DRAKE GENERAL PRACTICE REVIEW
EMPLOYMENT LAW CASE UPDATE

2022-23 EMPLOYMENT LAW UPDATE

Table of Contents

SUPREME COURT CASES

Torres v Texas Dept. Public Safety, No. 20-603 142 S.Ct. 2455 (2022)

https://www.supremecourt.gov/opinions/21pdf/20-603_o758.pdf

The Court rules, in a 5-4 vote, that the Uniformed Services Employment and Reemployment Rights Act of 1994 [USERRA] overrides the 11th Amendment immunity of the states. An honorably discharged vet with service-connected bronchitis was unable to return to his state job as a trooper. He asked to be reinstated to a comparable position, Texas refused, and he sued under USERRA. The State of Texas moved to dismiss on the ground of Sovereign Immunity. Although USERRA purports to override such immunity the Texas courts held that Congress could not authorize private suits against nonconsenting States pursuant to its Article I powers except under the Bankruptcy Clause. After this decision the SCOTUS ruled that States waived their sovereign immunity as to the federal eminent domain power pursuant to the "plan of the Convention." The SCOTUS thus granted certiorari. The Court held "that, as part of the plan of the Convention, the States waived their immunity under Congress' Article I power '[t]o raise and support Armies' and 'provide and maintain a Navy.'" Slip op. at 11-12. Quoting from *PennEast Pipeline Co. v. New Jersey, 594 U. S.* ___, the majority explained that "congressional abrogation is not the only means of subjecting States to suit. . . . States can also be sued if they have consented to suit in the plan of the Convention." Slip op. at 12. The *PennEast* test for such waiver:

> the test for structural waiver [is] whether the federal power at issue is "complete in itself, and the States

> consented to the exercise of that power—in its entirety—in the plan of the Convention." … Where that is so, the States implicitly agreed that their sovereignty "would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'"

Slip op. at 6. In as much as the power to wage war is complete in itself, the States consented to the exercise of that power when ratifying the Constitution, and so consented to the full exercise of that power. This included assuring a supply of recruits by protecting the jobs of those who might be employed by the state.

***Helix Energy Solutions v. Hewitt*, 598 U.S. 39 (2/22/23)**
https://www.supremecourt.gov/opinions/22pdf/598us1r4_1a7d.pdf

This FLSA deals with the question what constitutes a salary for exemption purposes. The Plaintiff worked on an oil rig and was paid a daily rate, with overtime hours only being piad at a straight time rate. The Employer's only hope was if he worked as a "bona fide executive." Under DOL rules one requirement for such a designation is that the worker be on a salary basis. The bona fide executive test applies a "salary basis test" to both highly compensated employees, and those who are not. The Court thus took up the issue of what is a salary, and the answer will be the same for all workers regardless of the level of compensation. The rule states a worker is on a salary "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 CFR § 541.602(a). That rule goes on to provide that the worker "must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." *Id.* The next paragraph 29 CFR § 541.602(b) states that if the compensation is *computed* at an hourly basis that amount must bear a "reasonable relationship" to the "amount actually earned" in a typical week, that is, must be "roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." "Those conditions create a compensation system functioning much like a true salary—a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week." *Helix Energy* at 47.

In this case, the Plaintiff was paid his daily rate times the number of days he had worked in the pay period. So assuming the daily rate was $1,000 if Plaintiff had worked only one day in a two week period, his paycheck would total $1000; but if he had worked all 14 days, he would get $14,000. This did not satisfy the usual earnings requirement of 602(b).

The issue then is whether it was a salary under 602(a). Again, that provision requires the payout to be independent of the number of days work, and to instead to be a fixed amount. (Or in Kantian terms a salary is determined *a priori*, not *a posteriori*). The Supreme Court, in a rather excruciatingly pedantic decision, concludes with "A daily-rate worker's weekly pay is always a function of how many days he has labored. It can be calculated only by counting those days once the week is over— not, as § 602(a) requires, by ignoring that number and paying a predetermined amount." *Helix at* p. 51. "A worker paid by the day or hour—docked for time he takes off and uncompensated for time he is not needed—is usually understood as a daily or hourly wage earner, not a salaried employee." *Id.* at 52. The Court thus found that the Plaintiff was not a salaried worker.

In a footnote the Majority made clear that "a pay scheme meeting § 602(a) and the HCE rule's other requirements does not also have to meet § 604(b) to make a worker exempt." *Helix* at 50. Notable for dictionary users, the Court continues to use dictionaries from around the time the law in question was passed, here relying on the out-of-print 1949 second edition of the Webster's International.

***Coinbase v. Bielski*, 599 U.S. 736 (6/23/23)**

https://www.supremecourt.gov/opinions/22pdf/599us1r48_986b.pdf

In a 5-4 vote the Court rules that a district court must stay its proceedings while an interlocutory appeal on the question of arbitrability is ongoing. There is no such provision in the Federal Arbitration Act, but the Court majority perceives one in its view of general appellate principles. In the Court's view an appeal, even including an interlocutory appeal, "divests the district court of its control over those aspects of the case involved in the appeal." *Coinbase* at 740 (*quoting Griggs v. Provident Consumer Discount Co.*, 459 U. S. 56, 58 (1982)). The majority casts the issue on interlocutory appeal as "whether the case belongs in arbitration or instead in the district court" and this means that the entire case is

"involved in the appeal." *Coinbase* at 741. Also the Court noted the usual tools to prevent unwarranted delay and deter frivolous interlocutory appeals that an automatic stay might otherwise encourage. Thus the majority holds that a district court must stay its proceedings while an interlocutory appeal on the question of arbitrability is ongoing.

***Groff v Dejoy*, *Postmaster General*, 600 U.S. 447 (6/29/2023)**
https://www.supremecourt.gov/opinions/22pdf/600us1r55_3dq4.pdf

In this unanimous decision the Court address the standard of "undue hardship" in religious accommodation cases - well, sort of.

The Plaintiff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. This was fine until the USPS agreed to start facilitating Sunday deliveries for Amazon. The Plaintiff was unwilling to do this work on Sundays, and his Sunday work was distributed to other workers. Plaintiff received "progressive discipline" for failing to work on Sundays, and he eventually quit.

Of course, under Title VII the USPS was required to accommodate religious beliefs, but only so long as the accommodation did not impose an undue hardship on the business. Citing to *Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63 the Circuit Court found that the *de minimis* cost standard (which is discerned in *Hardison*) was met. The hardship was that the extra work that was imposed disrupted the workplace and workflow, and diminished employee morale. The Circuit Court affirmed summary judgment but the Supreme Court reversed.

First up the Court disavowed that *Hardison* set out a *de minimis* standard. Reading the case very closely the Court found that this was *not* the standard at that the standard was "undue hardship." The Court held "that showing 'more than a de minimis cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII." Slip op. at 15. Significant additional guidance was not forthcoming. About all the Court provides as additional gloss is " 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business." Slip op. at 15-16. The Court does mention ""substantial additional costs" or "substantial expenditures." But the Court seems to eschew a "favored synonym for undue hardship." Instead "[w]e think

it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." Slip op. at 18. This decision must be made "in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer." *Id.*

The Court does suggest that "today's clarification may prompt little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs." Slip op. at 19. But anything more than a suggestion the Court says would "not be prudent." *Id.* Also the Court recognizes that impact on workers can constitute an undue hardship, but *only* if that impact in turn affects the employer's business. Most especially "a coworker's dislike of religious practice and expression in the workplace or the mere fact of an accommodation is not cognizable to factor into the undue hardship inquiry." Slip op at 20. Such concerns are "off the table" in the undue hardship analysis.

Finally, the Court instructs that just because one accommodation might be an undue hardship does not mean the employer should not consider others. "Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary." Slip op. at 21.

IOWA APPELLATE COURT CASES

[Supreme Court of Iowa]

***Vroegh v. Iowa Dept of Corrections, et al., & Wellmark, Inc.* 972 NW 2d 686 (Iowa 4/1/22)**
https://www.iowacourts.gov/courtcases/13260/embed/SupremeCourtOpinion

Plaintiff worked as a registered nurse at the Iowa Correctional Institute for Women from 2009 to 2016. Plaintiff began hormone therapy and started living publicly as a man in 2014. In June 2015, Plaintiff asked to use the male restrooms

and locker rooms at work. The Employer thought use of the men's facilities would be controversial and told Plaintiff not to use the men's restroom. Plaintiff then suggested that they convert two single-stall gender-specific restrooms in a separate administrative building to gender-neutral restroom, although he regarded this as a temporary solution. Management thought it was to be ongoing. In April, 2016 Plaintiff learned the arrangement was permanent. In December 2016, the Plaintiff was fired for the stated reason that he sent confidential information about an inmate to a third party. Suit was brought on the bathroom issue, and the insurance claim was about refusal to cover a mastectomy based on policy exclusions. A wage claim against the Department of Administrative Services was also premised on the mastectomy coverage denial. After a jury verdict in favor of the plaintiff, the defense appeals, and Plaintiff cross-appeals dismissal of the insurer.

The first issue was refusal to issue a business judgment instruction on the restroom dispute. In order to get such an instruction the defense must articulate a nondiscriminatory reason to support its decision. The state pointed to the discomfort of others, and the compromise of gender-neutral restroom as its reasons. "As to the first reason, discriminatory action doesn't somehow shed its unlawfulness simply because it's done to placate the real or perceived biases of others." Slip op. at 9. As to the second reason, Plaintiff "didn't waive his rights under the Iowa Civil Rights Act by agreeing to use the unisex restrooms." Slip op. at 10. "If an employer's action is discriminatory, the employer isn't absolved simply because the employee may have acquiesced to it." *Id.* In sum, according to the Court, both these reasons don't go to the lack of discriminatory motivation.

The second issue was the same decision defense which hold that "notwithstanding evidence that the employer impermissibly took the employee's protected characteristic into account in its decision, the employer may avoid liability if the employer can show it had a second, separate reason unrelated to the employee's protected characteristic that provides a lawful basis for the decision." Slip op. at 11. This suffered from the same flaw as the previous issue: no legitimate reason was offered. The second reason must be lawful, i.e. nondiscriminatory, and these reasons were not.

The state also argued on the wage claim that since the insurance coverage was a bargained benefit, the state was

bound by law to deny coverage. The Court rejected the claim because Chapter 20 does not permit illegal terms to become part of the CBA. "The State cites no authority for the proposition that because Vroegh's union approved insurance coverage as part of a collective bargaining agreement, Vroegh should be deemed to have forfeited claims against the Department (or any other party) under the Iowa Civil Rights Act." Slip op. at 18.

The final argument from the State was that a sex discrimination instruction should not have been given. The key issue is whether gender identity discrimination is subsumed under the idea of sex discrimination. The Court noted that back in *Sommers v. Iowa Civil Rights Commission*,337 N.W.2d 470 (Iowa 1983) this very argument was rejected. The Court was not moved by SCOTUS precedent to the contrary (*Bostock v. Clayton County,* 140 S. Ct. 1731, 1741–43 (2020)), fundamentally because the specific gender identity amendment in Iowa would have been unnecessary if it had already been illegal. Most significantly on the way to this ruling the Court stepped pretty hard on the language in the ICRA provision requiring it to be broadly construed. "Such a provision doesn't allow courts to ignore the ordinary meaning of words in a statute and to expand or contract their meaning to favor one side in a dispute over another. We effectuate the statute's 'purposes' by giving a fair interpretation to the language the legislature chose; nothing more, nothing less." Slip op. at 24. Back to the "sex" argument the fact of amendment to add gender identity strongly indicated a narrower meaning of "sex" since "Canons of statutory interpretation require that every word and every provision in a statute is to be given effect, if possible, and not deemed mere surplusage." Slip op. at 24. So weirdly, the Court makes the broad construction provision of no effect, and then rejects the Plaintiff's reading of "sex" because this would impermissibly make the gender identity provision of no effect! And this the Court did even though it ultimately just ended up affirming the jury verdict based on the gender identity instruction anyway. Meaning the surplusage discussion was really – surplusage.

On the Welmark claim the Court's "focus centers on whether Wellmark was in a position to 'control' or 'effectuate' the denial of benefits to Vroegh on the basis of sex or gender identity." Slip op. at 33. Here the State controlled what benefit plan to enact, and the Court affirmed the dismissal on the ground that "Wellmark's role in the State's benefit plan

insufficient to control or effectuate the denial of benefits to sustain an action against it under section 216.6." Slip op. at 34.

Next, the Court addresses "agent" liability on the Welmark claim. The Court ultimately treated agent liability in the same manner as "person" liability. "In analyzing this issue, we must consider not merely whether Wellmark was serving in some capacity as the State's agent, but more critically, whether its role as demonstrated in the record furnished it with the ability to control or effectuate the discriminatory denial of benefits…." Slip op. at 34-35. Again, "Wellmark had no power in its coverage determinations to deviate from the State's choices as reflected in the plan…" Slip op. at 36. This then defeated liability for Wellmark: "Without authority to alter coverage under the plan—and, as a result, without authority to approve requests for medical procedures excluded under the plan—Wellmark in administering the plan could not discriminate against Vroegh as an 'agent' of the State under section 216.6A." Slip op. at 38-39.

Finally, the Court took up whether Wellmark was liable as an abettor. Again liability could not be established since "the State possessed the sole authority to establish coverage exclusions and to decide whether an exception to an exclusion would be made. Wellmark's role as administrator of the plan, as elaborated above, fails on this record to establish the 'substantial assistance' necessary for Vroegh to prevail on his discrimination claim." Slip op. at 39.

***Savala v. State of Iowa*, 21-0900 (Iowa 12/9/22)**
https://www.iowacourts.gov/courtcases/16326/embed/SupremeCourtOpinion

A Plaintiff in an ICRA discrimination against the state challenges the makeup of the jury venire. He claimed the jury venire did not represent a fair cross section of the community and suffered from an underrepresentation of Latinos in the jury population. The Plaintiff requested two years of data to help him support the challenge. The district court held the fair-cross-section requirement does not apply to civil jury trials. After losing at trial the Plaintiff appeals raising the fair cross-section claim.

The Plaintiff recognized that the Sixth Amendment only applies in criminal cases, but argued instead that the Fifth and Seventh Amendment created such a right. The Iowa Supreme Court

refused to create a new civil fair cross section right under the Fifth and Seventh Amendment. Further those Amendments only apply to actions of the federal government directly, and the right to jury in civil actions is one of the few rights not incorporated through the 14th Amendment. The verdict was thus affirmed.

City of Ames v PERB, 986 N.W.2d 384 (Iowa 2/24/2023)

https://www.iowacourts.gov/courtcases/16907/embed/SupremeCourtOpinion

The Iowa legislature amended Iowa Code chapter 20 in 2017 to restrict the bargaining rights of public employees generally. But under federal law funding is conditioned on labor protections for transit workers. In 2018 the General Assembly amended chapter 20 to prevent the loss of federal funds. The City of Ames asked Iowa PERB for a declaratory order addressing what protection to give nontransit workers in the same collective bargaining unit as transit workers. PERB ruled that broader bargaining rights must be extended under section 20.32 to the nontransit employees in a bargaining unit consisting of at least thirty percent transit employees.

Cyclones will be familiar with the CyRide operated by the city of Ames. The CyRide workers are a mixed bargaining unit with over 30% being transit workers. It receives federal funding and section 13(c) of the Urban Mass Transportation Act of 1964 requires recipients of federal transit funds to protect the collective bargaining rights of public transit employees. 49 U.S.C. § 5333(b). Termed "section 13(c) agreements," public employers must certify they provide their transit employees certain minimum rights in order to hang onto the federal bounty.

Back in 1974 the General Assembly passed Iowa Code § 20.27 which states that "if any provision of this chapter jeopardizes the receipt by the state or any of its political subdivisions of any federal grant-in-aid funds or other federal allotment of money, the provisions of this chapter shall, insofar as the fund is jeopardized, be deemed to be inoperative." The City relied on this provision and agreed to give its transit employees the full bargaining rights they enjoyed before the 2017 amendments. The federal DOL was satisfied and certified the City's continued receipt of federal transit funding based on the City's reliance on section 20.27.

But now the issue is the nontransit CyRide workers. Iowa Code section 20.32 gives the enhanced public safety employee rights to "to any transit employee if it is determined by the director of the [Iowa] department of transportation, upon written confirmation from the United States department of labor, that a public employer would lose federal funding under 49 U.S.C. §5333(b) if the transit employee is not covered under certain collective bargaining rights." Here the director of the IDOT determined that section 20.32 was inapplicable because the DOL provided no such written confirmation and the City already had secured federal funding.

The City nevertheless petitioned PERB for a declaratory order, and got one finding that the nontransit workers had to be covered as well. The City now appeals.

PERB's reasoning was the section 23.32 references the rights of public safety employees. These rights are enhanced if a CBU has at least 30% public safety workers. In such a case the entire CBU gets enhanced rights. *E.g.* Iowa Code §20.9 ("For negotiations regarding a bargaining unit with at least thirty percent of members who are public safety employees..." the mandatory subjects are extended). PERB thus concluded that the entire bargaining unit that contains 30% transit workers should get the enhanced rights. The Court found this to be flat wrong.

PERB's reading simply substitutes "transit worker" in for "public safety employee" and goes from there. But this is not what the Code says. The Code gives the enhanced rights "to any transit employee," and the Supreme Court found this plainly means the transit employees and only the transit employees. Also Code section 20.32 only applies on the condition that the Iowa DOT director found federal funding was threatened. But because of code section 20.27 and the rights the City had *already* agreed to grant *transit workers* there was no such IDOT finding, and indeed no threat of funding loss.

Of course PERB's concern was how in heck the City, or anyone else, is supposed to negotiate a CBA with a unit that has workers with differing bargaining rights. The Supreme Court (who would not have been moved off the literal meaning anyway) was unconcerned with practical problems. This was based on the observation (and little else) that "The parties acknowledge that some intraunit bargaining disparity is unavoidable." *City of Ames*, at 389. The Court dealt with the argument that this

reading makes section 20.32 surplussage given the existence of 20.27 with the handy "belts and suspenders" maxim the Court tends to whip out when it doesn't want to deal with surplussage concerns.

***Copeland v. State of Iowa*, 986 N.W.2d 859 (Iowa 3/10/23)**
https://www.iowacourts.gov/courtcases/15701/embed/SupremeCourtOpinion

This is a case dealing with an exception to the protection granted veterans in state employment. The decision was issued after further review of the Court of Appeals decision discussed in last year's update. The Court of Appeals decision noted the issue has been described back in the 1940's as "always troublesome." The Court of Appeals essentially dealt with the issue in this case by deferring to the Supreme Court precedent. The Iowa Supreme Court then stepped in.

The Plaintiff was employed as an air base security guard. His chain of command was that he reported to the security forces manager who, in turn, reported to the adjutant general and his deputies. The appointing officer is the adjutant general. The Plaintiff was fired after failing the physical test four times, and he now claims violation of the veteran's preference law because of a lack of hearing.

At issue is the pre-termination process required before a veteran can be fired by the State. The exception in the preference statute is for a worker who has a "confidential relation to the appointing officer." Citing the precedent the Court of Appeals took the view that the provision must be interpreted broadly and that it does not require any specific association of the parties but rather applies generally to all persons who are associated by any relation of trust and confidence. The issue for the Plaintiff was that this would mean almost all national guard employees who fall within the exception rather than the rule. The Court of Appeals, citing primarily to precedent, was unmoved.

On further review the Iowa Supreme Court owned up to being inconsistent in its long long history of interpreting this provision. In the end the Court found that the words of the statute, and the policy of rewarding veteran service, were better served by a narrow reading of the exception. The Court held "that the exception cannot apply unless the veteran has a direct reporting relationship with the appointing officer." *Copeland* at 861.

On its way to this ruling the Court had to decide which of conflicting precedent to pick, and chose the precedent that has viewed the exception as more limited. In finding a direct reporting relationship requirement the Court did not abandon all other requirements. "As before, the veteran's job must involve work that the appointing officer has delegated. ... As before, the veteran's job must require skill, judgment, trust and confidence.... These remain necessary—but they are not sufficient. Rather, going forward, the veteran must also have a direct reporting relationship to the appointing officer. An indirect relationship —through a chain of command or otherwise —does not qualify." *Copeland* at 865. If these requirements are met the veteran falls within the *exception* and outside the protection of the statute.

***Dornath v. EAB*, 988 NW 2d 687 (Iowa 3/21/2023)**

https://www.iowacourts.gov/courtcases/15986/embed/SupremeCourtOpinion

Although this case involves only one week of unemployment benefits it was retained by the Supreme Court because of its cumulative impact. For years unions and employers in Iowa, principally in central and eastern Iowa, had contracts providing that apprentices must attend classroom training as part of their registered apprenticeships. These CBA's required this attendance substantially during work hours, but did not provide for wages. Instead the workers filed for unemployment, and would often receive a union stipend.

The problem, of course, is that the Employment Security Law requires a worker to be available to work in any week they claim for benefits. Iowa Code §96.4(3). One exception to this is Department Approved Training (DAT). Before 2018 IWD regulations had implemented DAT in a way that these apprentices were routinely approved for DAT, and paid benefits - hundreds of weeks of benefits a year - for those weeks of classroom instruction. Benefits paid while on DAT are charged to the tax supported fund, not the employer. The workers got benefits, the employers were not charged, and everyone was happy. Everyone but IWD.

In 2018 IWD changed its DAT regulation. Apprentices no longer qualified for DAT. For some years the benefits bureau, and the Administrative Law Judges at IWD continued to allow benefits anyway. When the first such case reached EAB it was

reversed. Since DAT did not apply the worker had to be available, and they just weren't while in classroom training. This went on for many months and finally this claimant appealed. The Supreme Court of Iowa affirmed.

The case turned on two potential exceptions to the availability requirement. One is job attached partial unemployment, and one is temporary unemployment.

First up was partial unemployment. To be partially unemployed one must work but less than a full-time week. And to be "totally" unemployed one must perform no service and have no wages payable. The EAB reasoned that if the classroom time was performing services then Dornath couldn't be partially unemployed because he was not working less than a full time week - he was working full-time, just not getting paid. But on the other hand, if the classroom time was not performing services then Dornath was totally unemployed, not partially unemployed. And totally unemployed workers must be available for work. This logical analysis premised on the the law of the excluded middle was largely adopted by the Iowa Supreme Court. Either Dornath was working full time and not unemployed at all, or he was totally unemployed and ineligible for the partial unemployment exception.

Next up the Court took on temporary unemployment. "The statute defines temporarily unemployed in relevant part to mean unemployment 'due to a plant shutdown, vacation, inventory, lack of work, or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time.'" *Dornath* at 691 (quoting Iowa Code section 96.1A(37)(c)). Here the claimant argued for a lack of work. "But concluding that Winger Electric didn't schedule Dornath the week of his training because it lacked work for him to perform entails not reasonable inference but speculation. ... Dornath presented no evidence at his hearing—in the form of testimony from someone at Winger Electric or otherwise —to establish the point." *Dornath* at 691. Since he argued no other basis for finding temporary unemployment the Court rejected the claim. Dornath therefore did not fall under any of the statutory exceptions and was thus required to be available in order to collect *unemployment* benefits. "As the board observed in its ruling, the unemployment benefits system created under chapter 96 is neither a job training fund nor a catchall compensation source." *Dornath* at 693. The Court in closing echoed the EAB, by noting that if Dornath had some

other claim (unpaid wages maybe?) that was another matter altogether.

***Feeback v. Swift Pork*, 988 N.W.2d 340 (Iowa 3/31/23)**
https://www.iowacourts.gov/courtcases/14103/embed/SupremeCourtOpinion

A worker is harshly criticized by his boss, then texts "FUCK You!" and "Believe who and what you want." He was fired and now brings an age discrimination case. The Court of Appeals reinstated the suit following summary judgment and in this case the Supreme Court reverses. On the way there the Court modifies the *McDonnell Douglas* burden-shifting framework, and adopts the good faith rule.

The Plaintiff was a 30-year employee at Swift. He complained to his direct supervisor about unsafe working conditions on the cut floor. His supervisor was not receptive, and hung up on the Plaintiff weeks later when Plaintiff brought it up a second time. The Plaintiff had a contentious relationship with upper management, and this culminated on New Year's Eve. The Plaintiff scheduled a safety meeting that day in order to conduct the annual safety training. But the workers traditionally got New Year's Eve off. So the GM sent the workers home and called the Plaintiff into his office. Bad things ensue.

The GM talked about the Plaintiff department's absentee rate, and Plaintiff replied with the low turnover rate. The GM then told him to keep his mouth shut. The GM also related that he had heard reports that Feeback called the GM the worst manager he had seen. The meeting broke up, but that night Feeback sent two text messages to the GM saying "FUCK You!" and "Believe who and what you want." The GM sent a screen shot to HR, and the next day they met with Feeback. Feeback in the meeting claimed that the messages had been meant for another and went to the GM by mistake. When asked why he didn't do something about it Feeback claimed that he did not know how to rescind a text and hadn't seen the GM that morning to explain. He was fired a few days later.

Feeback filed suit claiming age discrimination, harassment, and public policy termination. Summary judgment was granted, the case was reinstated by the Court of Appeals, and the Supreme Court granted further review. During discovery Feeback admitted he sent the messages, reasserted that he meant them for a friend, but admitted that he never re-sent the messages

and never explained (even during discovery) why he would send such messages.

The first issue in the Supreme Court was the order and allocation of proof in a summary judgment setting. The Court chose a modification in the McDonnell-Douglas approach when used at summary judgment:

> 1. Employee shows *prima facie* case of membership in a protected group (i.e., age sixty), qualified for the positions, and the circumstances of their discharge raised an inference of discrimination.
>
> 2. Then, the employer must articulate some legitimate, nondiscriminatory reason' for its employment action.
>
> 3. At that point, the burden shifts back to the employee to demonstrate the employer's proffered reason is pretextual or, while true, was not the only reason for his termination and that his age was another motivating factor.

The Court emphasized from Iowa Rule of Civil Procedure 1.981(5) that a resistor of summary judgment "may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Feeback* at 348(quoting IRCP 1.981(5)). The Court then took up whether the Plaintiff generated a jury issue on the mistaken texts. The Court, without a great deal of exposition, adopted the "honest belief rule" and summarized it as Feeback "must show that [his] employer did not honestly believe the legitimate reason that it proffered in support of the adverse action." *Id.* at 350. The Court ruled simply "Feeback made no such showing" without describing how to make such a showing of another person's mistaken belief.

The lack of investigation was not indicative of pretexts in the Court's view because there wasn't much to investigate. Plaintiff sent the texts, did not try to apologize, did not have an explanation for what they were meant to say, and had no active texting thread with the GM. Against this the Plaintiff said only "oops," and so a lack of investigation was not surprising. The Court reiterated the "super personnel" and "business judgment" devices: "The appropriate scope of an internal investigation . . . is a business judgment, and we do not review the rationale behind such a decision… Employment

discrimination laws grant us no power to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, *except* to the extent that those judgments involve intentional discrimination." *Id.* at 350.

The Court then turned to comparative evidence, namely, there's a lot of cursing in a packing plant. In admirably simple language the Court set out the usual standard: "Feeback must prove that he and the other employees were similarly situated in all relevant respects….But Feeback need not show the other employees committed the exact same offense…Rather, he must establish that he was treated differently than other employees whose violations were of comparable seriousness." *Id.* at 350-51 (cleaned up). The Court then, with perhaps more detail than necessary, concluded that cursing at your supervisor in reaction to criticism isn't the same as cursing at the universe out on the kill floor.

Finally, the Court dealt with the rather remarkable ruling by the Iowa Court of Appeals on pattern evidence. The Plaintiff filed an affidavit that named nine people over age fifty-five who were fired or demoted after 1994. Yet in his deposition he admitted that he couldn't say if age was the reason for their termination. The Court applied the "contradictory affidavit rule" to bar consideration of the affidavit to the extent that it suggested the Plaintiff *now* claims these persons were fired for age discrimination. Finally, Plaintiff "offered no expert testimony or statistical evidence that this management-level turnover over that span of decades was unusual." *Id.* at 352.

Notably, the principle modification to the order of proof is (finally) an obvious change to the *McDonnel-Douglas* approach. That case is about causal inference. The question is a causal link between the adverse action and the protected characteristic. All this modified test does is recognize that the causal link is not just a logical "but for" connection, but can also include a "motivating factor."

***Nahas v Polk County*, 991 N.W.2d 770 (Iowa 6/9/2023)**
https://www.iowacourts.gov/courtcases/17067/embed/SupremeCourtOpinion

An ex-employee sues Polk County for libel, extortion, civil conspiracy, intentional infliction, and termination in violation of public policy. The County argues for qualified

immunity but lost, and as allowed by §670.4A(4) the County immediately appealed.

The first big issue was whether the recent amendments to the municipal tort claims act apply retroactively. This requires the three-part inquiry: (1) Is this really retroactive application (2) Should the law be interpreted as applying retroactively and (3) Does any other provision prohibit retroactive application.

Since the new law would change the standard of liability for municipal officers applying the qualified immunity portion of the law to actions taken before passage would be retroactive application. "Because there is no express statement making the statutory immunity provisions retrospective, we conclude the law can only be applied prospectively to conduct occurring after the effective date of the statute. The qualified immunity defenses are thus not applicable in this case." *Nahas* at 779.

The heightened pleading standard was a different issue. This requirement is tripartite. The first two requirements - that a plaintiff plead with particularity a plausible violation of the law - govern the *drafting* of the complaint. Here the drafting could take place after the new law and so this is not retroactive application. The third part requires the Plaintiff to plead that the law was clearly established at the time of the alleged violation. The Court found that imposing this requirment would be retroactive since "whether the law was clearly established is inextricably intertwined with the new qualified immunity defense and only relevant to this case to the extent the new qualified immunity defense is operative in this case, and we already have concluded that qualified immunity is not operative in this case because it would be an impermissible retrospective application of the statute." *Nahas* at 780. Again with no provision making this requirement expressly retroactive the Court found it could not be so applied in this case.

Since only the particularity and plausibility pleading standard can be applied to this case the Court next turned to that issue. As an initial matter the Court found that "the particularity and plausibility aspects of section 670.4A(3)'s heightened pleading requirement require the same pleading as the Federal Rules of Civil Procedure." *Id.* at 781. The Court thus quotes from now-familiar principles of federal pleading.

> [P]articularity requires plaintiffs to plead the who, what, when, where, and how: the first paragraph of any newspaper story. ... Allegations that are vague or conclusory are insufficient. ...Likewise, an allegation pleaded on information and belief does not satisfy the particularity standard unless the allegation sets forth the source of the information and the reasons for the belief.
>
> ....
>
> [A]n allegation is plausible insofar as it allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged... Plausibility is not a probability requirement because plausibility demands "more than a sheer possibility that a defendant has acted unlawfully." ...[A] plaintiff is not entitled to relief if the court cannot infer more than the mere possibility of misconduct.... In short, plaintiffs need to allege sufficient facts to show the defendants are liable for specific causes of action.

Id. at 781-82 (cleaned up). Applied to the Petition here the most notable result is that merely alleging a general societal interest is insufficient to plausibly plead a public policy basis for the wrongful discharge claim.

Hedlund v State, 991 N.W.2d 752 **(Iowa 6/9/2023)**
https://www.iowacourts.gov/courtcases/17566/embed/SupremeCourtOpinion

Hedlund appears before the Iowa Supreme Court for the third time. This time the case "presents a question of statutory interpretation about the temporal application of the chapter 70A amendments." Slip op. at 3. Three days after the Court decided *Hedlund II* section 70A.28(5) was amended to add a treble damage remedy. Naturally Hedlund wanted some of that action. He asked the district court to allow him to pursue this claim, and to grant him a jury trial since now relief was beyond the equitable back pay. The district court agreed and the Supreme Court now reverses.

On retroactivity the court at first applied the old "remedial/substantive test." In applying this approach the Court agreed with the district court that the statute did not say it was retroactive. Next under this test the Court looked to "whether the statute affects substantive rights or relates

merely to a remedy... If it relates to a remedy, the statute is presumed to apply retrospectively" so long as this is consistent with legislative intent. Slip op. at 4. While the District Court found treble damages, and juries, to be remedial the Supreme Court disagreed. "Even if a statute might fit a broad conception of 'remedial' as we've defined that term, a statute that imposes a meaningful change in the parties' positions after the conduct at issue is nonetheless 'substantive' and requires prospective treatment." Slip op. at 5. The Court effectively abandoned a "substantive/remedial" dichotomy with the observation that "[a] change to a remedy can, without question, bring about a substantive change that requires a prospective, not retrospective, application." Slip op. at 7. The Court then adopts instead the *Nahas* test discussed above.

Again, this requires the three part inquiry: (1) Is this really retroactive application (2) Should the law be interpreted as applying retroactively and (3) Does any other provision prohibit retroactive application.

On the first step the Court must decide "whether the act or event that the statute is meant to regulate is in the past or future. If the future, then it's prospective; if the past, then it's retrospective." Slip op. at 9. The Plaintiff identified the conduct in question to be the jury's verdict, which remains in the future. (Quite possibly in the far far future). The Court disagreed and found the conduct regulated to be the alleged wrongful discharge or retaliation. "The amendments apply a new consequence—damages up to three times an employee's annual wages and benefits—to a prior act of wrongful termination or retaliation...As a result, the activity that the statute regulates doesn't take place in the future but in the past, making its application retrospective." Slip op. at 11. Since the Code of Iowa presumes a statute to be prospective only, unless expressly provided otherwise, and since there was no express provision otherwise, the Court ruled in the defendant's favor. The additional remedies were not available to Mr. Hedlund, so the district court was reversed and the matter remanded. At time of writing a trial scheduling conference had just been held the previous week - that is, a little over ten years after the Petition was filed.

***McCoy v. Thomas L. Cardella & Assoc*, No. 22-0918 (Iowa 6/16/23)**
https://www.iowacourts.gov/courtcases/17773/embed/SupremeCourtOpinion

The issue in this case is whether a negligent hiring claim (resulting in sexual harassment which was never filed with the ICRC) is preempted by the Iowa Workers' Compensation Law. Reading the first paragraph of the case did not bode well for the outcome for the Plaintiff: "She missed the deadline for bringing a hostile-work environment claim under the Iowa Civil Rights Act (ICRA), Iowa Code ch. 216 (2019), so she framed her petition as one for common law negligent supervision or retention. To avoid Cardella's pretrial legal challenges that her common law claim was preempted by either the ICRA or the Iowa Workers' Compensation Act (IWCA), Iowa Code ch. 85, McCoy shifted, and reshifted, her theory of liability and related damages, adopting and eschewing aspects from both the ICRA variant of her claim and the IWCA variant as necessary to form a claim that is neither quite one nor the other." Slip op. at 1.

In the end the Court premised its analysis on the idea that Plaintiff was asserting a negligent supervision claim only. The Court first of all explains that it has dodged the issue of whether a negligent supervision claim can lie "in favor of a plaintiff suing her own employer based on the wrongful conduct of a coemployee." Slip op. at 9. The Court does so again based on the conclusion that if such a claim does exists the IWCA preempts it.

"When an employee is injured by the tortious acts of another employee at work, the workers' compensation exclusivity rule precludes the injured employee from bringing a common law tort action against the employer for the resulting injuries, even when the coemployee's conduct is intentional." Slip op. at 12. "This exclusivity rule applies to claims for negligent supervision or retention by the employer." Slip op. at 13. The Court relied on *Nelson v. Winnebago Industries, Inc* 619 N.W.2d 385 (2000)for the rule that "[i]f the essence of the action is recovery for physical injury . . . , including in 'physical' the kinds of mental or nervous injury that cause disability, the action should be barred even if it can be cast in the form of a normally non-physical tort." Slip op. at 17.

Here the Plaintiff's claim was that her supervisor engaged in sexually inappropriate comments, and sexual touching. Since this was never filed as an ICRA claim she filed it as a tort claim against the employer based on negligent supervision. The Court concluded that "the gist of McCoy's lawsuit, as tried to the jury, was recovery of mental health injuries caused by Cardella's failure to protect her from injuries caused by

assault and battery in the workplace; in other words, physical injuries under the IWCA. Therefore, her common law claim is subject to the exclusivity provisions of, and barred by, the IWCA." Slip op. at 17.

Notably, this ruling is limited to torts committed by co-workers, and not the employer itself. As made clear in *Valdez v. West Des Moines Community Schools* 992 N.W.2d 613 (Iowa 6/30/2023) a coworker cannot be liable for a public policy discharge, and *Valdez* cast serious doubt on whether a supervisor with discharge authority but who is not the employer's alter ego could be held so liable. Of course, "claimed harassment of a worker, including threatened termination, does not give rise to a claim at common law." *Below v. Skarr*, 569 N.W.2d 510, 512 (Iowa 1997). So retaliatory harassment would not be actionable at common law anyway. The key then is that the torts of assault and battery are pre-empted. There is no tort of public policy harassment under *Below*, and supervisors without discharge authority (and maybe those with it) cannot be liable for a discharge anyway. Of course, the IWCA may not preempt torts committed by the employer itself. *Slip op. at 12 (*citing *Nelson v. Winnebago Industries,* Inc., 619 NW 2d 385 (Iowa 2000) for "the general rule that an employer is not liable at common law for the intentional torts of its supervisory employees causing injury to another employee unless the supervisor is the employer in person [or] a person who is realistically the alter ego of the corporation"). So the analysis here is consistent with the holdings finding retaliatory discharge actionable.

***Carver-Kimm v. Reynolds, No. 22-0005*, 992 N.W.2d 591 (Iowa 6/30/2023)**
https://www.iowacourts.gov/courtcases/16905/embed/SupremeCourtOpinion

This is an appeal from denial of a MTD in which the Defendants argue the Governor lacked authority to discharge the Plaintiff, that they're protected by qualified immunity anyway, and that Iowa's open records statute doesn't support a claim for wrongful discharge in violation of public policy.

The Plaintiff was in charge of all media communications for the Iowa Department of Public Health (now part of the Iowa Department of Health and Human Services). She alleges she had duties taken from her during the Pandemic, and eventually was forced to quit or be fired. She alleged this was an attempt to illegally limit responses to media request made for open records in order to avoid embarassing the Governor. She

brought suit under the whistleblower statute and brought a public policy claim with the source of the public policy being the open records law.

Citing to *Nahas* the Court refused to apply the substantive qualified immunity provision to the Petition. And, like *Nahas*, retroactive application of the pleading requirement was more complicated. In the end, only the second amendment to the petition was filed after the effective date, and given that substantial pleading occuring before this the Court refused apply the pleading requirement at all.

Next the Court takes up whether Chapter 22, the open records law, can be the source of public policy in a wrongful discharge suit. The Court rejected the argument that aspirational language in a statute could be the source of clearly defined and well-recognized publc policy. "[T]he broad declaration as to what is 'generally in the public interest' in Iowa Code section 22.8(3) is too general to serve as the basis for a wrongful discharge claim." Slip op. at 14. Notably the Court wrote:

> In Carver-Kimm's view, if she was fired or her job duties were changed because she had done anything that, in a jury's view, furthered the general policy stated in section 22.8(3), she can sue for tort damages. That position is untenable and inconsistent with our precedent. If Carver-Kimm's position were correct, then a department spokesperson would have absolute job protection whenever they told or gave the media anything so long as the information could be traced to a public record.

Slip op. at 15. One reason this discussion is notable is the concern is inconsistent with the so-called "manager rule." This "maner rule" doctrine, in a nutshell, requires a worker's protected activity to be outside their normal job duties in order to support a wrongful discharge claim. The normal job duties of a public information officer is responding to the media and to open records requests. Thus if the "manager rule" applied to public policy cases in Iowa the Court's concern would be an empty one. The spokesperson in the Court's counterexample would be doing their normal job duties and thus be unprotected regardless.

The next part of the Court's analysis similarly undermines the "manager rule" in this context. The Court ruled that while the

general language in Chapter 22 would not support the wrongful discharge claim, the specific duties set out therein would.

> At the same time, we disagree with the State that nothing in chapter 22 can support a wrongful-discharge-in-violation-of-public-policy claim. When Carver-Kimm was the custodian of records at the department, she was under a statutory duty to fulfill proper requests for public records....If Carver-Kimm was discharged for complying with that duty—which is what she alleges in her petition—those circumstances could support a claim.

Slip op. at 15. Thus Chapter 22 can support a wrongful discvharge public policy case. And someone who is required by their job to act in compliance with the law is still protected if fired for doing their job lawffully.

The Court also rejected the idea that because chapter 22 has its own enforcement mechanism a tort of wrongful discharge cannot lie. The enforcement mechanism is brought against the state by the *requestor* and is not a cause of action created in favor of the state employees. "The fact that a party can request records (and go to court if the records aren't produced) doesn't prevent undermining of the open-records objective if the employee statutorily required to produce those records is fired for doing so." Slip op. at 16. "The question isn't simply whether some remedy exists for someone that advances the public policy at issue, but whether a remedy exists to address the wrong associated with firing an employee against clearly defined public policy." Slip op. at 18. The Court emphasized, however, that the Plaintiff "can maintain a cause of action if, and only if, she can show she was terminated for complying with her statutory duty as lawful custodian to produce records that she had an obligation to produce." Slip op. at 21. Naturally, this same analysis makes quite clear the "manager rule" would not apply in this context.

Finally, the Court took up the attempt to put the Governor on the hook for the termination (forced quit). Citing primiarily to *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751 (Iowa 2009) Plaintiff asked the Court to draw an analogy between a corporate officer's power to manage and direct a corporation and the Governor's power to manage and direct state government. "Unlike a business entity, which can take on any number of decisional and operational structures, Iowa law imposes a defined structure for many state administrative

agencies...” Slip op. at 24. In this case, the Director of DHS was made the administrative head, and this included the power to appoint and assign the duties of employees. “The power to appoint comes with removal authority unless the law otherwise provides. But no statute or constitutional provision gives a governor (or a member of the governor’s staff) authority to appoint or remove a department employee such as Carver-Kimm.” Slip op. at 24. Given this the analogy to *Jasper* broke down.

The Court furthermore refused to “widen the net” of liability to include those who “influenced” or “provided input” into the discharge. The Court, however, found no such lack of authority for the State itself, and affirmed the refusal to dismiss the case against the State of Iowa.

The next issue is the scope of liability under Iowa Whistleblower law. In an echo of the *Valdez* ruling issued the same day the Court refused to give precise guidance. The Court found instead that since §70A.28 refers explicitly to “discharge” the only people who can be liable are those who can effect a discharge. And that is not the Governor or the Governor’s staff.

***Valdez v. West Des Moines Community Schools and Desira Johnson* 992 N.W.2d 613 (Iowa 6/30/2023)**
https://www.iowacourts.gov/courtcases/16332/embed/SupremeCourtOpinion

This case raises two issues only one of which is specific to employment law. First, a *Batson* challenge to the striking of a Black venireman, and second whether an individual defendant can be held liable for constructive discharge in the form of harassment under the ICRA.

The bulk of the *Batson* analysis trod no new ground. The Court sets out the usual three part test: “(1) Valdez must establish a *prima facie* case of purposeful racial discrimination in Defendants’ peremptory strike; (2) Defendants must proffer a race-neutral explanation for the strike; and (3) Valdez must carry the ultimate burden of proving purposeful discrimination, which turns on whether the strike was motivated in substantial part by discriminatory intent.” Slip op. at 6. The Court then applies the test to the particulars of this *voir dire*, and to the explanations given for the peremptory striking of a Black venire member. The three explanations included that the member had no experience with

complaints in his work as a manager, that he qualified his response to a question about the parties being on "equal footing," and the subjective explanation that the prospective juror lacked "rapport" with defense counsel. In response to post-trial motions additional reasons were forwarded. In analyzing these justifications the focus is on discriminatory intent.

Here the Court skipped over the issue of a *prima facie* case as moot since the issue was fully developed below. The first two explanations given were neutral on their face and not "characteristic of any particular race." *Valdez* at 623. Rapport was a closer question on facial neutrality. The Court first flagged the question of implicit bias, and so did not opine that "rapport" is always facially neutral. Instead, it based its ruling on the particular record in this case, principally the observations of the trial court. In so doing, it moved to step three and relying very heavily on deference to the trial court's observation of demeanor the Court affirmed that the explanations were not pretexts for discrimination. The Court did find some explanations less convincing than others (relying instead mostly on the "equal footing" and rapport justifications). The fact that some not-convincing justifications were put forward is insufficient to void the selection process. This was because "Valdez's limited evidence of pretext, in light of Defendants' other credible and non-race-based explanations, does not establish that the strike was motivated in *substantial* part by purposeful discrimination." *Id.* at 626 (italic in original). Notably, the Court in a footnote disavowed the district court's *dicta* that it should uphold the strike "as long as there is one race-neutral ground for the strike." *Id.* at 626, n. 5. This is not the standard. Instead, "[f]or present purposes, we caution that finding a single race-neutral ground for a strike does not relieve a district court from nonetheless determining whether the strike was substantially motivated by discrimination." *Id.*

The Plaintiff did invite the Court to move "beyond *Batson*" under the Iowa Constitution. In particular, the Plaintiff asked the Court to adopt a higher standard for strikes of "last minority" jurors, and asked the Court to require the evidence to be construed in favor of the party challenging the strike similar to summary judgment. The Court declined both invitations. Of most interest to employment lawyers the Court emphasize that "[a]dopting Valdez's summary-judgment-type standard is not merely a small nudge, as she suggests, but

would effectively preclude the district court from even making these credibility determinations if there was any evidence to the contrary." *Id.* at 628. The Court did indicate a concern for the issue of a lack of representation on juries, and delved into some of the reforms made in other states. But these were made either legislatively or by rule. The Court seemed reluctant to adopt a new standard in a single stroke. "For present purposes, we hold that the two 'beyond Batson' approaches Valdez seeks in this case are not mandated by the Iowa Constitution." *Id.* at 629.

On the standard of individual liability for harassment the Court found that a harasser is not always liable for the harasser's own actions of harassment. In *Rumsey v. Woodgrain Millwork, Inc.*, 962 N.W.2d 9, 33–37 (Iowa 2021) the Court "held that in order to be liable, an individual must both be personally involved in, and have the ability to effectuate, the particular challenged discriminatory action." *Id.* at 631. The *Valdez* court then observed about harassment that under either a negligence theory, or under a vicarious liability supervisor theory, the liability is ultimately premised on a failure to take prompt and appropriate remedial action. "Under either theory of liability, the focus is on allowing harassment to continue to the point of creating an abusive working environment rather than just the fact of harassment itself." *Id.* at 632. A failure to remedy harassment leaves an employee facing a hostile "environment" where "the employee must endure an unreasonably offensive environment or quit working." *Id.* at 632. "But employees are not similarly held hostage where the hostile environment is being caused by someone without any authority to actually control the employee's working environment or their employment. Giving the employer an opportunity to correct the hostile actions of its employees is therefore a critical aspect of what makes a hostile work environment an unfair employment practice in the first place." *Id.* at 632. The Court thus held that "[n]onsupervisory employees cannot 'effectuate' a hostile working environment because they are not responsible for creating or maintaining the working environment and lack the authority to correct or prevent an abusive environment." *Id.* at 632. As a practical matter this ruling means that nonsupervisory employees cannot end up being liable under the ICRA for their own actions where the employer succeeds in avoiding liability because of remedial action, or a failure to complain. (Of course, assault and battery, and other torts remain possible.)

The Court also rejected individual liability of the alleged harasser under a wrongful discharge theory. The Court did recognize that in "*Jasper v. H. Nizam, Inc.*, we held that individual liability for wrongful discharge can extend to individual officers of a corporation who authorized or directed the discharge of an employee for reasons that contravene public policy. 764 N.W.2d 751, 776–77 (Iowa 2009)." Slip op. at 27 (cleaned up). But beyond this the Court emphasized that this common law claim has no "any person" language akin to the ICRA. Instead the tort is focused on the employment relationship. "At a minimum, liability for this tort still turns on the scope of the defendant's authority in the workplace. In fact, we have never even recognized the claim as against a mere supervisor who was not the employer's alter ego, let alone one who lacks discharge authority over the plaintiff." *Id.* at 634. Avoiding the issue of exactly who, if anyone, other than an *alter ego* could be liable the Court held "It is enough to recognize that it does not extend far enough to hold Johnson [a nonsupervior] liable in this case." *Id.*

***UE Local 893 v. State* No. 22-0790 (Iowa 10/27/2023)**
https://www.iowacourts.gov/courtcases/18022/embed/SupremeCourtOpinion

On the eve of the change in Iowa public bargaining law the Union voted to ratify a contract with the state. The State took the view that it didn't have to abide by the contract. The Supreme Court of Iowa under the obscure "a deal is a deal" doctrine found otherwise back in 2019. The State had in the meanwhile not withheld dues, in part because it doubted there was a contract and in part because it was afeared that the State would be violating the new collective bargaining law if it did. The State did offer to withhold dues upon the conditions that the Union get a *new* written authorization from each person dues is to be withheld from, *and* agree to indemnify the state for any damage resulting, *and* agree to waive claims for back dues. The offer likes not, so the Union continues to try to collect dues on its own and sues for the difference. This case is the suit for the missing dues.

The first issue up for the Court is whether the failure to collect dues was a violation of the CBA. The Court read the written words of the applicable contract. These required that the state withhold the dues "upon receipt." The Court found that the phrase "'upon receipt' is broad enough to include all

authorizations that the State received regardless of whether they were received before or after the effective date of the 2017–2019 contracts." Slip op. at 9. The bulk of the remainder of the analysis on this point was standard contract interpretation, all pointing to the idea that the contract terms align with the parties previous understanding: past elections would be honored in the future unless withdrawn according to the pre-2019 statutory process.

Next the Court turned to damages. The State argued that it should be ordered to collect back dues (and be allowed no doubt to blame the union for the members' smaller paychecks) rather than pay damages. The Court applied the usual rule that the "benefit of the bargain" is the measure of damages in a contract case. "[T]he 'benefit' that UE lost was the amount of money that UE would have received if the State had performed its dues-collection duty. That lost money was an appropriate remedy for the State's breach." Slip op. at 13. Furthermore, the general rule is that equitable remedies like specific performance are not available is an adequate remedy at law exists. Thus the Court observed "we have found no authority for the proposition that a plaintiff can
only obtain specific performance when, as here, money damages are adequate and preferred by the plaintiff." Slip op. at 13. So, of course, the foreseeable damage caused by the breach was an appropriate remedy.

The Court found sovereign immunity waived for two reasons. "First, the State waived immunity by failing to plead it as an affirmative defense. Second, even if immunity had been properly pleaded, we would still find that it had been waived through the entry of the collective bargaining contract." Slip op. at 18.

[Iowa Court of Appeals]

***Swanson v. Oldenburger*, No. 21-1176 (Iowa App. 9/21/22)**
https://www.iowacourts.gov/courtcases/15727/embed/CourtAppealsOpinion

An attorney who had been forced to resign at the Wapello County Attorney's office ran for office in Boone County against the incumbent. The Boone County incumbent called the Wapello County office to seek information on the job loss of his opponent. He was told that he could obtain the

information through a Chapter 22 public information request. He made the request. All hell broke loose.

When the Plaintiff resigned it was pursuant to a notice of termination that summarized the past disciplinary actions and Plaintiff's difficulties with case resolution that led to dismissals for failure to prosecute. Wapello County emailed this notice of termination to Boone County, explaining "this is the only document which shows the reasons and rationale for his resignation."

The Plaintiff claimed this was a violation of chapter 22 which makes records open, but makes personnel records confidential. One exception to this exception, back in 2016, provided:

> [T]he following information relating to such individuals contained in personnel records shall be public records…(5) The fact that the individual was discharged as the result of a final disciplinary action upon the exhaustion of all applicable contractual, legal, and statutory remedies.

Iowa Code §22.7(11)(a)(5)(2016). The parties fought over whether a resignation in lieu of discharge was equivalent to a "discharge." The Plaintiff points to a 2017 amendment (H.F. 291 §50) that altered the provision to read:

> [T]he following information relating to such individuals contained in personnel records shall be public records…(5) The fact that the individual resigned in lieu of termination, was discharged, or was demoted as the result of a disciplinary action, and the documented reasons and rationale for the resignation in lieu of termination, the discharge, or the demotion. For purposes of this subparagraph, "demoted" and "demotion" mean a change of an employee from a position in a given classification to a position in a classification having a lower pay grade

Iowa Code §22.7(11)(a)(5) (2022). The Plaintiff argued that the addition of "resigned in lieu of termination" to this provision meant that it was previously not covered, back in 2016, and that therefore the disclosure was unauthorized. The defense argued the amendment merely clarified what was

covered. The Court took up the issue, cited some dictionaries, took a deep breath, and skipped the whole thing.

In the Court's view the critical language (now struck) was the requirement that before the personnel information could be disclosed the "discharge" must be "the result of a **final** disciplinary action upon the exhaustion of all applicable contractual, legal, and statutory remedies." "In other words, there must be a final disciplinary action and the employee must exhaust all applicable remedies before the information is disclosed. Assuming that the termination notice qualifies as final disciplinary action, there is nothing in the record to support a finding that Swanson exhausted all contractual, legal, and statutory remedies." Slip op. at 8. Since there was no showing that the appeals had been exhausted (which kind of defeats the whole idea of resignation in lieu or termination, doesn't it?), then the information was not shown to be public and summary judgment on this issue was reversed.

Summary judgment was affirmed on a blacklisting claim because the defendant responded to open records request, erroneously it turns out, but there was insufficient evidence that this was intent to deny future employment. Summary judgment was affirmed because "there is no evidence on which to base a finding that Oldenburger or Wapello County intended to injure Swanson in order to deny him future employment—only speculation and conjecture." Slip op, at 10-11.

***Schwickerath v. Anderson*, No. 21-1465 (Iowa App. 12/7/22)**
https://www.iowacourts.gov/courtcases/16783/embed/CourtAppealsOpinion

Although not an employment case, the interest of this case is procedural. The Court awarded common law attorney fees in this fraud, misrepresentation, and malpractice case. The district court determined that fees should be awarded, and directed Plaintiff to file the requisite affidavits. The Defendant appealed and *two weeks later* the district court awarded fees. In this fact pattern the previous appeal was not sufficient to raise the fees issue. "Although the filing of a notice of appeal generally deprives the district court of jurisdiction, the court retains jurisdiction to proceed as to issues collateral to and not affecting the subject matter of the appeal. Attorney fees are such a collateral matter. Because that issue was decided after Anderson appealed the court's ruling on the merits of the lawsuit, he needed to separately appeal the award of attorney fees to bring that matter before

us for review." Slip op. at 22-23 (cleaned up)(quoting *Iowa State Bank & Tr. Co. v. Michel*, 683 N.W.2d 95, 110 (Iowa 2004)).

***Ingram v. Iowa Interstate RR*, No. 21-0940 (Iowa App. 12/7/22)**
https://www.iowacourts.gov/courtcases/16804/embed/CourtAppealsOpinion

In this unpaid wages case the bulk of the Court's discussion deals with evidentiary issues, harmless error, and failure to preserve error. Of most interest to employment practitioners is the Court's discussion of the "objective reasonableness test." This is a doctrine sometimes used in contract cases where termination can only be for cause. This doctrine provides:

> [T]he judicial fact-finder's role is not to determine whether the facts underlying the employer's "cause" determination were actually true, or to conduct de novo review of whether the facts found by the employer amounted to "cause" for termination under the terms of the contract. Instead, the judicial fact-finder determines only whether the cause claimed by the employer for termination was "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power," based on facts "supported by substantial evidence and reasonably believed by the employer to be true," and "not for any arbitrary, capricious, or illegal reason."

Slip op. at 19. This test, however, was rejected in "cause" cases by the Iowa Supreme Court in *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 659 (Iowa 2008). But *Kern* left for another day whether the "objective reasonableness" test should apply where the employment contract fails to define the standard to be applied by the fact-finder. The Court noted that the task of interpreting the contractual terms that give rise to the event claimed to justify the termination of the employment contract is a jury question, and thus it was up to the jury to find this *was* a cause case, and that the objective reasonable test did not apply under Kern.

The other issue of interest – always – to attorneys was the disposition of attorney's fees. Of particular interest the plaintiff sought fees that included time spent on lost discovery battles. Since the issues were sufficiently

interrelated to the successful ones the Court of Appeals found no abuse of discretion in allowing the fees.

"Finally, the Railroad takes umbrage with the district court's award of costs for research, transcripts, and copying." Slip op. at 26. The only request rejected was the copying costs. The Code allows for "fees paid by the successful party in procuring copies of deeds, bonds, wills, or other records…" Iowa Code §625.6. "Parties can be reimbursed for the costs of procuring copies, not their printing costs. … With no expenses for the procurement of these types of records clearly listed on their itemization of costs, we agree the award of this cost was an abuse of discretion…." Slip op. at 27.

***Campfield v. Iowa Beef Breeds Council*, No. 21-1899 (Iowa App. 2/8/2023)**
https://www.iowacourts.gov/courtcases/16638/embed/CourtAppealsOpinion

In this breach of employment contract case the Court effectively bases its decision on the concept of *injuria sine damno* (*i.e.* the Latin version on "no harm, no foul").

The Plaintiff's contract of employment stated "This Agreement shall be effective on May 1, 2019 and shall continue in force through April 30, 2020 unless sooner terminated in the manner hereinafter provided." It also provided that "Either party may terminate this Agreement by giving the other party written notice of at least sixty (60) days prior to the effective date of the termination, except that a notice of termination tendered on or after July 1st cannot become effective until after the following April 1st."

The next year the parties entered into a 90 day extension that provided that the agreement continued on the same terms and conditions and stated "The Executive Director's Agreement dated April 18, 2019 . . . is extended to July 29, 2020." It provided for earlier termination by a vote of the Council which did occur on June 30, 2020. She was paid through the end of July.

Plaintiff sued arguing she was not given her 60 days notice prior to the effective date of the termination. The Defense moved to dismiss on the ground that even if the June 30 termination was ineffective the contract still terminated on July 29 and she was paid through that date. The district court agreed and now so too does the Court of Appeals.

The Plaintiff's problem is that "[a] party seeking to recover for breach of contract is entitled only to be placed in as good a position as the party would have occupied had the contract been performed." Slip op. at 4 (*quoting Grunwald v. Quad City Quality Serv., Inc.*, No. 01-1353, 2003 WL 182957, at *2 (Iowa Ct. App. Jan. 29, 2003)). Here "[t]he express language of Campfield's extended executive director's agreement set out a definite end date—July 29, 2020. She was paid through that date." Slip op. at 4. The Court refused to extend the termination to the following April 1 as a result of early notice, because this would render the termination date in the extension useless. There was thus no injury and no contract action will lie.

***Champion v. PERB*, No. 21-1995 (Iowa App. 2/8/2023)**
https://www.iowacourts.gov/courtcases/17394/embed/CourtAppealsOpinion

This is a bargaining unit clarification appeal. The Petitioners argue they are law school research assistants and as such within the Campaign to Organize Graduate Students (COGS) bargaining unit represented by Electrical Radio & Machine Workers of America, Local 896 (UE), since certification on May 6, 1996. After a hearing the Administrative Law Judge concluded that there were two relevant categories of law research assistants: (1) those helping folks out at the law library, and (2) those assigned to professors. The ALJ ruled that only the first were within the COGS unit. This was based on the evidence that the library assistants would have to be replaced by a regular employee if not there, but the professorial assistants would not have to be. This was because while law reasearch assistants were within the unit this was so only if they "provide services to the university." The Regents argued, and PERB agreed, that this phrase "was intended to differentiate between law research assistantships that were created to fulfill a business need of the University, i.e., the University needs employees in those positions, from the rest of law research assistantships that were created to benefit the student, such as through financial aid packages, learning experiences, or academic credit." Slip op. at 8.

Reviewing PERB's decision for error of law the Court observed "[w]hen interpreting an agreement, we look at the words chosen to determine what meanings are reasonably possible and, if the terms are ambiguous, to choose among reasonable meanings." Slip op. at 12. Looking at the particular language the Court

found PERB's interpretation that the unit description does not unambiguously include or exclude law research assistants was no error. The language was thus ambiguous and it was appropriate to look outside the contract for guidance. That guidance included extensive history and clear reasons for this history. Notably this was a unit clarification proceeding (arguing they were *already* within the unit) and not an attempt to amend the unit. In such a proceeding " the focus is on those matters probative of whether the position is and has been in the bargaining unit, not whether it should be or should have been placed in the bargaining unit." Slip op. at 15.

***Krogman v. PERB*, No. 22-0043 (Iowa App. 2/8/2023)**
https://www.iowacourts.gov/courtcases/17372/embed/CourtAppealsOpinion

This is a just cause termination case. After fairly lengthy discussion of the standard of review (in which frankly the parties have jumbled up *application* of the law with *interpretation* of the law), the Court determines that PERB has been clearly vested with the authority to determine whether there was just cause for dismissal in this case. The employee worked as a resident treatment worker at Glenview. A resident spit in her hand and rubbed it in her hair. In response he slapped her hand twice and was fired for it. In his appeal he argues thea PERB did not consider the mitigating factors sufficiently, but the Court of Appeals affirmed finding that the PERB's weighing of the factors was no a wholly unjustifiable application of the law to the facts. The employee argued that lesser discipline was more appropriate but, again, the Court affirmed as not unjustifiable the PERB conclusion that this one incident was of sufficient seriousness that it justified immediate dismissal. The intentional physical nature of the abuse was sufficient to distinguish the case from prior precedent and the agency made sufficient explanation of this fact.

***Schmitz v. Nevada Comm'n Sch. Dist.*, No. 22-0801 (Iowa App. 2/22/2023)**
https://www.iowacourts.gov/courtcases/17639/embed/CourtAppealsOpinion

A Plaintiff sues and immediately faces the separation agreement he signed releasing any claims he might have against the district or its employees arising out of his employment. He was represented by an attorney during the internal investigation but he did not get legal advice before signing.

On appeal the Plaintiff argued his financial stress caused him to sign and so the agreement was voidable. The Court of Appeals was unmoved.

"Economic duress can serve as a basis for invalidating a release when the releasor involuntarily accepted the terms of the release, the circumstances allowed only that alternative, and such circumstances were the results of the coercive acts of the releasee." Slip op. at 5. On the first element (voluntariness), Plaintiff admitted that he read and understood the contract, did not seek to negotiate its terms or request additional time, and returned the agreement two days prior to its deadline [because] he knew he was going to sign it regardless in order to be paid." Slip Op. at 6. This being the case his state of mind upon signing was not attributable to the defendants.

As far as reasonable alternatives Plaintiff chose the separation agreement over the alternative option to treat the letter as two weeks' notice of termination, pending a hearing before the school board. The Court reviewed the evidence of actual whistleblower retaliation and found almost none. This being the case taking the two week notice was a reasonable alternative (but would not have been presumably if the termination was retaliatory).

On the third element the record must show the plaintiffs' financial troubles were the result of the defendants' wrongful or coercive acts. Again there being no genuine issue on a whistleblower violation no wrongful act of the Defendant was responsible for the Plaintiff's financial condition, and dismissal was upheld.

Notably the Plaintiff failed to press in the district court that the contract required wavier of unemployment benefits. This is, of course, illegal. Iowa Code §96.15. The argument that this would void the agreement was not made below and so not addressed by the Court.

***Avery v. Iowa Dept. of Human Services*, No. 22-1012 (Iowa App. 7/13/2023)**
https://www.iowacourts.gov/courtcases/18412/embed/CourtAppealsOpinion

A supervisor of social workers at DHS (now HHS) was fired back in 2016 and had her claim of sex and sexual-orientation

discrimination dismissed on summary judgment. The Court of Appeals heard the matter *en banc* but it was decided by eight judges since by the time of decision Judge Vaitheswaran had retired and Judge Langholz was yet to be appointed. The eight judges of the Court of Appeal unanimously affirmed.

With the benefit of *Feeback* the Court is the first since that case to apply the new (ish) summary judgment standard. The Employer articulated that the Plaintiff was fired for shortcomings in supervision of social workers. The Employer states this was discovered after an investigation into the death of a child who died during the pendency of a child protective assessment, which was to be conducted by one of the Plaintiff's subordinates. The Employer reviewed this case and randomly selected cases under Plaintiff's supervision. Employer claimed that as a result the Employer terminated the Plaintiff. The Employer argued that it identified violations of HHS's code of conduct and work rules in the case of the death, and in seven others a failure to follow HHS's policies, procedures, best practices, and the guidelines contained in HHS manuals. Five members of the leadership team who conducted the investigation asserted they had never seen such an egregious case and that termination was warranted.

In response the Plaintiff asserted that a single person, her supervisor McInroy, admitted to PERB that ultimately he had made the decision to terminate. She also points to deposition testimony from another supervisor that McInroy had made biased comments about the Plaintiff's sexuality. The Plaintiff further pointed to the evidence that McInroy played favorites, and argued for the inference that a lesbian could not be in the "in crowd" of McInroy. This, she argued, was sufficient to create a jury issue on whether sexual orientation played a role in the decision to terminate.

Quoting from the District Court (Judge Huppert of Polk County), and with no further analysis, the Court of Appeals affirmed. The key district court observation was "[t]aking the record in a light most favorable to Avery, it is clear that McInroy did harbor feelings that were not favorable to her, and made statements accordingly. Not all of these feelings or statements
were tied to her status within a protected class, however…Likewise, the adversarial nature of the [HHS] investigation and the claim that Avery "had a target on her back" long before the N.F. case have not been tied to any improper discriminatory motive; to the contrary, the nature of

the investigation and its ultimate conclusion are undisputedly tied to only the circumstances of the N.F. case." Slip op. at 9.

EIGHTH CIRCUIT CASES

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 4/30/23with case number 221234P.pdf the URL would be http://www.ca8.uscourts.gov/opndir/23/04/221234P.pdf.

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

Said v. Mayo Clinic, (8th Cir 08/17/2022) (213881P.pdf) (Grasz, Author, Gruender, Benton) – A physician is fired following allegations of persistent pursuit of an unwelcomed romantic relationship. The evidence was strong including a notebook page of his feelings, describe by the victim, and found by the investigator. Also there was a video, was set to music showing Plaintiff and the victim's hands overlapping on a patient's heart during surgery. The Court affirmed the summary judgment based on this strong evidence of misconduct. Although some comparitors had also downloaded porn they had not pursued an unwelcome relationship. The recognized that only seriousness need be comparable and then went to their comfort zone by saying "our ability to compare the seriousness of offenses does not vest us with" super-personnel powers. Slip op. at 9. "We conclude Mayo was justified in treating Said's unwelcomed romantic advances and sexual harassment as not of the same or comparable seriousness to Maltais's disrespectful and bullying misconduct." Slip op. at 9. The Court also reiterated the rule that the Plaintiff's untruthful allegations of discrimination were not protected activity. In the end, it is nearly impossible for people guilty of bad actions to win on summary judgment in the Eighth Circuit.

Thompson v. University of Arkansas, (8th Cir. 11/10/2022) (213376P.pdf)(Gruender, Author, Shepherd, Erickson) - A Black University police officer complained of mistreatment, but didn't raise racial issues. A few days later the Plaintiff responded to a report of a intoxicated man passed out in a dorm room. The key facts about the August 24 incident are undisputed. He does not contest that the man had vomited, passed out, and was foaming at the mouth and that Plaintiff did not provide first aid, check vital signs, reposition, or continually observe the intoxicated man. The resident advisor who had called it in later complained, and the Plaintiff was fired for his poor response. Summary judgment was granted on

retaliation and the Plaintiff appeals. The argument of timing was defeated by the usual observation that timing alone is insufficient - and that the incident in question was also soon before termination. A short investigation was not probative because "Thompson's conduct was apparent from the body-camera footage." Slip op. at 5.

Mobley v. St. Luke's Health System, Inc., (8th Cir. 11/16/2022((212417P.pdf) (Menendez, Author, Loken, Kelly)- Just for a second this case looked like a Plaintiff would get a grant of summary judgment reversed in the Eighth Circuit. But in the end the case ended up as all the others this year. Plaintiff worked in customer service for a health care system. He suffered from MS and requested the accommodation of telework, but was denied. The District Court had granted summary judgment on the idea that telework is not a reasonable accommodation. The Defendant cited cases that telework was not a reasonable accommodation but the Circuit Court explained "none of the decisions involve a case in which a disabled employee, much less nearly all employees in a department, regularly teleworked, yet the employer rejected that employee's proposed accommodation to telework when his or her condition flared." Slip op. at 6. The Court thus could not base dismissal on the unreasonableness of the requested accommodation. But before the Plaintiff could celebrate the Court notes "However, for a failure-to-accommodate claim to survive summary judgment, an employee must do more than establish a prima facie case—he must also show that his employer failed to engage in the interactive process in good faith." Slip op. at 7. What the Employer did was to tell Plaintiff that he could reach out to his manager on a case-by-basis, but that St. Luke's would not approve a blanket request to work from home during flare-ups. Since he was only ever denied one request the Court found no triable issue on the failure to engage in the interactive process.

Slayden v. Center for Behavioral Medicine, (8th Cir. 11/17/2022) (213009P.pdf) (Kobes, Author, Loken, Arnold) - The Court grants summary judgment on a harassment claim because there was no material issue on whether it was timely filed. The most interesting claim was the argument that failure to remedy harassment was an ongoing discrimination for timeliness purposes. The Circuit Court wrote, "Slayden relies on Faragher v. City of Boca Raton, 524 U.S. 775 (1998) to make this argument. Faragher concerned an employer's vicarious liability for a hostile work environment where it had failed to exercise reasonable care to prevent harassment; it does not

support the notion that failure to take remedial action is itself discrimination." Slip op. at 4, n. 3.

Corkrean v. Drake University, (8th Cir. 12/13/2022) (Shepherd, Author, Smith, Benton) (221554P.pdf) – In this Iowa case a long-time employee of Drake, who reported directly to the dean, runs into trouble when a new dean comes to town. The two did not get along and at least some of the problems stemmed from the Plaintiff's irregular schedule that was itself related to her MS. Ultimately the Plaintiff was fired citing multiple deficiencies. During litigation she admitted to many of these including "failing to pay faculty members the appropriate amounts… was often late to work, missed deadlines, took unapproved time off for personal reasons, frequently failed to communicate why she would be absent, and did not always fill out FMLA paperwork despite repeated requests for her to do so." Slip op. at 5. Since the Plaintiff always got the FMLA she had coming on the FMLA claim the Court applied a discrimination analysis. That analysis was driven by "a robust, well-documented set of
legitimate reasons for Corkrean's termination" that she does not dispute. This being the case pretext is the issue. The only close question was the fact that the Plaintiff complained of harassment by the Dean, and Drake did not follow its policy, responding instead with FMLA info, for example. The Court found the deviation not indicative of intent because although the HR department did not investigate it did develop a plan to address the concerns – in essence jumping to the remedy. Ultimely Plaintiff was doomed by "Drake has a robust, well-documented collection of non-discriminatory reasons for Corkrean's termination; Drake informed Corkrean in writing multiple times of what she needed to do to improve, and she failed to do so every time; Drake has never wavered in its explanation for Corkrean's termination; Corkrean does not dispute the alleged deficiencies; and an employee who made similar mistakes as Corkrean,but who did not have FMLA leave, was also terminated." Slip op. at 11.

Mayorga v. Marsden Building Maintenance, (8th Cir. 12/20/2022) (Kelly, Author, Shepherd, Grasz)(221630P.pdf) – In this Iowa case the Circuit Court holds that the defendant proved its affirmative defense of reasonable factor other than sex under Iowa law. The Employer considered experience during the hiring process, and experience was generally used to set wages. The Plaintiff's comparators had prior experience in the special services cleaning performed, and using the specialized machinery. The Circuit Court remarked that Plaintiff "points

to no evidence that creates a factual dispute about her male counterparts' prior experience at the time of hire." Slip op. 6. The Plaintiff also claimed sex discrimination in her termination following a confrontation with her manager. She had sought a higher wage rate, was told it was based on experience, and still she confronted management over the issue, got into a heated argument, and was fired. The Plaintiff alleged the manager did not like being challenged by a woman, but the Circuit Court gave the issue a quick death with the entire analysis boiling down to "none of the evidence she presented supports a reasonable inference that Velasquez's decision to fire her is more likely than not explained by an intent to discriminate against her on the basis of her sex." Slip op. at 8.

Connors v. Merit Energy Company, LLC, (8th Cir. 02/15/2023) (Loken, Gruender, Erickson) – In this very brief decision the Court takes up the case of decision not to hire a 55-year old female as a oil & gas lease operator. Summary Judgment on age was affirmed primarily because over half of the operators hired in this corporate acquisition were over 40, and 5 of the 20 were over 55. The age claim failed on the *prima facie* case. On sex the Plaintiff did show a *prima facie* case and the Employer was now tasked with articulating a reason. The Employer pointed to supposed clashes with supervisors. But this "was based on either after-acquired testimony, which could not have influenced its
hiring decisions, or contested hearsay statements." Slip op. at 3. On claimed safety concerns the entire analysis was "Connors testified with sufficient detail to discredit these concerns, for purposes of summary judgment." On production concerns, the Court briefly remarks "contemporaneous interview notes suggest this allegation may be unfounded." Further preferred males lacked the Plaintiff's depth of knowledge and experience. The Employer then turns to that old reliable "enthusiasm." Again the extremely brief analysis was simply "based on the record before us, a reasonable jury may doubt the sincerity of this rationale." The Court thus for the first time is two years reversed a grant of summary judgment in a discrimination case based on a triable issue of fact – **but** could not bring itself to publish the opinion.

Bell v. Baptist Health, (8th Cir. 02/28/2023) (Gruender, Author, Benton Shepherd) (222057P.pdf) – In a markedly *pro forma* decision the Court affirms summary judgment against a radiologic tech who asserts poor treatment by a physician. The problem for the Plaintiff was that the treatment was not

particularly remarkable for this type of thing, and that the Employer didn't really do anything to her. Indeed, the Employer offered to keep her in her same job in different locations, or move her to a different shift if she wished, she declined, and the Court found no adverse action. Fundamentally, the Court finds "there was no genuine dispute of material fact about whether alleged harassment was based on sex [since] the plaintiff failed to present evidence of the offender's motivation." Slip op. at 7. She *alleged* that women were treated worse by this physician, but presented no admissible evidence to this effect. And, incidentally, the Court would not find the environment abusive anyway.

Walker-Swinton v. Philander Smith College (8th Cir. 03/13/2023) (Stras, Author, Smith, Arnold) (221547P.pdf) – In this short decision the Circuit Court affirms summary judgment on gender harassment and gender-based termination claims. The Plaintiff was a non-tenured faulty member at a college. One day in class she took away a student's quiz because he was using his cell phone. The student left the class, and she lectured to the students that "no instructor would let anyone use their damn phone during a fuckin quiz or test" and that "it was insane and retarded for anyone to think it was ok." Slip op. at 2. Upon being informed that he had been called a "fucking retard" the student in question returned, confronted the instructor with choice words of his own, and students separated the two. Then – as hard as it may seem to believe – things got worse. The nephew of the Plaintiff, who lived with her, later confronted the student and, with assistance, punched and kicked the student. The College was not pleased, and conducted an investigation. The record showed that the Plaintiff left out that one of the attackers lived with her, and that she had requested student witness to make particular points when questioned. She was fired for using "retarded," coaching witnesses, and omitting key facts in the investigation. She files a always-doomed-for-the-trash-bin gender discrimination claim. This wasn't changed by the fact that the student in question didn't have a disability – the insult in question was target to that population. Also statements like "cover your asses" aren't exactly comparable to this situation. And in a quotable portion of the case the Court responds to the "botched investigation" claim with "cutting corners hardly supports a finding of pretext when there was not much to investigate." Slip op. at 5. On the harassment claim the most interesting point was that the Plaintiff had provoked much of the animosity she complains about. "Even if the conditions were intolerable, in other

words, her own role in provoking these incidents undermines the claim that the college created a workplace full of 'discriminatory intimidation, ridicule, and insult.'" Slip op. at 7. Notably this observation was directed towards the student's behavior – who had been beaten by Plaintiff's nephew.

Smothers v. Rowley Mem. Masonic Home, (8th Cir. 03/23/2023) (Wollman, Author, Kelly, Kobes) (213038P.pdf) – In this Iowa case the Plaintiff worked as a CNA for a care facility. She entered into a contract on the side with a resident to provide services. This was a violation of policy and raised issued of financial exploitation. The Employer suspended the Plaintiff, investigated, and was unable to reach a conclusion. The Employer instead reported the incident to DIA and requested an investigation. DIA informed the Employer that Plaintiff was cleared, and the employer awaited written confirmation before reinstating. In the meantime the Plaintiff quit. In analyzing the Plaintiff's age discrimination claim the Court focused on the ICRA since "the ADEA requires that age be the but-for cause of the adverse employment action, whereas ICRA requires only that age be a motivating factor…[and since this means] [i]f ICRA's lesser standard is not satisfied, we need not consider the ADEA's but-for causation requirement." Slip op. at 5. The first took up the question of direct evidence. The statement by the Director of Nursing that she would not suspect a younger CNA of having a romantic relationship with a resident was not direct evidence in as much as she also said she would not suspect any of the older CNA's either. (Which doesn't exactly negate the idea that had Plaintiff been younger she would have escaped suspicion.). Beyond that the Plaintiff had precious little, with the most substantial allegation being that the investigation was skipped. But it was clear that *some* investigation took place, and the completeness of the investigation was not the sort of irregularity that would give rise to an inference of discrimination.

Winters v. Deere & Company, (8th Cir. 03/23/2023) (Kobes, Author, Kelly, Wollman) (221035P.pdf) – In this Iowa case summary judgment for disability discrimination is affirmed. The Plaintiff suffered from anxiety and depression and had received FMLA leave and other medical leave for it in the past. He then started a period of missing a lot of work and warned for it, although the employer encouraged him to sign up for FMLA leave again if he needed it. At one point the Plaintiff expressed to the employer that he had thoughts of

suicide every morning and the employer attempted to get the Plaintiff meetings with occupational health and a psychiatrist, but scheduling conflicts interfered. HR told Plaintiff to go on leave and return once he passed a fitness for duty exam, which he did. Upon his return no accommodation was indicated. Within a month the Plaintiff received bad feedback, and confronted the coworker whom he blamed for this. He then took a few days off, returned, and then *Plaintiff* requested a meeting with management. At this meeting the Plaintiff yelled at the manager and said "I will fight you to the end on this" and "it will not turn out good . . . . for one of us." He was subsequently fired. On the accommodation claim, because he was fully released when he returned, and the Court found that this meant there was no triable issue on whether the Employer knew he needed accommodation following his return from leave. On the termination claim, the Court pointed out "[m]ere knowledge of a disability is not the same as discriminatory animus" and that therefore there was no direct evidence. Slip op. at 5. As far as indirect evidence the Court's analysis is not remarkable, and boils down to the point that the final statement by the Plaintiff, and his later insistence that he did not regret it, was a pretty convincing reason for termination.

Nagel v. United Food and Com. Workers (8th Cir. 03/24/2023) (Stras, Author, Smith, Benton)- Plaintiff claimed a breach of the duty of fair representation by the union when it allegedly failed to reveal all of the provisions in a new CBA when it went up for the ratification vote. The Circuit Court found summary judgment was proper because of a lack of causation. The provision in question was a 30-and-out benefit that allowed retirement at 30 years of service regardless of age. As part of cost-cutting measures for the defined benefit plan this was to be eliminated. But this elimination was not one of the bullet points handed out by the union before the vote. The Plaintiff discovered the change, had a heated discussion with other, and the CBA was ratified by a 119 vote margin. Skipping directly to causation the Court noted "he still must establish a causal link between the union's bad faith and his injuries. As we have explained, "a union [can] be held accountable only for that portion of the employee's damages attributable to the union's breach . . . ." Slip op. at 5 (*quoting Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 580 (8th Cir. 1981). Here the problem with causation is summed up in a sentence no litigant wants to see: "What is missing here is actual proof." Slip op. at 6. The CBA passed by 119 votes. The Plaintiff produced only 9 workers who say they would have

changed their vote. This leaves the CBA passing by 110 votes. Attempts by the Plaintiff to suggest larger numbers were met with "Nagel moves from predictions to reading tea leaves" and "[l]ayering wishful thinking on top of guesswork cannot get Nagel past summary judgment." Slip op. at 8-9. The Court thus affirmed summary judgment.

O'Reilly v. Daugherty Systems, Inc., (8th Cir. 03/29/2023) (Erickson, Author, Gruender, Melloy) (213465P.pdf) – In a brief decision in this Equal Pay Case the Court focuses on the affirmative defense for the single comparator raised by Plaintiff. The Plaintiff made about 2.5% less than the comparator (about 8K less). The Court noted "a marginal pay differential is permitted if it arises from a 'finely calibrated' compensation system that is based on legitimate factors." Slip op. at 5. Here, the Plaintiff acknowledged that her comparator had more experience and additional skills. The Court found the affirmative defense was carried as a matter of law where "explanation for the pay differential—the differences in skillsets and experience and the desire to incentivize O'Reilly to grow in the position—is sufficient to satisfy its burden of proving the pay differential was based on a factor other than sex." Slip op. at 5.

Bonomo v. The Boeing Company, (8th Cir. 03/29/2023) (Smith, Author, Gruender and Stras) (221523P.pdf) - The Plaintiff brings an age discrimination claim for failure to promote and constructive discharge. The constructive discharge claim was dismissed based on untimely filing with the Missouri commission and this leaves only the failure to promote claim for summary judgment. Essentially, the Plaintiff scored poorly in the structured interviews for both jobs he applied for, and the positions went to substantially younger applicants. In the first application the Plaintiff did not submit a resume, and explained his 30 years of experience was why. He did not prepare for the interview. He was not selected as he performed poorly and seemed entitled. In the next interview he was also outscored, by all interviewers in all categories, by the preferred candidate. The Plaintiff challenged the grant of summary judgment on seven grounds. The analysis of them treads no new ground. Notably, the Plaintiff claimed that the handbook required consideration of more than just the interview in hiring, but the form submitted in the decision included a checkbox that only the structured interview was considered. The Court as unconvinced this tended to show discrimination since "the record demonstrates that what Bonomo cites is a general policy, superseded with appropriate

authority by a more specific, nuanced policy." Slip op. at 7.The argument that relying on the interview alone is sufficient to get to the jury also failed. ""[T]he presence of subjectivity in employee evaluations is itself not a grounds for challenging those evaluations as discriminatory."" Slip op. at 8 (*quoting parenthetically Wittenburg v. Am. Exp. Fin. Advisors, Inc.*, 464 F.3d 831, 839 (8th Cir. 2006)). Since the Employer was able to pinpoint the negative for the Plaintiff and the positives for the preferred candidates, and the Plaintiff had no "plausible alternative prospective," the Court granted summary judgment.

05/19/2023 *Hopman v. Union Pacific Railroad*, (8th Cir. 05/19/2023) (Loken, Author, Smith, Wollman) (221881P.pdf) – A train conductor with service-related PTSD won a verdict under the ADA over his request to bring his rottweiler service dog with him on the moving train. The Judge, perhaps not a dog lover like the jury, set aside the verdict and the Circuit Court affirms. The key issue in the case was formulation of what the claim was. The Plaintiff was able to do his job without the dog, and indeed received a promotion. What he wants is to be more at ease when doing his job. "The question underlying this appeal, which we have not addressed in prior cases, is whether Congress in the ADA also intended to bar employer discrimination that does not directly affect the ability of an employee who is a qualified individual to perform his job's essential functions. The statute contains strong indications that Congress did intend to bar employer discrimination in providing such benefits and privileges." Slip op. at 3. The Circuit Court found that the ADA mandated accommodation to assure that the qualified person with a disability was able "to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." Slip op. at 4. The Plaintiff still loses, however, for the simple reason that he was not complaining of the "benefits and privileges of employment." The Circuit Court adopted the District Court's observations about this sort of claim: " '[B]enefits and privileges of employment (1) refers only to employer-provided services; (2) must be offered to non-disabled individuals in addition to disabled ones; and (3) does not include freedom from mental or psychological pain.'" Slip op. at 8. Since dealing with mental pain was the gravamen of the Plaintiff's claim the Court focused on this point. First of all, "mitigating pain is not an employer sponsored program or service" and thus failed the first point. Second, the Court quoted from the EEOC guidance that accommodation "does not extend to the provision of

adjustments or modifications that are primarily for the personal benefit of the individual with a disability." Slip op. at 11.

Kelly v. Omaha Public Power District,(8th Cir. 07/28/2023)(Kelly, Author, Erickson, Stras) (222321P.pdf) – The Employer provides tuition assistance to its workers in certain cases. The Plaintiff applied for this assistance but was denied under the Employer's policy which denied duplicative assistance where the employee receives tuition from any other source. The only amount eligible for the Employer's program would be the overage. The Plaintiff had received tuition assistance, covering all of it, from the Montgomery G.I. Bill, and claims the denial is a violation of USERRA. The Circuit Court affirmed the grant of summary judgment. Key to its analysis was the observation that "[a]n employer violates USERRA's anti-discrimination provision if an employee's military status is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of that status." Slip op at 6-7. The Court found that the Plaintiff was denied the additional assistance "not because of his prior military service—which is what USERRA prohibits—but because he was receiving duplicative tuition assistance from another source, which, in Kelly's case, happened to be the military." Slip op. at 8. This was not discrimination in the Court's view. The Court held "that denying an employment benefit based on an employee's receipt of duplicative military benefits does not, standing alone, violate USERRA." Slip op. at 9.

Boston v. TrialCard, Inc., (8th Cir. 07/28/2023) (Erickson, Author, Smith, Melloy) (222298P.pdf) – An employee is separated after the employer concluded she violated the 3-day no call/no show rule and sues claiming race, disability, and sex discrimination. The articulated reasons for termination included that the Plaintiff missed 9 days following the termination of her FMLA leave without informing management. The fact that she informed nonmanagement did not rebut this reason as the policy clearly required informing management. Next, Plaintiff asserted disparate enforcement of the attendance policy. But this was supported by affidavits from other African Americans asserting preferential treatment and no evidence that the better-treated persons were similarly situated. The Court then turned to the FMLA claim. The Court neatly summarizes the three types of FMLA claims: "There are three types of claims arising under the FMLA: (1) where an employer refuses to authorize leave under the FMLA or takes

other action to avoid responsibilities under the Act (an entitlement or interference claim); (2) where an employee opposes any practice made unlawful under the FMLA and the employer retaliates against the employee (a retaliation claim); and (3) where an employer takes adverse action against an employee because the employee exercises rights to which she is entitled under the FMLA (a discrimination claim).” Slip op. at 8. On the entitlement claim the Plaintiff failed to submit required certification after repeated reminders and so was not entitled to the leave. On the discrimination claim the Plaintiff again relies on statement of a nondecisionmaker and the claim that she didn’t actually violate the attendance policy. Unconvincing before, they remain so.

Nelson v. Lake Elmo Bank, (8th Cir. 08/01/2023) (Benton, Author, Colloton, Wollman)(222827P.pdf) – A woman fired for the stated reason of sexual harassment brings a claim of discrimination and defamation (under Minnesota law). The Plaintiff was assistant VP of teller services and supervised the tellers. The case, *per usual*, turns on a showing of pretext. First up the allegedly inadequate investigation. The failure to interview third parties (boyfriend, fiancé) who would have witnessed the incident was not sufficient to generate pretext, especially where the Bank cited confidentiality concerns. Since the Bank did interview both parties the fact that the Bank believed one of them, with no real explanation of why, qualifies it for the “good faith” defense, as *per usual*. As for comparators they weren’t really, as *per usual*. “They engaged in different conduct, reported to a different supervisor, and had distinguishing circumstances, especially the lack of a formal report against them.” Slip op. at 8.

Houston v. St. Luke's Health System, Inc. (8th Cir. 08/11/2023) (Gruender, Author, Arnold, Kelly) (221862P.pdf)- In this FLSA and state law unjust enrichment claim the Circuit Court for the first time in two years reverses in favor of a Plaintiff. Notably the case involves fairly technical legal analysis based on uncontradicted facts. At issue is an automated rounding policy. “Clocked times within six minutes of a shift’s scheduled start or end get rounded to the scheduled time for compensation purposes. For example, an employee who clocks in at 8:56 a.m. for a 9:00 a.m. shift would not be paid for those four minutes. Likewise, an employee who clocks out early at 4:54 p.m. for a shift ending at 5:00 p.m. would still be paid for those unworked six minutes.” Slip op. at 2. Naturally, the employee shorted four

minutes is hardly satisfied if another worker get an extra six minutes. The experts pretty much agreed that the rounding policy, on average, benefit the company at the expense of the workers. The district court nevertheless concluded the policy was neutral because it wasn't that much time, it might be different over a different time period, and on a per-shift basis, the rounding policy took time from about half of shifts while it added to or left neutral the other half. The Circuit Court disagreed. The applicable DOL regulation on rounding clock times states "this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."
29 C.F.R. § 785.48(b). The problem for the Court of Appeals is what does it mean for everything to average out neutral "over a period of time." What time? How close to neutral must it be? The Court thus turns to "distinguish statistical anomaly from discernable pattern." Slip op. at 6. The Circuit Court did not give definite contours to this effort, however, because "[n]o matter how one slices the data, most employees and the employees as a whole fared worse under the rounding policy than had they been paid according to their exact time worked." Slip op at. 7. "Thus, we need not resolve whether an employer runs afoul of the rounding regulation whenever it undercompensates any individual employees over a period of time or only when it undercompensates employees as a whole, including those who were overcompensated or neutrally compensated. Here,the rounding policy did both." Slip op. at 7-8. The Court was unconvinced by argument over impracticality, and over the notion that time clock placement often results in non-work activities while technically on the clock. The computer age makes the impracticality argument unconvincing as "[t]his is not like the old days of punch cards and hand arithmetic." Slip op. at 8. And the employer's own stipulation was sufficient to overcome the suggestion that non-work activities routinely take place at the bookends of the shift. The Court did not address the *de minimis* issue for the unjust enrichment claim since the issue was never resolved by the district court.

Warren v. Mike Kemp, (8th Cir. 08/22/2023) (Gruender, Author, Kelly, Grasz) (222067P.pdf) – In this case the Court takes away a Plaintiff verdict based on purely legal conclusions – according to the majority. The Plaintiff worked as an interim school superintendent for a district in Little Rock under a court ordered desegregation plan. He complained to the lawyers

for the district, and the members of the School Board, about disparities in two schools being built in racially different areas. He was eventually not hired and claims section 1981 retaliation. Although he won before the jury the problem on appeal is that section 1981 generally only protects what Title VII would protect. Looking to Ttitle VII for guidance the Court remarked "[a] plaintiff need not establish that the conduct he opposed was in fact prohibited under Title VII; rather, he need only demonstrate that he had a 'good faith, reasonable belief that the underlying challenged conduct violated Title VII.'" Slip op. at 8. The bottom line was that the practice challenged was not a protected *employment* practice, and the mere fact that the Plaintiff's job required her to report it does not convert an educational racial disparity into employment discrimination. Judge Kelly dissented on the ground that "The evidence in this case was sufficient for a jury to make a reasonable inference that PCSSD's discriminatory approach to the construction of facilities at a school in a predominantly Black community affected the conditions and privileges of employment for that school's predominantly Black staff."

Anderson v. KAR Global, (8th Cir. 08/25/2023) (Kelly, Author, Gruender, Arnold) (222808P.pdf) – The Plaintiff was hired as an outside sales representative tasked with maintaining accounts ("farming") and generating new sales ("hunting"). Plaintiff was hired for his skills as a "hunter." A merger took place a year after hire and outside sales were basically separated into hunter and farmer positions. The Plaintiff was offered an expanded hunter position. The he had a seizure which meant he couldn't drive to his appointments. He was accommodated by having someone drive him to his appointments 2 days a week. A week later the Employer told him that they may not be able to continue this. The Plaintiff offered to have his father-in-law drive him 2 days a week. He received no response, but continued to receive the initial accommodation. As management was feeling out if the accommodation would work long term, other members of management were assessing possible termination related to the merger. When a decisionmaker with no personal knowledge of the Plaintiff's abilities, but knowledge of the need for accommodation, asked if he was "good" the response from the front line manager was that he had some issues but "In a pure hunter role though I think he would be pretty darn good." Slip op. at 3. Still, the Plaintiff was slated for termination and then fired with the stated reason being that others had met their sales goals and he had not, and they had one hunter role too many in his

region. The district court found a lack of causation, and for the first time in two years the Court of Appeals found a triable issue of fact in an employment discrimination suit. The course of events was particularly important to the Court. The merger happened, *then* the Plaintiff was told he was envisioned as a "hunter" going forward, *then* Plaintiff told management about the seizure, and then within 10 days he was identified for termination. Noting no temporal bright line on such things the Court nevertheless explained "[h]ere, the interval was ten days. That is sufficient
to establish causation based on temporal proximity at the prima facie stage for Anderson's disability discrimination claim and his retaliation claim." Slip op. at 8. On pretext most interesting was that the Plaintiff did not dispute he underperformed compared to his peers. Yet management could not identify when they discovered this. The Circuit Court felt that "[a] reasonable jury could conclude that Hopkins looked into Anderson's job performance only after she learned of his disability and accommodation request and had decided to terminate him." Slip op. at 9-10. "A reasonable jury could conclude that Hopkins was unaware of Anderson's professional shortcomings at the time she first identified him for termination, and thus this post hoc rationale could not have factored into her termination decision." Slip op. at 10. In essence the case boils down to timing – causes precede effects, and the closer in time the better the inference.

NON-SUMMARY JUDGMENT/VERDICT REVIEW CASES

Gamble v. Minnesota State-Operated Svcs, (8th Cir. 04/26/2022) (212626P.pdf) (Gruender, Author, Benton, Erickson)- For purposes of the FLSA Civil detainees who participate in voluntary Vocational Work Program in the Minnesota Sex Offender Program are not employees of the state. "First, there is no bargained-for exchange of labor for mutual economic gain like that which occurs in a true employer-employee relationship… [Second], [t]he detainees' participation in the VWP is not for their economic gain but rather is part of their rehabilitation…[Third], the VWP [is not] for the state's economic gain because it generates no profit, and, regardless, any net profits must be used for the benefit of the detainee. [Fourth], like prisoners, the detainees have their basic needs met by the state, which means that the FLSA's purpose to maintain a standard of living

necessary for health, efficiency, and general well-being of workers" does not apply here." Slip op. at 6-7.

Blackorby v. BNSF Railway Company, (8th Cir. 2/16/2023) (Shepherd, Author, Colloton, Grasz) (213330P.pdf) – The Plaintiff was injured at work and reported it, and was disciplined. A jury found BNSF violated the Federal Railroad Safety Act (FRSA) by disciplining him in retaliation for filing the injury report and awarded (eventually) compensatory damages in the amount of $58,240. This is the attorney fees case. The Court rejected the argument that disproportionality between the recovery and the fee request necessitates reduction of the fees. The Court distinguished cases reducing awards based on limited monetary relief because "[h]ere, the significant award of fees is largely driven by the procedural history of this case, which has involved several jury trials and multiple appeals." Slip op. at 7. **But** the Court did reduce the fee award because in the first trial (this was the third) the Plaintiff had offered a jury instruction which was error under 8th Circuit precedent. "We agree with BNSF that Blackorby is not entitled to fees that were unreasonably caused by his own legal error." Slip op. at 8. The Court thus reduced the fee award to remove the fees incurred during the first trial.

Avina v. Union Pacific Railroad Co., (8th Cir. 07/03/2023) (Stras, Author, Kelly, Erickson) (222376P.pdf) – In this failure to promote case the Plaintiff had to show, of course, that she applied for a promotion to a position for which the employer was seeking applicants. "The sticking point is whether she actually applied for either promotion: she says she did, but Union Pacific disagrees. To resolve the dispute, we need to know what it means to apply." Slip op. at 5-6. The problem is that deciding this question is an issue "inextricably bound up" with the union contract. And this is a railroad. And "minor disputes" over the meaning of the CBA in such cases are resolved first through the internal dispute process and then "the Railway Labor Act strips federal courts of subject-matter jurisdiction and places it in the National Railroad Adjustment Board." Slip op. at 4. Here the Plaintiff's entire case, including her lawyer's argument at trial, was about the deviation between what the Employer did and what it should have done under the CBA – and what it should have done was a matter of disputed interpretation. Here the centrality of the interpretation of the CBA in a discrimination case brought by railroad employee means "this case involves a 'minor dispute' over the meaning of a collective-bargaining agreement, [and so if] Avina wants to

pursue this case further, she will have to do so elsewhere." Slip op. at 8.

A Quick Look At Other Updates

The Pregnant Worker Fairness Act
https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf#page=1626

Effective June 27, 2023 this Act mandates that an employer provide accommodation of "known limitations." A "known limitation" is a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability..." Sec. 102(4). The employer need not make accommodation if it can prove and undue hardship. The employer is required to engage in an interactive process, and cannot force a leave of absence if other accommodation is viable. Of course, retaliating for requesting an accommodation is prohibited.

The PUMP Act

Effective December 29, 2022. Providing Urgent Maternal Protections (PUMP) Act expands the 2010 Break Time for Nursing Mothers Act. It now covers employees who are "exempt" from FLSA overtime provisions, and adds enforcement remedies not available before (primarily liquidated damages).

Updated EEOC Harassment Guidance

Published September 29, 2023 the guidance would supersede the 25-year-old guidance now in place.
https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace

Certiorari in 8th Circuit Case

Last year the case update discussed Muldrow v. City of St. Louis, 30 F.4th 680 (8th Cir. 2022). In that case the circuit court held that a transfer that doesn't change enough jobs conditions isn't actionable. The United States Supreme Court granted certiorari on this case on June 30, 2023 with the question presented being: "Does Title VII prohibit discrimination as to all 'terms, conditions, or privileges of employment,' or is its reach limited to discriminatory

employer conduct that courts determine causes materially significant disadvantages for employees?" https://www.supremecourt.gov/qp/22-00193qp.pdf

Civil Rights Commission & EAB changes

The 2023 government reorganization bill placed the ICRC as an attached unit to the Department of Investigations, Appeals, and Licensing (DIAL, formerly DIA). Like EAB (an attached unit for 35 years), the ICRC remains independent in function, but physically present within DIAL which supplies support functions. One upshot is that both EAB and ICRC will have new addresses. As of October 13 the new EAB address is:

> Iowa Employment Appeal Board
> Iowa Department of Inspections, Appeals, & Licensing
> 6200 Park Avenue Suite 100
> Des Moines, IA 50321

As of this writing ICRC had toured these same offices but had not yet made the move. This location is pretty much on the corner of 63rd (Highway 28) and Park on the south side of Des Moines, just across Highway 28 from Brown's Woods.