tell, but it seems likely the Court has not been overly precise in its understanding of *Price Waterhouse.* The 1991 CRA neither codified nor incorporated the *Price Waterhouse* approach but it seems clear the *Hawkins* opinion acts as if it did, thus it seems that the Justices intend that the same decision defense only goes to individual damages. One last difficulty is that the Court says "To clarify, we no longer rely on the *McDonnell Douglas* burden-shifting analysis and determinating-factor standard when instructing the jury" as if there is a necessary link between the method of proof (indirect) and the level of causation. From a logical standpoint there isn't, nor is it necessary to toss out *Burdine* in order to implement the 1991 CRA approach to "same decision," as legions of federal cases make clear. Finally, the concept of a "determinating-factor" rather than "determining factor" seems to be a typo and neither a new level of causation nor a reference to Arnold Schwarzenegger (De Terminator). ("Determinating" is identified by the OED as a noun and adjective derivative of the obsolete verb "determinate" meaning "To determine or decide" so either it's a typo or Justice Wiggins has spent so much time researching ancient case law he has now uses words that have been obsolete in English since the 17th century).

***Baldwin v City of Estherville*, No. 18-1856 (Iowa 6-14-2019)**
https://www.iowacourts.gov/courtcases/6277/embed/SupremeCourtOpinion

In *Baldwin v. City of Estherville*, 915 NW 2d 259, 281 (Iowa 2018) the Court held that qualified immunity is available in a *Godfrey* action since "a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law." The 2019 *Baldwin* follows up on this with a number of new certified questions. Most interesting are whether a City can assert an "all due care" defense based on the care of its employees, can a City be tagged with punitives based on the action of its employees, and can attorney fees be awarded against the City based on the fact that the plaintiff attained some degree of success against a City employee. The Court's analysis depends in large part on the holding that while a *Godfrey* action against the individuals proceed as usual, the municipal tort claims act applies to limit liability of the municipality. The answers:

Answer to Question one (A Municipality's Ability to Assert Qualified Immunity Based on Its Officers' Exercise of "All Due Care."):

> "If the officers exercised due care in executing an ordinance, the City would be immune pursuant to section 670.4(1)(c).
>
> Therefore, the answer to certified question number 1 is that the due care exemption under section 670.4(1)(c) could provide the City immunity."

Slip op. at 10.

Answer to Question three (Award of Punitive Damages Against the Municipal Employer of the Constitutional Tortfeasor):

> We have decided the IMTCA applies to Baldwin's Iowa constitutional tort causes of action.
>
> [T]he legislature amended the IMTCA to exempt municipalities from punitive damages liability…
>
> Therefore, the answer to certified question number 3 is that section 670.4(1)(e) precludes an award of punitive damages against the municipality that employed the constitutional tortfeasor.

Slip op. at 12.

Answer to Question Five (Award of Attorney Fees Against the Municipal Employer of the Constitutional Tortfeasor):

> Therefore, the answer to certified question number 5 is that in a Godfrey action, a court cannot award attorney fees against the municipal employer of the constitutional tortfeasor unless there is a statute expressly allowing such an award. We find none here. As for the common law rule regarding awarding attorney fees to the victorious party, it will be up to the trial court to determine if Baldwin has met the common law standard.

Slip op. at 14-15. *See Remer v. Bd. of Med. Exam'rs*, 576 N.W.2d 598, 603 (Iowa 1998) (*en banc*); *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993)(" "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.") This holding seems to call into question whether attorney fees could be awarded in *any Godfrey* action, including those against individuals.

***Hedlund v State*, No. 18-0567 (Iowa 6-28-2019)**
https://www.iowacourts.gov/courtcases/6283/embed/SupremeCourtOpinion

The Plaintiff brings a claim as a whistleblower, for age discrimination, and for intentional infliction of emotional distress. The district court granted summary judgment on the whistleblower claim on the grounds that the exclusive remedy for such a claim by a management level trooper is the process through the EAB under Code §80.15. Summary judgment on the discrimination claim was granted for a lack of proof, and on the intentional infliction for a lack of outrageousness.

One fateful day in 2013 Hedlund spotted an SUV doing a "hard ninety" and contacted the highway patrol. A trooper located the SUV but determined it was driven by another trooper with the Governor in the back. He did not pull over the Governor. A few days later, in the midst of several other employment related issues, Hedlund reported himself for not insisting that the Governor and his SUV be pulled over.

Five days after the SUV incident Hedlund was placed on suspension. He was investigated. Ten weeks and 500 pages later, he was told that he would be fired for various things he had done back in April. He was fired the same day the report was issued and the next day the Governor held a press conference where he said that DPS "felt for the morale and for the safety and well-being of the Department, this was action that was necessary." Slip op. at 6.

Following the notification of possible termination, the Plaintiff took his case to the EAB. The way this works is the DPS gives a supervisory trooper notice of an intent to terminate, and the worker has 30 days to take the issue to the EAB. If this is done the worker remains on state payroll, but is suspended. All pay, benefits, IPERS, seniority accrual, etc. remain unaffected. After a hearing the EAB can decide that the worker should be terminated, or decide there is not good cause to terminate. At that point the worker is no longer a state employee. A few months after his notice of contest, Hedlund withdrew the EAB case. His withdrawal was accepted on January 22, 2014, his termination was then set for January 30. He filed an ICRC complaint a week before the termination, and retired (preserving sick leave) the day before.

Finding *Walsh v. Wahlert*, 913 N.W.2d 517 (2018) controlling the Court found that the §80.15 is not the exclusive remedy. "Because the legislature expressly created section 70A.28(5) as an independent statutory cause of action, a challenge to agency action under the administrative procedure act is not the exclusive means of obtaining judicial review…Hedlund may seek judicial review of DPS action through 70A.28(5)'s civil action." *Slip op.* at 10. The Court seems not to mark that in the EAB process the decision to terminate is only provisional and that the EAB decision is what leads to the separation, whereas in *Walsh* the decision is final but subject to reversal. This seems, at minimum, to raise the specter of failure to mitigate damages where one stays on payroll the entire time the EAB process is pending. One supposes the argument would be that rather than withdrawing the appeal and thereby triggering your own termination, Hedlund could have stayed on payroll, accrued all benefits and seniority, and litigated the case through the EAB – an agency entirely independent of the DPS.

The Court reinstated the whistleblower claims finding enough evidence to get past summary judgment. Then it addressed remedial issues for remand. The statute provides for "affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs." If the relief is equitable then no jury trial can be had. The Court notes that "[u]nder the doctrine of last preceding antecedent, qualifying words and phrases refer only to the immediately preceding antecedent, unless a contrary legislative intent appears." Slip op. at 13. The Court thus concludes that "'any other equitable relief' necessarily implies the 'affirmative relief' authorized is equitable." *Id.* A jury trial is thus not available under the whistleblower statute.

The Court then turns to the issue of summary judgment for age discrimination. The Plaintiff argues, for some reason, that the *McDonnell Douglas* analytical framework should not apply. The Court dodged this question and found against the Plaintiff under any standard – perhaps making clear that the problem for Plaintiffs is not the name the analysis goes under. The evidentiary analysis was fairly standard, summed up in the Court's remark that "[e]ven with the formulated assistance of the *McDonnell Douglas* framework, Hedlund has not moved beyond generalities." *Slip op*. at 22.

On intentional infliction the Court set out the usual rule that "outrageous conduct must be extremely egregious; mere insults, bad manners, or hurt feelings are insufficient." *Slip op*. at 23. In short it must go "beyond,

typical bad boss behavior" and this case did not fit the bill. *Slip op.* at 25.

[Iowa Court of Appeals Decisions]

***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 was denied.

***Cupps v. S&J Tube*, No. 17-1922 (Iowa App. 1-9-2019)**
https://www.iowacourts.gov/courtcases/4348/embed/CourtAppealsOpinion

Although Plaintiffs and Defendants each get a little something from this case Defendants get more. The issue is whether an arbitration agreement exists. The agreement was found in an application of employment. The Plaintiff filled it out, was offered a job, and accepted. When he later brought suit outside the terms of the arbitration agreement the company argued that he must be compelled to arbitrate. The Court of Appeals agreed with the Plaintiff that the application for employment was not, in itself, a contract since merely applying for a job did not obligate the company to anything. The Court "agree[d] the job application only constituted a solicitation or invitation of an offer," citing a rather pithy treatise that explains a "[r]equest for an offer is not an offer." Slip op. at 7. This did the Plaintiff no good whatsoever since the Employer did make an offer, and the Plaintiff did accept it. The application set out terms that would be included in the forthcoming offer, and so when the offer was made it was understood that the arbitration agreement was incorporated. Thus when the Plaintiff accepted the offer of employment, which incorporated terms from the solicitation (application), then a contract of employment was formed which included the arbitration term.

Of all the unlikely uses of this case is does seem relevant to recent action by Iowa municipalities to "ban the box." Such provisions typically provide that an employer cannot ask about criminal history prior to making an offer of employment. The provisions also tend to provide that once an offer is made the employer can request such information, operating much as the ADA handles medical inquiries by employers. Some Employers have stated an intention to challenge such ordinances under Iowa Code §364.3(12)(a). That provision states that "A city shall not adopt, enforce, or otherwise administer an ordinance, motion, resolution, or amendment providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to a minimum or living wage rate, any form of employment leave, hiring practices, employment benefits, scheduling practices, or other terms or conditions of employment." The issue, then, is whether the contents of a form used to solicit an offer is a "term or condition of employment." *Cupps* indicates the filled out form is a solicitation for an offer from the Employer, and thus the contents of the blank form is even one more step removed from "employment." So long as the ordinance allows the actual offer to encompass terms beyond the contents of the application – as most employment offers do – then it would not seem that regulating the contents of "solicitations of solicitations of offers" is regulating the terms and conditions of any *employment* that may result. Notably the phrase "hiring practices" describes the state or federal law that may conflict, and textually does not refer to the provisions of the ordinance.

Further review was denied.

***Huss v. State*, No. 16-2145 (Iowa App. 2-6-2019)**
https://www.iowacourts.gov/courtcases/2021/embed/CourtAppealsOpinion

In this case the Plaintiff suffered from Multiple Chemical Sensitivity and lost her job over it. She brought a claim for disability discrimination, got to the jury, lost, and then prevailed on a motion to set aside the verdict. Then she lost on appeal.

The Plaintiff had severe reactions to chemicals in her job environment. The granting of JNOV was premised on a "Perry Mason" moment. The Director of the Department of Residence, under cross examination, testified:

> Q. So as of the time you fired her and insisted that you could not relocate her, you just told this jury she could have been placed in Friley Hall? A. Yes
>
> Q. And that would have been a reasonable accommodation? A. In my opinion, yes.

Slip op. at 4. The district court then concluded that failure to accommodate was established as a matter of law. The Court of Appeals was apparently not as impressed by cross, noting that the admission could be reasonably taken as "impaired Huss's ability to work with her team and not whether the move would have addressed all of Huss's concerns." *Slip op*. at 7. Further evidence from other witnesses more directly involved with the Plaintiff contradicted the idea that accommodation was possible and this conflict in the evidence was enough to support the jury verdict.

Application for further review was denied.

***Cooper v. City of Reinbeck*, No. 18-1170 (Iowa App. 5-12-2019)**
https://www.iowacourts.gov/courtcases/5881/embed/CourtAppealsOpinion

In this case the Plaintiff brings a defamation claim against his employer arguing that, among others, statements contained in the Employer's letter prepared for the unemployment proceeding was defamatory. This letter included an allegation that the Plaintiff had falsified signatures on bond documents. The statement was included as a proposed exhibit 1, but was not offered by the Employer at the hearing.

The parties argued about whether the statement should receive absolute immunity or qualified immunity. The district court granted summary judgment finding statements at issue either not defamatory or privileged under the qualified privilege.

On appeal the City claimed the district court should be affirmed on the basis of absolute privilege. The Court noted that the issue is addressed by statute since Code §96.11(6)(b)(2) states that "A report or statement, whether written or verbal, made by a person to a representative of the department or to another person administering this law is a privileged communication. A person is not liable for slander or libel on account of the report or statement unless the report or statement is made with malice." The court observed, however, that "[i]n their arguments to us, the parties do not address statutory immunity under section 96.11(6)(b)(2) and whether it affects the availability of absolute privilege here. Thus, we do not reach absolute privilege and decide the appeal on qualified privilege below."

The Court then turned to the qualified privilege given to members of subordinate legislative bodies if those statements are made in the performance of official duties and concern any pertinent subject matter. The elements of the privilege are "(1) the statement was made in good faith, (2) the defendant had an interest to uphold, (3) the scope of the statement was limited to the identified interest, and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only." Slip op. at 6-7. The parties agreed that statements made during council meetings were qualifiedly privileged, and the Court found the same to be true of the letter to IWD "because it was written by government officials in the performance of their official duties on a qualifying

matter—the defense of a claim for unemployment benefits." Slip op. at 7. The Plaintiff claimed the privilege was defeated here by actual malice, but the Court found that the Plaintiff could not generate a jury issue on actual malice. Notably, the failure to investigate suspicions of dishonesty in detail did not show actual malice since the Plaintiff "has not provided evidence the defendants entertained serious doubts after investigating their suspicions…" Slip op. at 8.

Although not discussed by the court it is notable that documents sent to IWD prior to the Administrative Law Judge process are confidential, and this character was only lost because the letter was sent in as a proposed exhibit in a contested case. Iowa Code §96.11(6). Further, "[i]nformation obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review under chapter 17A…" Iowa Code §96.11(6)(b)(3).

Further review was denied.

Whitman v. Casey's General Stores, Inc. **No. 18-1320 (Iowa App. 9-25-2019)**
https://www.iowacourts.gov/courtcases/7496/embed/CourtAppealsOpinion

The Plaintiff in a drug testing case appeals an adverse jury verdict. When the Plaintiff applied for work he was asked "Have you ever been convicted of a crime other than a routine traffic violation?" and he responded by mentioning only a 1998 conspiracy conviction. He was hired, and after several years he used meth in his off hours, came to work, used meth again, was arrested, for possession, bonded out, and smoked some pot. When the Employer learned of the arrest they met with the Plaintiff. He admitted to arrest and to having used marijuana. He was sent to take a drug test, and mentioned to the Employer that he had PTSD. The results came back negative on November 14, 2014. According to the Employer before the decisionmaker was aware of the negative result he reviewed the Plaintiff's criminal history and saw a lot more convictions which he had not disclosed. The Employer then decided, without knowing the drug test result, to terminate the Plaintiff based on his admitted drug use (marijuana) and his underreported convictions. The Plaintiff brought a claim under the ADA for disability discrimination (PTSD) and for a drug test violation. "The jury found Whitman was 'currently engaged in the illegal use of drugs at the time of his termination'; he did not prove his disability discrimination claim based on PTSD; Casey's complied with section 730.5, and even if there had been a violation of section 730.5, Whitman would have been terminated anyway…" Slip op. at 4.

On appeal Whitman claimed that "Casey's failed to (1) adequately train supervisory personnel, (2) have reasonable suspicion to test him, (3) reinstate him after his negative drug test, and (4) follow its written policies concerning drug testing." Slip op. at 4-5. The Court of Appeals, citing to *Sims v. NCI Holding Corporation*, 759 N.W.2d 333 (Iowa 2009), held that "an employee is entitled to relief only if the employee's employment was 'adversely affected' by an improper drug test." Slip op. at 6; *see also* p. 10. Thus "[e]ven if the request for a drug test was improper, it did not mean Casey's was unable to discharge Whitman for entirely different reasons." Slip op. at 11. The evidence, viewed in the light favorable to the verdict, supported that the decision was made before the test results

came in, and that the test results did not affect the decision one way or the other. The Employer stated it should have terminated based on the admission of marijuana smoking. The Court thus found no error in the finding that the drug test process had no adverse effect on the employment. Also of interest was the Plaintiff's argument that "even if he was determined not to be adversely affected by an improper drug test, he is entitled to attorney fees under the statute." Slip op. at 11. The Appellate Court disagreed reasoning "Section 730.5(15)(1)(a) provides an employee who is aggrieved due to a violation of the drug-testing statute is entitled to attorney fees. The jury found Whitman was not aggrieved by an improper drug test because Casey's had independent grounds to terminate him." Slip op. at 11.

Application for further review is pending.

***Milligan v. Ottumwa Civil Service*, No. 18-1810 (Iowa App. 11/6/2019)**
https://www.iowacourts.gov/courtcases/7782/embed/CourtAppealsOpinion –

A police Sergeant was fired, and appealed the civil service decision to district court. The district court reversed in large part because it felt the police chief had been biased, and because prior discipline which should has been expunged as too old had been considered. The Court of Appeals reversed.

Briefly an officer got into a verbal exchange with a third party who wanted her stuff from the car that had been stopped. During this exchange the officer stated the person had threatened to "beat his ass" and so she was arrested. Review of the matter by management concluded the officer had engaged in petty unprofessional banter, and did not have probable cause to arrest. Sergeant Milligan was the supervisor officer on site but he did not exit his vehicle. When investigated he said that he did not understand what was going on between the officer and the juvenile, but audio from the patrol car recorded after the arrest established otherwise. In the end he was fired for not taking control of the situation, and for not telling the truth during the investigation.

On review the district court decided there was hostility between the chief and the Sergeant, and that the investigation was biased. The district court reversed, but the Civil Service Commission appealed.

Key to the Court of Appeal's decision was the legal issue of the standard of review. Prior to 2017 such matters wee reviewed by "trial de novo" in the district court. This changed in 2017:

> In 2017, the legislature deleted the language requiring a "trial de novo." 2017 Iowa Acts ch. 2, § 62.9 Applying the amended statute here, the scope of review on appeal is "de novo appellate review without a trial or additional evidence." Iowa Code § 400.27(3) (2017). "Trial de novo" and de novo review are distinct concepts. Sieg, 342 N.W.2d at 828. While the "trial de novo" standard allowed us to "give weight to the findings of the district court" after it tried the case anew, even with new evidence presented for the first time to the district court, a "de novo appellate review" standard requires we now place weight on the findings of the commission.

Slip op. at 9.

Under the new standard the Court found that the termination was not arbitrary. First, the Court found there was not extensive evidence of bias as asserted by the district court. Further, the bias or appearance of bias, the Court found would not *automatically* result in reversal, and so the Court turned to the record. As far as the misuse of the prior discipline the Court noted that even though prior discipline is removed from the personnel file, this did not mean it could not be considered in subsequent discipline. "We agree and find it appropriate to consider Sergeant Milligan's prior discipline when imposing discipline here." Slip op. at 13. The failure to gain control of the situation resulted in a suspension and this was affirmed. The key issue, of course, as the dishonesty in the investigation since this caused the termination. The Court echoed the Chief's "concern about possibly being required to disclose Sergeant Milligan's dishonesty in this investigation if he were involved in future criminal prosecutions." Slip op. at 17. The Court thus found "that termination is in the public's interest. Termination, while harsh, is appropriate discipline for dishonesty in an internal investigation." Slip op. at 17.

***Fenceroy v. Gelita USA*, No. 18-1817 (Iowa App. 11/6/2019)**
https://www.iowacourts.gov/courtcases/7744/embed/CourtAppealsOpinion –

The Court affirms a defense summary judgment in a racial harassment and discrimination claim. The harassment consisted of an incident that was reported to management, and several disturbing incidents which were not. The reported incident was a piece of rope tied in a loop which the Plaintiff took to be a noose. Management responded to the complaint, determined that the rope was tied in a loop as a handle for a legitimate business reason. The loop was untied anyway, but was later retied by unknown persons, and nothing more seems to have happened. The other incidents included overtly white supremacist comments, and assault. Since the Plaintiff did not complain of the more serious incidents of harassment, and the Employer had an effective complaint system, the Employer was granted summary judgment on a vicarious liability claim under *Faragher-Ellerth*. The Court quickly disposed of co-worker (negligence based) liability on the conclusion that the Plaintiff did not generate a jury issue on whether the Employer knew or should have known of the harassment. Notably, the Court seems to hold that where a supervisor (here foreman) know of the harassment but do nothing then the complaint must go further. The liability for the foreman's inaction was defeated by *Faragher-Ellerth*, but in analyzing the question of negligence liability – knew or should have known – the foremen's knowledge was not mentioned. Finally, the Court found that the Plaintiff was not constructively discharged by the "noose," since that occurred two years before the Plaintiff's retirement, was retied, but never mentioned again. He thus did not give the company a chance to correct the ongoing problem, and could not generate an issue on whether the job conditions were intolerable.

***Hollinger v State*, No. 18-2181 (Iowa App. 11-27-2019)**
https://www.iowacourts.gov/courtcases/8093/embed/CourtAppealsOpinion

In this disability discrimination case the fighting issue was whether the Plaintiff was disabled. In the first trial the district court, after hearing the evidence, found the Plaintiff was not disabled since "squatting and kneeling" is not a major life activity. The Court of Appeals in an

earlier appeal reversed and remanded because "squatting and kneeling" is a major life activities. On remand the case was submitted on the previous record and the State lost. The State appeals arguing that the Court of Appeals did not *really* mean that "squatting and kneeling" is a major life activity. The Court of Appeals, unsurprisingly, responded: "Ah, yeah. We did." The actual quote was " We agree with Hollinger that our prior decision settled the question. An activity is either a major life activity or it is not. Determining whether a broad category of activity meets the statutory definition of major life activity is a question of law." Slip op. at 7. The case then turns on whether the Plaintiff was substantially limited in this activity. The Court found no error in the district court's analysis which looked to the ADA, noted that "substantially limits" is not a demanding standard and should not require extensive analysis, and set out four factors: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment; and (4) whether the individual is impaired during episodes or flare-ups even if not impaired during remission." Slip op. at 8-9. Since the Plaintiff basically could not squat or kneel without unbearable pain, the Court affirmed the finding that the Plaintiff was a person with a disability.

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

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 office 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.

Hustvet v. Allina Health System, (8th Cir. 12/07/2018)(Grasz, Author, Loken, Erickson) (172963P.pdf) – In this ADA case the Court find the requirement of a pre-placement health screen including "tracking for immunity to certain communicable diseases, as well as a Respirator Medical Evaluation ('RME'), which was based on an OSHA form, and asked questions about potential health conditions directed at evaluating safe respirator fit and use." Slip op. at 2. The Plaintiff worked as a living skills specialist working with clients many of whom had fragile immune systems. She failed to fill out the RMA form, or to obtain the MMR vaccine. She declined the vaccine because she was concerned for her chemical sensitivity. She was fired for not obtaining rubella immunity, and for not filling out the RME form. The district court found no violation of the ADA health inquiry provisions because the termination was for not getting the immunity rather than not responding to the inquiry. The Circuit Court disagreed on this point, finding that the failure to complete the screening was part of the reason for termination. The Court found, however, that given the Plaintiff's job the inquiry was job related and consistent with business necessity, and therefore not illegal. When an employer requires a class of employees to submit to a medical exam, it also must show that it has reasons consistent with business necessity for defining the class in the way that it has. "This burden is satisfied when the employer can show a reasonable basis for concluding that the class poses a genuine safety risk and the exam requirement allows the employer to decrease that risk effectively." Slip op. at 9. Citing to CDC guidance the Court found that standard satisfied here notwithstanding the elimination of rubella in the USA. As for the request to accommodate by foregoing immunization for rubella the Court found the Plaintiff not disabled (recall in an illegal inquiry claim there is protection even for the nondisabled). This was because "[t]here is insufficient evidence in the record to support the conclusion that Hustvet's chemical sensitivities or allergies substantially or materially limit her ability to perform major life activities. She has never been hospitalized due to an allergic or chemical reaction, never seen an allergy specialist, and never been prescribed an EpiPen. Nor has she ever sought any significant medical attention when experiencing a chemical sensitivity, taken prescription medication because of a serious reaction, or had to leave work early because of a reaction." Slip op. at 13.

Kirklin v. Joshen Paper & Pkg of Arkansas, (8th Cir. 12/19/2018)(Gruender, Author, Colloton, Grasz) (171935P.pdf) - The most interesting issue in this case was the claim that the filing period should be extended for claims of failure to promote, layoff, and hostile environment. These were all more than 180 days before the charge was filed, with the only timely incident being a failure to rehire/recall. The Plaintiff alleged that he was lulled into a false sense of security by assurance that he was laid off, not fired. The Court looked at this first as a claim of estoppel and this failed because "being eligible for rehire is not the same as being promised his job back and is not a sufficient basis for application of the

doctrine of equitable estoppel, especially when Kirklin expressed no interest in returning to work after his layoff." Slip op. at 6. As for tolling, "a reasonable person in Kirklin's position would not have expected to be rehired when he was laid off because Kirklin's supervisor never made such a promise, as Kirklin admitted, and because Kirklin never requested to be rehired." Slip op. at 7. Finally, on continuing violation the Court found the failure to promote and layoff were discrete acts which are no actionable if untimely even if related to a timely incident. The harassment claim failed because no act of arguable harassment fell within the filing period. On the failure to rehire claim the complaint had specified "December 5, 2013" as the date of the failure. "Kirklin testified that he had no knowledge of Joshen taking any adverse employment action against him on December 5, 2013 and could only speculate that someone at the EEOC must have typed that date into his charge." Slip op. at 6-7. The Plaintiff said he must have told EEOC sometime in December 2013, but incredibly the Circuit Court held him to the precise day mentioned. "[I]t is not reasonable to believe that an EEOC investigation arising from Kirklin's charge would extend past December 5, 2013 to examine events beginning on December 30, 2013, when a white male submitted an application for a driver position. Because Kirklin's EEOC charge specified a single day on which Kirklin admits that Joshen took no adverse employment action against him, the district court properly granted summary judgment in favor of Joshen on Kirklin's failure-to-rehire claim." Slip op. at 8. Perhaps this requirement of total precision in a layman drafted charge was made easier by the alternate ruling that the Employer had good reasons for not even considering the Plaintiff for rehire – he didn't apply, and he didn't want to work that kind of job anyway.

Lipp v. Cargill Meat Solutions Corp., (8th Cir. 12/19/2018) (Grasz, Author, Loken, Erickson)(172152P.pdf) – In an unsurprising case the Court finds that a plaintiff who had 195 days of unplanned absences for both personal and medical reasons and whose suggested accommodation at the time of termination was additional absences to cover flare-ups without timely medical verification was not a qualified person with a disability. In particular her requested accommodation was not one that enabled her to perform the essential function of regular and reliable attendance but was one that would relieve her of that function. Perhaps more interesting was the footnote about hearsay. The Employer argued that the final absence was not for being "sick" but for being on "vacation" apparently because they wanted to get around a claim of "direct evidence" of discrimination. The Plaintiff argued that the vacation claim was hearsay. The Circuit Court remarked "the standard is not whether the evidence at the summary judgment stage would be admissible at trial—it is whether it could be presented at trial in an admissible form." Slip op. at 8. In other words, the Employer could call people with firsthand knowledge that "vacation" is what was reported to the employer. Oddly, the Employer had done exactly this by including "two sworn declarations based on personal knowledge from Cargill human resources employees" and yet the Court still discussed the hearsay issue. Yet if the evidence had non-hearsay evidence of what the Plaintiff said, then that would be good enough since a statement of a party is not hearsay. Moreover the vacation statement would be offered to show this is what was said, not that it was true – that the employer *thought* it was for vacation even if it was not. It was thus not offered for the truth of the matter asserted.

Brunckhorst v. City of Oak Park Heights, (8th Cir. 02/04/2019)(Wollman, Author, Colloton, Benton) (173238P.pdf) – The Plaintiff did IT and payroll

work for a small city, and was required to perform a number of backup tasks as well. He contracted the notorious flesh-eating bacteria and survived, but with life altering injuries. While the Plaintiff was on extended leave the City eventually farmed out his duties to others, and eliminated his position. The Plaintiff was offered a severance package, or a new job with a reduced salary. The Plaintiff requested instead that he be given his old job, and that for some months he be allowed to work from home. His physician had not limited him to remote work. The City replied that the original position was gone, and that the essential functions of the new position could not be performed remotely. The Plaintiff requested a meeting with the mayor, but the City declined and offered instead to have staff meet with Plaintiff. The Plaintiff was then fired, and he brought suit under the ADA. The Court first of all stated that under the FMLA Plaintiff "was not entitled to return to the Senior Accountant position because he did not return to work prior to the expiration of his FMLA leave." Slip op. at 6. Plaintiff argued that the EEOC guidance instructs that disabled workers should be returned to their old jobs at the expiration of leave unless it is an undue hardship, but the Circuit Court found this guidance unconvincing. The Court took as a given, then, that return to the old position was not a reasonable accommodation since the Plaintiff did not return before the expiration of FMLA leave. No "undue hardship" analysis was undertaken by the Court, and so this is apparently a *per se* rule developed in a single paragraph. The Court finds working from home was not a required accommodation since it was not *necessary*, and the medical limitation did not include it. The Court applied the rule that employer is not required to accommodate an employee based on the employee's preference. The Court found remote work would also be an undue hardship given the small size of the Employer, and the fact that workers would have had to take out some time to do things like scan documents for him. The Court also refused to find retaliation since he was only fired once he failed to return, and since "an employer may reassign an employee to a lower grade and paid position if the employee cannot be accommodated in the current position and a comparable position is not available." Slip op. at 8 (quoting *Cravens v. Blue Cross & Blue Shield of Kan. City*, 214 F.3d 1011, 1019 (8th Cir. 2000)).

Gardea v. JBS USA. LLC, (8th Cir. 02/08/2019) (Magnuson, Author, Loken, Erickson) (172163P.pdf) – In this Iowa case Judge Jarvey grants summary judgment and the circuit court affirmed. The Court disposed of the matter on the conclusion that the Plaintiff was not qualified to perform the essential functions of his job. The Plaintiff had lifting restriction, and the Court found heavy lifting was an essential job function even though it was not frequently required because ""a task may be an essential function even if the employee performs it for only a few minutes each week…" Slip op. at 6. Further since he would need assistance with many commonplace items in his job the burden on co-workers would be too great. Similarly, lifting devices were not available in many areas. In the end, "[i]t is utterly impractical to expect that a mechanic can function properly when he needs an assisting device to lift most objects, including ladders." Slip op. at 7. On the alleged interactive process the Employer offered inferior positions, because the pay was lower, but the Plaintiff failed to show that a position comparable to his maintenance mechanic job was available.

Strubbe v. Crawford Co. Memorial Hospital, (8Th Cir. 02/11/2019)([Benton, Author, Beam and Erickson) (181022P.pdf) - In this Iowa Case Judge Strand dismissed a False Claims Act whistleblower retaliation case on summary judgment and was affirmed. As an initial matter the Court found that the

FCA does not impose individual liability, notwithstanding recent amendments to the FCA. The Court further found that the *McDonnel Douglas* framework applies to FCA claims. The Court found that the was insufficient proof that the "solely motivated" by the protected conduct since the events claimed to show the bias occurred before the removal from part-time status (effective termination). Further the removal was consistent with established policy that a worker who hasn't performed duties for six months will be terminated.

Voss v. Housing Authority, etc., (8th Cir. 2/25/19) (Grasz, Author, Colloton and Gruender) (171650P.pdf) – The Plaintiff tested positive when a drug test was performed and he then supplied information that he was on a prescription for Hydrocodone. While on suspension the Plaintiff had supplied the prescription but was not responsive to requests for a list of all prescription medicines. He was eventually returned to work, after about 2 months. He was reinstated retroactively, and the demand for more information was dropped. During his return to work meeting the Employer told him that he could not operate the Housing Authority's vehicles and equipment until the Plaintiff provided information from his doctor describing how and when to take the prescription, along with any side effects that could hinder his ability to perform his duties. He was also told that due to funding issues he needed to get pre-approval for orders. It was at this time that Employer was informed of the medical conditions that required the medication. The employer believed that in the interim there were plenty of other general office duties that the Plaintiff could perform as part of his job. Five days later the Plaintiff quit citing retaliation. Unfortunately for Plaintiff his EEOC charge said nothing about constructive discharge, but focused exclusively on the prior suspension – which had been remedied retroactively. Put together this meant the only claim he had exhausted had no adverse employment action prior to the time that the employer could have known of any disability, and the only claim based on such an adverse employment action had not been exhausted.

Engelhardt v. Qwest Corporation, (8th Cir. 03/22/2019)(Smith, Author, Loken, Gruender) (172492P.pdf) - The Plaintiff was one of 300 employees who sued the Employer and then settled the claim. The next year he was terminated, ostensibly for low productivity. He went to work for a temporary contract and was assigned back to Centurylink. But he was on a do not rehire list, and lost the assignment. He complained, was eventually cleared to return, but never did because of seasonal slowdown and release of all contractors. He move to another state, reapplied at some point and once again came on as a contractor assigned to CenturyLink. He once again received complaints of low productivity. The Court affirmed the grant of summary judgment on FLSA retaliation. As for the first failure to rehire, the fact is the Employer did rehire him and clear him to return, and he did not do so only because CenturyLink laid off all contractors on a seasonal layoff. The allegation of retaliation in the final termination of assignment the Court found unconvincing. The decision maker supervised 325 employees, and a contractor workforce which turned over almost 100% every year. He claimed he did not even recognize the Plaintiff's name when he ended the assignment for low productivity, and the Plaintiff introduced no evidence suggesting otherwise. "The record simply does not support Engelhardt's 'grudge' theory." Slip op. at 8. In contrast there was a good deal of evidence show low productivity and that this usually resulted in adverse employment action for other workers.

Harrell v. Handi Medical Supply, Inc., (8th Cir. 04/09/2019) (Wollman, Author, Colloton and Benton) (173349P.pdf) - The Plaintiff's husband has severe bipolar disorder and the Plaintiff consequently took periodic FMLA leave to attend to him. At a meeting the Employer announced a reorganization which entailed demoting the Plaintiff. She called her husband to complain and he reacted by saying he would come down there to talk to the boss. The Plaintiff then realized she needed to take time off from work to go deal with him. On her way out she displayed some pique at having been demoted, and others complained about her behavior. The next day she was warned over it, but refused to sign because she denied any cursing. The Plaintiff accused the manager of using her husband's disability against her, and the manager became angry and told her not to accuse him of this. The Employer then suggested the Plaintiff might be happier working elsewhere, and suggested that maybe they should find an "exit strategy." The Plaintiff left the meeting muttering the Employer's motto "enriching lives," and was then fired for insubordination. She sued, and on appeal the only claims at issue were under the Minnesota Human Rights Act pertaining to marital status and retaliation. The Court assumed the "exit strategy" was adverse employment action but dismissed anyway. The Court found the concern the Plaintiff raised about using her husband against her was not a legitimate complaint of discrimination. The Court's reasoning was that even if the allegation of cursing was a lie, the Plaintiff acknowledged that if the lie were true the Employer would have legitimate grounds to terminate, so since the Employer chose to believe the lie the Plaintiff (who knew it was a lie) had no reasonable grounds to think the Employer was acting out of animus. Apparently, the Court rules that even someone who knows the allegations against her are a lie could not reasonably suspect discrimination by her supervisors who chose to believe the lie. This meant that the opposition, the complaint about discrimination, was not protected. As for termination the Court would not find animus because "[i]t was only when Harrell offended Bailey by suggesting that he was unlawfully discriminating that the exit strategy was broached." Slip op. at 7. Apparently this means that when an Employer believes a lie, if the worker who knows the truth complains of discrimination in choosing whom to believe, then the Employer gets to terminate once offended by the complaint of discrimination made by the victim of the lie.

Beckley v. St. Luke's Episcopal-Pres Hosp, (8th Cir. 05/16/2019) (Erickson, Author, Colloton, Gruender) (182643P.pdf) – In this FMLA retaliation case the majority of the short decision details the rather profound performance issues of the Plaintiff as a operating room nurse. The evidence further showed she regularly used FMLA leave without consequence for a couple years, before she started having problems with the newly enacted "on call" procedure. The Plaintiff was thus unable to show a genuine issue linking her FMLA usage to her warnings. Meanwhile allegations of "holding her to a different standard than other employees, scrutinizing her work more closely, failing to correct or address a co-worker's comment about her FMLA leave usage, inquiring whether she could schedule doctor's appointments during off-duty hours, and asking if paperwork received by facsimile was 'FMLA too,' without evidence of tangible injury or harm is not actionable under the FMLA." Slip op. at 7.

Charleston v. McCarthy, (8th Cir. 06/13/2019) (Shepherd, Author, with Gruender, Wollman) (181965P.pdf) – In this retaliation case out of the Polk County Sheriff's office the Court finds no adverse employment action and affirm dismissal. The Plaintiff had run against the Sheriff and lost, and

now claims retaliation for his political beliefs in the form of a suspension, a transfer and a reprimand. The challenge to the suspension, however, was untimely since it had been more than two years before filing, and the subsequent refusal to rescind "cannot revive the adverse employment action to bring it within the appropriate limitations period." Slip op. at 9. Meanwhile, "a reprimand constitutes an adverse employment action only when the employer uses it as a basis for changing the terms or conditions of the employee's job for the worse. [But here] the record is devoid of any evidence that the 2013 reprimand in any way changed the terms or conditions of Charleston's employment. It did not involve any reduction in pay or otherwise adversely affect his employment; it was merely documented in his personnel file. This is insufficient to demonstrate that the reprimand was an adverse action." Slip op. at 9. The transfer was to a position that did not materially alter his terms or conditions of employment, and thus was not adverse action. "The transfer did not reduce Charleston's pay; he remained in a supervisory position even though his number of direct supervisees decreased; he remained in the position for two-and-a half months before being transferred to another department that gave him more supervisees; he was still eligible to work overtime and to use a patrol car when needed; he was routinely transferred between divisions at least eight times during his employment with the department; and Charleston admitted that the Transport Division performed essential functions of the sheriff's department." Slip op. at 10.

St. Paul Park Refining Co, LLC v. NLRB, (8th Cir. 07/08/2019) (Shepherd, Author, Arnold, Erickson) (182256P.pdf) – Although not a summary judgment case, here the Court does review the sufficiency of the evidence supporting a decision by the NLRB finding a suspension was for engaging in protected concerted activity. The worker had refused to do work pending an appropriate change in the safety procedures, an argument ensued, then an investigation resulting in the Employer disbelieving the union member and suspending him. The Court found that the worker's call for a safety stop was an extension of earlier conversations he had had about safety, and so was an example of concerted activity. In Union cases once concerted activity is shown, and once it is shown the Employer knew of the activity (here conceded) then the General Counsel must show that the concerted activity was a motivating factor in the adverse action. Slip op. at 7.Here the Court found multiple indications of bias including the fact that the investigation relied almost exclusively on the supervisors' account. Also the rational for the discipline shifted over time. This was sufficient to shift the burden to the Employer to prove the same decision defense, and weighing the evidence as the agency did the Court found this defense was properly rejected.

Lovelace v. Washington Univ. School of Med, (8th Cir. 07/25/2019) (Smith, Author, Arnold, Kelly) (173673P.pdf) – In this FMLA discrimination case the Plaintiff claims she was fired in retaliation for her use of FMLA leave. The Court finds that the timing suggests otherwise, since the return from leave was five months before the termination, and thus the Plaintiff had to have "something more." The Plaintiff pointed to prior satisfactory performance but this was not enough. The Court then repeatedly discusses the case as if the Court were a jury deciding it rather than deciding a motion for summary judgment. Throughout it talks about what the Plaintiff has not proven, not in terms of genuine issues of fact: "These complaints, whether true or false, provided a nondiscriminatory basis for Lovelace's supervisors to discuss her work performance. Lovelace's supervisors offered her the opportunity to revise her initially negative performance review.

The events that followed the July 31 meeting have not been shown to be related to Lovelace's use of FMLA or any animus towards that use. The decision to terminate Lovelace based on the office incident may have been mistaken or imprudent, but in order to be actionable, it must be shown to be connected to Lovelace's use of FMLA leave. The record in this case simply does not establish this connection." Slip op. at 9 (emphasis added). While there was evidence that the complaining physicians were "disgusted" by the use of FMLA leave, the Court refused to apply the cat's paw theory because "there is no evidence that [the supervisor] did not terminate Lovelace of his own volition…" She was terminated because she became upset over the complaints, and the Court (essentially believing the employer's version of the meeting) found this a legitimate reason for termination.

Lacey v. Norac Inc., (8th Cir. 7/30/2019) (Erickson, Author, Colloton, Gruender) (181947P.pdf) – In an extremely brief decision the Court affirmed summary judgment against a Plaintiff who alleged retaliation for her refusal to sign an affidavit proffered to her as part of an internal discrimination investigation. The Employer presented evidence that reorganization, and the resultant layoff of Plaintiff, was planned before she was even presented with the affidavit. The Plaintiff's theory was that the documents were fake, but the Circuit Court observed this was mere speculation and thus insufficient to generate a material issue for trial.

Mahler v. First Dakota Title Ltd Partner, (8th Cir. 07/31/2019) (Benton, Author, Wollman, Grasz) (181632P.pdf) – In this Iowa case an upper level manager alleges hostile work environment, discrimination and retaliation but loses on summary judgment. The Plaintiff had relayed complaints of harassment to management, and had subsequently been fired. She claimed direct evidence of retaliation but the Court found none. A decision maker had described the complaining employee as being "egged on" by the Plaintiff. But this remark was made six months after the termination, and was in connection with rehiring the alleged harasser and so the Court refused to find it was "related to the decisional process." Slip op. at 5. It also found that a remark that the Plaintiff "tended to embellish" was not made by a decisionmaker, and in any event had not shown a "specific link between Mahler's termination and protected conduct…" Slip op. at 6. The Court then broke out the indirect evidence rubric, and disposed of the case on the ground that the Plaintiff had not "demonstrated" pretext (by which one must assume the Court meant "generated a genuine issue for trial on pretext"). This was quickly disposed of by the usual means, namely, finding that since the ground pointed to existed, and that complaints pre- and post- dated the protected conduct then there could be no causal link. On harassment the Court not surprisingly found a single joke that the Plaintiff responded to as not being offensive was insufficient to constitute a hostile environment.

Farver v. Ryan McCarthy, (8th Cir. 7/31/2019)(Grasz, Author, Shepherd, Melloy) (182789P.pdf) – In this failure to hire case the Court affirms summary judgment by applying the rule that "[t]o show a prohibited reason is more likely because he or she was more qualified than selected candidates, a rejected candidate must present evidence the other candidates were in fact *less* qualified." Slip op. at 5-6 (emphasis in original). Of some interest, the Plaintiff pointed to his ranking as performed by the resume screening software. The Court found that "[t]here is no requirement the hiring be done solely on the basis of the computer rankings, and the decision-maker retains some authority to pass over highly ranked candidates

he or she determines do not have the prioritized skills and experiences." Slip op. at 7.

Beasley v. Warren Unilube, Inc., (8th Cir. 08/09/2019) (Kobes, Author, Gruender, Stras) (182655P.pdf) – In this termination case alleging race discrimination, the Court grants summary judgment but does find the prima facie case was satisfied. Of most interest on this point is the discussion of prong 4 – "the discharge occurred under circumstances permitting an inference of discrimination." The Court agreed with the district court that replacement by a white man of similar qualifications was sufficient to satisfy this prong. Slip op. at 7. The Court finds for the defense on pretext because the Plainiff "never shows that he and any of [his comparitors] shared the same supervisor, were subject to the same standards, or engaged in the same conduct." Slip op. at 8.

McNeil v. Union Pacific Railroad Co, (8th Cir. 08/26/2019) (Colloton, Author, Melloy, Shepherd) (182333P.pdf) – In this race, disability, and FMLA case the most important fact supporting summary judgment is the Plaintiff's inability to work mandatory overtime. The Plaintiff first argued that working overtime was not an essential function because the Employer had been willing to accommodate a restriction on overtime in the past. The difference, however, was the new request was for an indefinite period. The Court held that "Union Pacific's earlier willingness to accommodate a two-month restriction does not create a genuine issue of fact about whether availability for overtime is an essential function." Slip op. at 6. The Plaintiff argued that her current restriction was only part time and the failure of the Employer to check on this was a breakdown in the interactive process of accommodation. The Court noted that when the Plaintiff told the Employer about this fact the Employer asked her to get documentation of the temporary nature. As a result, "[h]er failure to do so supports the conclusion that she, not Union Pacific, stalled the interactive process." Slip op. at 7 (cleaned up).

Southern Bakeries, LLC v. NLRB, (8th Cir. 9/11/2019)(Loken, Author, Wollman, Stras) (182370P.pdf) – Although not a summary judgment case, here the Court does review the sufficiency of the evidence supporting a decision by the NLRB of Union discrimination in two cases. On one of the cases the Employer relied on a prior discipline which had been ruled an ULP by a decision of the Court of Appeals. The NLRB applied a *per se* rule that prior discipline which was an ULP may never be used as a factor in subsequent discipline. Since the NLRB concluded the "general council had failed to make the showing of animus necessary to prove Section 8(a)(4) violations," and since the Court rejected a per se rule, it reversed the finding of the Board in this matter. In the second case an employee was fired for discussing discipline with co-workers. This, of course, impinges on section 7 rights and the only defense for the employer was to claim that this was not the reason for the termination. The Employer alleged error because the agency believed the complainant's "self serving" description of the termination conversation over the statements of four others including three "disinterested" witnesses. The Court had no trouble finding the agency can believe who it wants unless this "shocks the conscience" - a very extraordinary circumstance not present here.

Garrison v. Dolgencorp, (8th Cir. 10/3/2019)(Stras, Author, Smith, Benton) (181066P.pdf) – The Plaintiff suffered from anxiety, migraines, and depression. She requested a leave of absence from her lead sales job at Dollar General. Her supervisor said she thought no leave was available,

and that if the Plaintiff continued to miss shifts she could not remain in her full-time lead position. The next week the Plaintiff went to the emergency room for gastritis and anxiety. She requested the rest of the week off but was denied because the other employees with keys were scheduled to be gone. The Plaintiff then quit for her health. The Plaintiff sued claiming a failure to accommodate under the ADA, and FMLA retaliation. The district court granted summary judgement but the Court of Appeals affirmed only on the FMLA claim. On the ADA claim the only close issue was whether the Plaintiff had put the Employer on notice of her request for accommodation. Even though the Plaintiff never "used the word accommodation or asked about anything other than leave" the Court emphasized that it "is not limited to the precise words spoken by the employee at the time of the request, and an employee need not even suggest what accommodation might be appropriate to have an actionable claim." Slip op. at 5. The Court found a jury issue where the Employer was aware of the disability, and the worker had asked for leave no less than four times. The Court also found a failure to engage in the interactive process of accommodation. Key was that the Employer acknowledged that it would have protected the Plaintiff's job and given her leave had she requested under the FMLA. "So it stands to reason that Dollar General could have found a way to make leave (or some other reasonable accommodation) work under the ADA too had [the supervisor] considered it." Slip op. at 6. The ruling on retaliation/constructive discharge makes a distinction that may be important going forward. The Court found that the decision to quit was not based on the employer's actions. "Rather, assuming that Garrison is sincere in her belief that she 'ha[d] to quit . . . to get better,' the reason would have been her worsening medical condition, not any intolerable working conditions that Dollar General itself created." Slip op. at 8. This was so even though she would not have had to quit if she had been accommodated. On the FMLA request the Court found the claim doomed by the failure to follow the employer's leave procedures. The Court found that telling the Plaintiff leave was probably not available was not an "unusual circumstance" excusing this failure to take the request further.

Non-Summary Judgment/Verdict Review Cases

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.

Jones v. Douglas County Sheriff's Dept., (8th Cir. 02/06/2019) (Benton, Author, Beam and Erickson) (173196P.pdf) – In this brief case the Court dismisses a petition on the pleadings. As an initial matter, however, the Court found that even though the Plaintiff's termination claims were time barred, the refusal to reinstate were not. "A reinstatement denial is a discrete employment action." Slip op. at 3. This was in contrast to the district court who had ruled that revive her time-barred claims by demanding reinstatement and relying on Douglas County's refusal as a new, discrete discriminatory act." Slip op. at 3. On the merits the Plaintiff had made conclusory, or insufficient allegations. For example, she failed to allege she was similarly situated to a male who filled the open position. "Jones did not plead any facts showing that candidate was similarly situated or went through a reinstatement process. Her threadbare allegation does not survive a motion to dismiss." Slip op. at 4.

Webb v. Farmers of North America, Inc. (8th Cir. 05/31/2019) (Smith, Author, Wollman, Grasz) (173456P.pdf) – This is an appeal of an order staying the proceedings while arbitration is pursued. The district court granted the motion compelling arbitration and stayed the proceeding pending the outcome of that arbitration. This was appealed and the Circuit Court held that when a district court enters a stay of litigation, instead of a dismissal of the claims, that order is not appealable. Review is permitted only once the arbitration award is made, and then on the usual terms for review arbitration decisions. Note that the month before the USSC reaffirmed in *Lamps Plus v. Varela*, No. 17-988(USSC 4/24/2019) that an order that both compels arbitration and dismisses the underlying claims qualifies as a final decision with respect to an arbitration, and is appealable.

Shockley v. PrimeLending, (8Th Cir. 7/15/2019) (Smith, Author, Benton, Stras) (181235P.pdf) – The Plaintiff sought to bring an FLSA claim, but the company argued she had agreed to arbitrate. The agreement was contained in an electronic handbook. The Plaintiff had to click on the link and generated a pop-up with a link to the full text of the handbook. This full text contained an arbitration agreement, and a delegation clause purporting to give the arbitrator the exclusive power to determine if the parties had agreed to arbitrate. There was no evidence the Plaintiff actually read the full text of the handbook. Here the Plaintiff specifically challenged the delegation provision, and so the Court had before it not the question of the validity of the arbitration, but the question of the validity of the delegation provision. "Shockley challenged the contractual formation of the delegation provision by name; the law requires no more." Slip op. at 6. The key to the case was the issue of acceptance. "In Missouri, 'mere continuation of employment [does not] manifest[] the necessary assent to [the] terms of arbitration.'" Slip op. at 7. That said, "continued employment may constitute acceptance where the employer's document clearly states that continued employment constitutes acceptance, and the employer informs all employees that continued employment constitutes acceptance." *Id.* Here the evidence showed that the Plaintiff was given the opportunity to review the contract provisions, but she did not do so. The Court observed that mere awareness of the existence of the handbook and its provisions is not equivalent to acceptance of the terms. "Even assuming the delegation provision, as presented, constitutes an offer, Shockley's document review, and the subsequent system-generated acknowledgment, does not create an unequivocal acceptance; therefore, no contract was created." Slip op. at 8. This was true of the delegation provision, and by the same

logic, the arbitration provision as well. Suit was thus allowed to proceed, and arbitration was not ordered.

Von Kaenel v. Teasdale, (8th Cir. 12/3/2019) (Erickson, Author, Beam and Smith) (182850P.pdf) – Although dismissed on summary judgment on the pleadings this case is not about inferences of discrimination. The employer in fact maintained a mandatory retirement age of 70 years old. This would be a clear violation of the ADEA except that the Plaintiff was an equity partner in a law firm. The issue then, was employee or partner/owner? Only employees are covered by the ADEA. The Plaintiff, as an equity partner, had a right to vote on the partnership agreement and was paid according to a " complicated calculation pursuant to the partnership agreement." Slip op. at 2. Hourly rates were set by committee, but the Plaintiff only asked to set his rate differently one time, and this was approved. After proceedings in state court found the Plaintiff not to be covered under the Missouri act, for several reasons, the Plaintiff sued in federal court under the ADEA. The motion to dismiss was on the pleadings but the Court considered the record developed in State court and so it was effectively a summary judgment. Citing to *Clackamas Gastroenterology Associates*, P.C. v. Wells, 538 U.S. 440, 450 (2003) the Court set out the governing factors: " (1) whether the organization can hire or fire the individual or set rules and regulations for the individual's work; (2) whether and to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and to what extent the individual is able to influence the organization; (5) whether the parties intended the individual to be an employee, as expressed in written contracts or agreements; and (6) whether the individual shares in the profits, losses, and liabilities of the organization." Slip op. at 6. Applying these the Court was convinced the Plaintiff was a partner. Facts making this clear included that he had to make a capitol contribution to become a partner, he had voting rights, he was pay was tied to profit and loss of the partnership, he work was not reviewed by others, and he could be terminated only by a vote of the other equity partners.