DRAKE GENERAL PRACTICE REVIEW
EMPLOYMENT LAW CASE UPDATE

2019-20 EMPLOYMENT LAW UPDATE

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SUPREME COURT CASES

***Fort Bend County Texas v. Davis*, No. 18-0525 (USCC 6/3/2019)**, (https:// www.supremecourt.gov/ opinions/ 18pdf/18-525_m6hn.pdf) – In an unsurprising, and unanimous, decision the Court finds that the charge filing period of Title VII is not jurisdictional. After years of litigation the defense asserted that a claim of religious discrimination – the only one to survive summary judgment – was not the subject of a timely filed charge. The issue now before the Supreme Court is whether the Title VII charge filing period is "jurisdictional" and thus can be raised at any stage of a proceeding; or whether it is a procedural prescription that can be forfeited if not timely raised.

The Court commences analysis by explaining the difference in effect between a jurisdictional requirement, and a nonjurisdictional, although mandatory, requirement. The latter is mandatory no less than a jurisdictional one, but it must be timely raised. The Court finds that Title VII's requirements speak to a party's procedural obligations, but "[l]ike kindred provisions directing parties to raise objections in agency rulemaking… follow procedures governing copyright registration, … or attempt settlement, … Title VII's charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts." Slip op. at 9-10. The Court thus found that the defense was one that was subject to forfeit if not timely raised. Plaintiffs should take caution, however, in that the Court describes the requirement as "mandatory" and so leaves open the possibilities that it is not subject to equitable defenses such as estoppel. The Court made this point explicitly in the earlier case of *Nutraceutical Corp. v. Lambert*, https:// www.supremecourt.gov/ opinions/ 18pdf/ 17-1094_bq7d.pdf (USSC 2/26/2019). There a district court ordered decertification of a class and the plaintiffs then had 14 days to ask for review. They missed the deadline but the Circuit Court allowed the appeal based on tolling. The Court explained that the rule was not jurisdictional and that "[i]t therefore can be waived or forfeited by an opposing party. …The mere fact that a time limit lacks jurisdictional force, however, does not render it malleable in every respect. Though subject to waiver and forfeiture, some claim-processing rules are 'mandatory'— that is, they are 'unalterable' if properly raised by an opposing party." *Nutraceutical*, slip op. at 3-4.

This is exactly the category the *Fort Bend* Court put the Title VII charge into. In *Nutraceutical* the Court observed that "[w]hether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility." *Nutraceutical*, slip op. at 4. Thus in footnote 5 of *Fort Bend* the Court explains "[t]he Court has 'reserved whether mandatory claim-processing rules may [ever] be subject to equitable exceptions.'" *Fort Bend,* slip op. at 7, n. 5. Iowa has found such tolling under state law for charge filing, *Mormann v. Iowa Workforce Development,* 913 NW 2d 554, 566-570 (Iowa 2018), but for the federal courts one should stay tuned.

Comcast Corp. v. Nat'l Assoc. of African American Owned Media, **No. 18-1171 (USCC 3/23/2020)**, (https:// www.supremecourt.gov/ opinions/ 19pdf/ 18-1171_4425.pdf) – The Court finds that the causation standard for proving racial discrimination under section 1981 is "but for" causation. The Plaintiff is an African-American-owned television network who tried to get Comcast to carry its channels. Comcast refused, citing lack of programming demand, bandwidth constraints, and a preference for other network's programming. A motion to dismiss was on the basis that the pleaded facts failed to plausibly show that, but for racial animus, Comcast would have contracted with ESN. The Ninth Circuit reversed on the theory that a plaintiff must only plead facts plausibly showing that race played "some role" in the decision. The Court granted certiorari to address a split amount the circuits over the standard of causation required. With Justice Ginsburg concurring in the result, the Court unanimously adopted the "but for" standard. The key to the Court's ruling, which Ginsberg acknowledges is now the law, is that "but for" is the default causality standard which Congress is normally presumed to have legislated when creating its own new causes of action. With this as the default, analysis devolved to whether there was a reason to think §1981 is different. In refusing to so find, the Court started with the text of the statute: "The guarantee that each person is entitled to the 'same right . . . as is enjoyed by white citizens' directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the 'same' legally protected right as a white person." Slip op. at 5. Less compelling perhaps is the Court's notation that a neighboring section, which did create an express cause of actions, used language like "on account of," "by reason of," and "on account of." These terms the Court took as indicating *sine qua non* causation. Analogy to Title VII, either pre-1991 CRA, or post, was rejected. In short, "we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard." Slip op. at 9. Fundamentally, the 1991 CRA amended the causation standard for Title VII, but left the one for §1981 alone.

Babb v. Wilke, Sec'y of Veteran's Affairs, **No. 18-882 (USCC 4/6/2020)**, (https:// www.supremecourt.gov/ opinions/ 19pdf/ 18-882_3ebh.pdf) – Applying the first rule of statutory construction - read the statute - the Court finds that the federal sector provision of the ADEA does not require proof of "but for" causation to prove a violation of the statute, but that such proof may be required to obtain damages. The critical statutory language states "all personnel actions affecting employees or applicants for employment who are at least 40 years of age [for specific federal

employees] shall be made free from any discrimination based on age." 29 U. S. C.§633a(a). The phrase "free from any discrimination based on age" essentially decides the case. The words "free from" means "untainted by" and the "addition of the term 'any' ...drives the point home." Slip op. at 5. Engaging in a detailed, and slightly silly in its fussiness, grammatical analysis the Court notes "'free from any discrimination' is an adverbial phrase that modifies the verb 'made'" that "based on age" is an adjectival phrase that modifies the noun "discrimination." This leads the Court to conclude that while age must be the "but for cause" of the discrimination (because the discrimination is "based on" age), the age discrimination need not be the "but for cause" of the personnel action.

The analytical extravagance of describing "free from discrimination based on age" as encompassing *two* causal standards adds nothing but confusion to the analysis. In ordinary discourse, your average American English speaker would find no difference between "free from discrimination based on age" and "free from age discrimination." In "age discrimination" the attributive noun "age" (look it up) is in front and in "discrimination based on age" we have moved the noun "age" to the back. In so doing we have made that noun an object, either of a preposition and or of a verb, one or both linking "age" to "discrimination." In most constructs "of" or "for" would fill the bill. So "brick house" becomes "house made of brick," "passenger seat," becomes "seat intended for passengers" and so on. In many such cases the verb is aptly implied and so "house of brick" and "seat for passengers" are normal English. But "discrimination of age" is not a thing in English. We understand "discrimination of age," but it is not the idiom. (In French it is indeed "discrimination d'âge" further suggesting that the use of "based on" rather than "for" is linguistic, not logical). The phrase we use for discrimination typing is not prepositional using "for" or "of," but rather the noun becomes the object of a phrasal verb such as "based on," or "on account of." This is linguistically necessary if we move the attributive noun to the back. To say that "discrimination based on age" is discrimination that would not occur but for age is like saying a "house of brick" is a house that would not exist "but for" brick. More simply brick is the *type* of house whether "brick" comes before or after "house," and "age" is the *type* of discrimination whether "age" comes before or after discrimination. Discrimination is a classification, and in age discrimination the criterion of the classification is age. It is not at all clear why moving attributive nouns around suddenly brings us into the realm of causal analysis. One could certainly speak of racecars as a "but for" cause of "racecar driving" but nothing seems to be gained from this kind of thinking but confusion of plain English. Constructing casual standards out of adjectival words is almost a trivial exercise, and it does not become profound merely because the phrase in English associated with "discrimination" make age the object of the verb "based on," rather than of the preposition "of." Just saying "age" is the type of discrimination rather than finding a causation standard imbedded in all adjectival usage of words, brings the case to the same place. To wit: Did you take into account the age of a federal employee in making the decision? If age is considered adversely, its age discrimination, and *now* we consider what result flowed from the discrimination, and in that analysis there is a causal standard that needs to be addressed.

The Court gives an example of a scoring system that docks 5 points for age over 40. If an older worker ends up with 80 points after the dock, but loses out to a younger candidate with 90 points, this is still illegal even though the points would have been 85 to 90 without the docking. As for

remedies, that is a different matter. "It is bedrock law that 'requested relief' must "redress the alleged injury...Thus, §633a(a) plaintiffs who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, back-pay, compensatory damages, or other forms of relief related to the end result of an employment decision. To obtain such remedies, these plaintiffs must show that age discrimination was a but-for cause of the employment outcome." Slip op. at 13. This is a departure from *Price-Waterhouse* which had adopted the theory that once discrimination has been shown to play a role in the decision, then the burden is on the defense to show that the damages in question where not caused by the discrimination. The idea is the defendant is no longer with clean hands, and since it is the defendant's wrongful conduct that has muddled the causality and it is the defendant who should lose if causation cannot be definitively establish - just as the errant shotgun- wielding hunters had to prove between them whose pellet put out Mr. Summers eye. *See Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948). This silent disregard of the causal aspects of *Price-Waterhouse* is not, however, anything new as it is the basis of the ruling in *Gross v. FBL Financial Services*, Inc., 557 U. S. 167 (2009).

***Our Lady Of Guadalupe School v. Morrissey-berru*, No. 19-267 (USCC 7/8/2020)**, (https:// www.supremecourt.gov/opinions/ 19pdf/ 19-267_1an2.pdf) – In a 7-2 vote the Court refines the ministerial exception to employment suites brought against churches. Two elementary school teachers at Roman Catholic schools in the Archdiocese of Los Angeles with teaching responsibilities bring employment suits against the Church. The Church asserts the "ministerial exception" first recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012). This exception is based on the idea that Freedom of Religion includes the right of churches "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Slip op. at 1. In *Hosanna-Tabor* a religion school elementary teacher was found to fall within the exception. In making the ruling in *Hosanna-Tabor* the Court identified four factors as relevant, but did not identify any one as more important. The factors were that (1) the teacher has the title "minister, with a role distinct from that of most of its members," (2) the role had a significant degree of religious training followed by a formal process of commissioning (3) the teacher held herself out as a minister of the Church by accepting the formal call to religious service, and (4) she taught religion four days a week, led her students in prayer three times a day, took her students to a chapel service once a week, and participated in the liturgy twice a year. The Ninth Circuit took these factors as a sort of test in deciding if a worker is a "minister" covered by the exception. The majority eschews that approach, focusing instead on the "role in conveying the Church's message and carrying out its mission." Slip op. at 16. In this inquiry, training and titles are relevant but not controlling. In the end, "[w]hat matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." Slip op. at 18. Coming very close to an instructional personnel at religious schools exception, the Court dismissed both cases here principally because they were "the school staff who were entrusted most directly with the responsibility of educating their students in the faith." Slop op. at 21.

***Bostock v. Clayton County*, No. 17-1618 (USCC 6/15/2020)**, (https://www.supremecourt.gov/ opinions/ 19pdf/ 17-1618_hfci.pdf) – The issue in this case is whether the prohibition against sex discrimination also covers sexual orientations discrimination, and discrimination based on being transgender. In 6-3 decision the court finds that the sex discrimination ban does sweep this far. According to the majority it is a question of logic. "The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." Slip op. at 2. The cases before the court all involve long term employees fired only once the employee revealed that he or she is homosexual or transgender—and allegedly for this reason. Suits were brought under Title VII, different results followed due to the courts' opinion over whether Title VII covered the situation, and the Supreme Court granted certiorari to resolve the conflicting opinions over the scope of Title VII's protections for homosexual and transgender persons.

As common is dealing with this Court the analysis begins and ends with statutory language. The Court basically applies the Scalia-friendly method of looking to the text, and the text primarily, with the intent of the Congress only coming into play if the question cannot be answered by the text. At language at issue: "because of...sex." Citing dictionaries from more or less the same time frame as the passage of Title VII, the parties dispute about what "sex" meant in 1964; the employers asserting that it referred to "reproductive biology" and the employees asserting that even in 1964 the term reached "at least some norms concerning gender identity and sexual orientation." Slip op at 5. Because it makes no difference in the final analysis the Court assumed the narrower biological reference as the meaning of "sex." The important language, it turns out, is "because of." This phrase generally means "'by reason of' or 'on account of.'" Slip op. at 5. "In the language of law, this means that Title VII's "because of " test incorporates the "'simple'" and "traditional" standard of but-for causation That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. ... In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." Slip op. at 5. One again we find ourselves in the realm of *sina qua non* causation, in essence John Stuart Mill's "difference method" - a binary yes/no logical test that has no degrees of comparison. In a slightly confusing remark the Court states "Often, events have multiple but-for causes." Slip op. at 5. Unless one is discussing the creation of reality, this should of course be "always" events have multiple but-for causes. Presumably the Court, being more interested in law than philosophy, limits its considerations to legal cognizable causes, and so disregards remote but-for causes such as the birth of the plaintiff, the Big Bang, and so on. Hence "often" events have multiple legally relevant but-for causes, such as when a car accident "occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn..." Slip op. at 6. The Court explains that because of the 1991 CRA the "but for" test is no longer the exclusive means of proving a violation of Title VII but it certainly will suffice.

Turning then to the word discriminate, and again returning to dictionaries from the mid-20th, the Court finds "discriminate" has not changed much in meaning, but means "To make a difference in treatment or favor (of one as compared with others)." Slip op at. 7. [Dictionary-philes would note the Court cites to the second edition of Webster's from 1954 not the 3rd

Edition from 1960, likely under the influence of the perhaps-unfair bias of Scalia to the more modern edition.] Dismissing the idea that "discriminate" refers to categorical rather than individual discrimination, the Court then comes to the nub of the matter:

> An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.

slip op. at 9. So to put it to the but-for test a male plaintiff is homosexual because he is attracted to men. Change his sex to female, and the plaintiff is not homosexual, and thus not the subject of discrimination. Thus "but for" the *biological* sex of the Plaintiff being male, and thus the same as those whom he is attracted to, then he would not be fired. "Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." Slip op. at 10.

One criticism of this approach is that the Employer is discriminating against a worker based on sex but only as a side-effect of discriminating against, *e.g.* homosexuals. Thus the gay-bias is the motivator of the sex-bias. The Court answers that motives are not the test. Intent in the test. "Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees." Slip op. at 11. The Court goes on to reject the employers' plethora of arguments reducing them either to an invitation to follow intent over text, or the claim that so long as groups are treated fairly then individuals can be discriminated against. Both contentions being wrong, the Court finds for the Plaintiffs.

IOWA APPELLATE COURT CASES

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

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

discrimination claim was granted for a lack of proof, and on the intentional infliction for a lack of outrageousness.

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

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

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

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

The Court reinstated the whistleblower claims finding enough evidence to get past summary judgment. Then it addressed remedial issues for remand. The statute provides for "affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs." If the relief is equitable then no jury trial can be had. The Court notes that "[u]nder the doctrine of last preceding antecedent, qualifying words and phrases refer only to the immediately preceding antecedent, unless a contrary legislative intent appears." Slip op. at 13. The Court thus concludes that "'any

other equitable relief' necessarily implies the 'affirmative relief' authorized is equitable." *Id.* A jury trial is thus not available under the whistleblower statute.

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

On intentional infliction the Court set out the usual rule that "outrageous conduct must be extremely egregious; mere insults, bad manners, or hurt feelings are insufficient." *Slip op*. at 23. In short it must go "beyond, typical bad boss behavior" and this case did not fit the bill. *Slip op.* at 25.

***Ferguson v. Exide Technologies*, No. 18-1600 (Iowa 12-13-2019)**
https://www.iowacourts.gov/courtcases/7956/embed/SupremeCourtOpinion

In this sweeping ruling, in 14 pages, the Court establishes a general rule that it may not imply a common law remedy for violation of a statute that includes its own statutory *civil* remedy.

The Plaintiff experienced work related repetitive injuries, but refused to take the drug test the employer require before treatment. The employer fired her for refusing a drug test. The Plaintiff brought suite under s730.5 but also asserted a claim for wrongful discharge in violation of public policy. The employer eventually admitted violation of the statute - because everyone violates this statute - and went to trial on damages. The Employer had tried to get the common law case dismissed but could not. The Supreme Court now takes up the issue of exclusivity of the statutory remedy where the statute provides for a *judicial* remedy of its own.

The Court commences analysis with the observation that the whole purpose of recognizing an implied public policy cause of action is to vindicate the public policy. "Our reasoning for adopting the wrongful-discharge claim focused on the need to provide a remedy for conduct that violated legislatively declared public policy." Slip op. at 5.

The Court then reviewed its cases, noting that in those where preemption was not found "involved administrative, rather than court, remedies." Slip op at 10. Since "[a]dministrative remedies do not provide the level of protection, control, and right to process involved in the court system" those cases are distinguished. Yet, the cases finding preemption involved either the mandatory language of the ICRA, or a right to *continued* employment under civil service laws. These also were distinguished. (Note again that in *Hedlund* the EAB civil service remedy did not preempt another *statutory* remedy).

Finding this to be case of first impression, therefore, the court falls back on the original purpose of the tort: to provide a judicial remedy for violation of an important public policy. "In keeping with the original purpose of the common law action, when the legislature includes a right to

civil enforcement in the very statute that contains the public policy a common law claim would protect, the common law claim for wrongful discharge in violation of public policy becomes unnecessary." Slip op. at 11. The Court thus creates this new sweeping bright line rule:

> Thus, we hold that when a civil cause of action is provided by the legislature in the same statute that creates the public policy to be enforced, the civil cause of action is the exclusive remedy for violation of that statute.

Slip op. at 11. Note, however, the specification that the statute must provide a "civil cause of action," not merely an administrative remedy for this general preemption rule to apply.

***Petro v. Palmer College of Chiropractic*, No. 18-1600 (Iowa 12-13-2019)**
https://www.iowacourts.gov/courtcases/8502/embed/SupremeCourtOpinion

The Plaintiff brought a claim for age discrimination in education. This is not covered by the Iowa Civil Rights Commission, so the claim was filed with the Davenport civil rights commission because the ordinance did cover this. A right to sue was obtained, and the issue before the Court: "[W]hether a municipality can confer district court jurisdiction on a claim by one private party against another under that municipality's civil rights ordinance?" Slip op. at 9.

The Court ruled that the local commission could not issue the right-to-sue because "home rule in Iowa generally stops at the point where a municipality attempts to bring about enforceable legal relations between two private parties...[and that for] a municipality to enact law that would be binding between those parties in state court, specific authorization from the general assembly is needed." Slip op. at 3. The Court found no such authority in the ICRA.

The Court commenced analysis with the rule from *Molitor v. City of Cedar Rapids,* 360 N.W.2d 568 (Iowa 1985) that city has no power to confer jurisdiction in the district court by city ordinance. In short, "[m]unicipal power over local and internal affairs does not include authority to determine the jurisdiction of a state court." *Molitor* at 569.

The Court thus turned to whether the General Assembly had conferred such a power on local commission *via* the ICRA. Section 16 of that Act confers upon the *state* commission the power to issue a right to sue. Section 19 provides for, and governs, local commissions, and subsection 19(8) states that the referral of a complaint from the state commission to the local commission shall not extinguish the right to get a RTS from the *state*. That subsection does not, however, transfer the power to issue the RTS along with the complaint.

The Court then provided possible rational for the limitation. "To the extent that denying right-to-sue letters under local ordinances restricts private enforcement of local civil rights ordinances, one has to ask whether that might have been the legislature's plan. In the end, rights to sue under local ordinances matter only when the local ordinance is broader than the ICRA. Otherwise, the existing right to sue under the ICRA suffices. But the legislature might have been concerned that allowing local commissions to create additional

protected classes—and then to authorize private suits for discrimination based on these forms of protected status—might have been too much too soon." Slip op. at 16. Further, also section 216.9(1)(c) allows local agencies to "prohibit[] broader or different categories of unfair or discriminatory practices" than the ICRA this "should not be confused with authority to grant private rights of action..." Slip op. at 18. Notably, the Court recognizes the right of "the local civil rights commission to have authority to issue a right-to-sue letter under the ICRA when a complaint is referred to it by the ICRC." Slip op. at 19; *see Gray v. Kinseth Corp,* 636 N.W.2d 100, 101 (Iowa 2001)(when case has been referred the local can issue state Act RTS). This is different, however, than issuing a RTS under the ordinance to enforce a right only provided for in the ordinance.

[Iowa Court of Appeals Decisions]

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

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

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

In this disability discrimination case the fighting issue was whether the Plaintiff was disabled. In the first trial the district court, after hearing the evidence, found the Plaintiff was not disabled since "squatting and kneeling" is not a major life activity. The Court of Appeals in an earlier appeal reversed and remanded because "squatting and kneeling" is a major life activities. On remand the case was submitted on the previous record and the State lost. The State appeals arguing that the Court of Appeals did not *really* mean that "squatting and kneeling" is a major life

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

Dix v Casey's General Stores, **No. 18-1464 (Iowa App. 1-9-2020)**
https://www.iowacourts.gov/courtcases/7767/embed/CourtAppealsOpinion

In this drug testing case the most interesting issue is the scope of 730.5(11)'s immunity provision: "A cause of action shall not arise against an employer who has established a policy and initiated a testing program in accordance with the testing and policy safeguards provided for under this section, for any of the following... Testing or taking action based on the results of a positive drug or alcohol test result, indicating the presence of drugs or alcohol, in good faith,[5] or on the refusal of an employee or prospective employee to submit to a drug or alcohol test." The Court read the immunity as only immunizing employers from actions of third parties that may violate the statute, for example, negligence in the interpretation of results by a medical review officer. "[I]t is reasonable to construe section 730.5(11)(a) as inoculating employers only from suits arising from third-party conduct [but] the employer would enjoy immunity only if it established a policy and initiated a testing program in line with statutory safeguards, and drug tested or took action based on a positive test, in good faith." Slip op. at 13.

The next issue is whether it is the job environment that renders a position safety sensitive or the job duties. The Court found that the job duties determine whether a position is safety sensitive, and merely because a worker may be injured by someone *else's* poor performance of a safety sensitive function does not make the every one exposed to the hazard of unsafe co-workers into safety sensitive workers. Quoting from the district Court, the Court explained: "[T]he fact that a light-duty warehouse employee (or a human resources employee) is injured in the warehouse when struck by an errant forklift driver does not make the former a safety-sensitive position. It is the operation of the forklift that makes its driver a safety-sensitive position, not the environment in which it is operated." Slip op. at 15.

Casey's fall back was that although it violated its policy by testing employees outside safety sensitive positions this was not a violation of statute since the statute allowed designating all workers on the job site. The Court of Appeals rejected this because "[e]mployers can only test 'within the terms of a written policy.'" Slip op. at 17.

Further review has been granted and the case has been submitted to the Iowa Supreme Court.

***Woods v Charles Gabus Ford,* No. 19-0002 (Iowa App. 1-9-2020)**
https://www.iowacourts.gov/courtcases/8395/embed/CourtAppealsOpinion

In another drug testing case the Court decided the same day as *Dix* the Court takes up several particular provisions of Code §730.5. First the Court rules that the Employer substantially complied with the requirement that the employer notify the "employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample..." The Court found this even though the employer sent the mail certified mail, with tracking, but **not** return receipt requested. "[T]he fact that the notice was sent by certified mail that gave the notice the requisite cachet of importance. Woods was indeed alerted to a serious situation. A return receipt request would add nothing more. We therefore find no error..." Slip op. at 7, Next, as almost everyone seems to do, the Plaintiff argued the employer did not comply with the training requirements of §730.5(9)(h). This claim was based on the argument that the employer has the burden of proving compliance, and that no proof on this was put on during trial. The Court rejected this approach. "[N]othing in section 730.5 places an affirmative burden upon an employer to defend non-existent claims of wrong doing. The training claim was not raised in Woods's petition. The claim was not raised in Woods's trial brief. The claim was not raised during trial. Without a specific claim that Gabus Ford did not provide the requisite section 730.5 training, Gabus Ford was not on notice it needed to prove it..." Slip op. at 7. The Court did find for the Plaintiff on the notice regarding the cost of confirmatory testing. The employer omitted the probable cost of the confirmatory test in the notice, but did tell the plaintiff he would be reimbursed. The employer thus argued that this was substantial compliance since an innocent worker would get the money back and ultimately not have any out of pocket expense. The Court disagreed. "Even though Woods was alerted he would be reimbursed if the second test was negative for drug use, there is nothing to show the cost would be minimal. For an employee just fired, alerting the employee that he had to pay for a second test without stating the cost did not give Woods 'a meaningful opportunity to consider whether to undertake a confirmatory test.'" Slip op. at 9.

Further review has been granted and the case has been submitted to the Iowa Supreme Court.

In both *Dix* and *Woods* the Court refers to the "byzantine provisions" of Iowa Code §730.5. This is perhaps a slander on the courtly procedures of medieval Constantinople.

***Heyland v Des Moines County*, No. 19-0479 (Iowa App. 4/15/2020)**
https://www.iowacourts.gov/courtcases/8904/embed/CourtAppealsOpinion

In this case a courthouse security officer brings defamation and whistleblower claims against the county attorney. The big problem with the whistleblower claims is that the county attorney is not generally in a position to take adverse employment action against a courthouse worker. But the Plaintiff tried the theory that he could bring a claim for emotional distress caused by violation of his statutory whistleblower

protection. But the statute, §70A.29, states that a person cannot "discharge an employee from or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position in employment..." This means some adverse employment action is required to state a statutory whistleblower claim, and there is no independent claim for retaliatory infliction of emotional distress. Since Heyland failed to show he was discharged or that someone took or failed to take action regarding his appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position in employment he could not prevail under the statute.

***Watkins v City of Des Moines*, No. 19-1511 (Iowa App. 6/3/2020)**
https://www.iowacourts.gov/courtcases/9411/embed/CourtAppealsOpinion

The Court of Appeals reverses in part a grant of summary judgment in a racial discrimination case. The Plaintiff brought harassment, and failure to promote claims. The Court denied the harassment claims, but found a triable issue on harassment. The plaintiff presented evidence that a superior who was on the panel deciding the promotion had earlier that year used the word "monkey" to refer to the Plaintiff, and had laughed later the same day when someone threw a banana peel on the floor next to Plaintiff. Another member of the panel, some three years after the decision not to promote, and referred to a city crew as suffering from "Step and Fetch It syndrome." Other incidents relevant to the harassment claim including a rag doll found hanging in in a supply shed, about 8 years before the promotion denial. The employer ordered sensitivity training after the incident. Later that year the public works director remarked, in response to a question to Plaintiff about operating a cement truck, that "If he doesn't run it, we're going to hang him." The Plaintiff also complained of different treatment in equipment and training received, based on race. In analyzing the promotion issue the Court noted the hiring decision had both objective and subjective components. The City, citing to 8th Circuit precedent, argued "where the employer does not rely exclusively on subjective criteria, but also on objective criteria, the use of subjective considerations does not give rise to an inference of discrimination." Slip op. at 11. The Court of appealed sifted through this by observing that whereas the preferred candidate scored better by one objective criterion (testing), the Plaintiff scored better on the other (education and experience). This is why the deposition testimony showed that the subjective interview score was so important. In fact the testimony was that the "sole basis" for the decision was the interview score. The Court thus found "the city relied exclusively on the subjective interview process to reach its promotion decision. Because subjective considerations are "easily fabricated," the interview process here may give rise to an inference of discrimination." Slip op. at 12. This inference was bolstered by discriminatory statements made by the decision makers. In a remark never to be seen in the Eighth Circuit the Court observed about the Stepin Fetchit comment "We understand Thies made the comment more than two years after the interviews. But that timing does not erase its potency." Slip op. at 13. As for harassment the main problem with the span of years. The Court ruled that the "smattering of other conduct that Watkins considered harassing did not happen with enough frequency to create a hostile work environment, as that term has been defined." Slip op. at 16.

***Deters v International Union, Security, Police And Fire Professionals Of America,*, No. 20-0262 (Iowa App. 10/21/2020)**
https://www.iowacourts.gov/courtcases/10902/embed/CourtAppealsOpinion

The defense appeals a plaintiff verdict in an age discrimination case. The primary argument of the defense was that "the district court abused its discretion by sustaining the plaintiffs' relevance objections when the union solicited the opinion of their coworkers about the discriminatory nature of the rebidding process." Slip op. at 2. The Defense has asked witnesses three questions which would elicit the opinion of a couple union member about whether they thought age discrimination was present in the rebidding process. The Court agreed with the District Court that "it was irrelevant to the union's defense whether Lingelbach and Kepley believed that the shift-rebidding procedure discriminated based on age." Slip op. at 6. The Union challenged this idea by arguing the importance of treatment given to similarly situated employees. The Court recognized that *treatment* of the similarly situated workers is one thing, but the *opinion* of those workers about the intent of the employer is something else altogether. "The opinions of similarly situated employees about the policy itself do not make it more or less probable that the plaintiffs suffered discrimination based on their age." Slip op. at 6. The Court also found that the testimony sought impermissible lay opinion about the issue to be decided by the jury. "the district court here did not prevent the union from asking Lingelbach and Kepley whether they observed any discriminatory acts in the workplace. Rather, the court blocked the union from asking those lay witnesses for their opinion on the question before the jury: whether the union's action in implementing a new shift-bidding process discriminated against older workers. That testimony would have been both irrelevant and improper lay opinion." Slip op. at 7-8.

EIGHTH CIRCUIT CASES

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

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

Garrison v. Dolgencorp, (8th Cir. 10/3/2019)(Stras, Author, Smith, Benton) (181066P.pdf) – The Plaintiff suffered from anxiety, migraines, and depression. She requested a leave of absence from her lead sales job at Dollar General. Her supervisor said she thought no leave was available, and that if the Plaintiff continued to miss shifts she could not remain in her full-time lead position. The next week the Plaintiff went to the emergency room for gastritis and anxiety. She requested the rest of the week off but was denied because the other employees with keys were scheduled to be gone. The Plaintiff then quit for her health. The Plaintiff sued claiming a failure to accommodate under the ADA, and FMLA retaliation. The district court granted summary judgement but the Court of Appeals affirmed only on the FMLA claim. On the ADA claim the only close issue was whether the Plaintiff had put the Employer on notice of her request for accommodation. Even though the Plaintiff never "used the word accommodation or asked about anything other than leave" the Court emphasized that it "is not limited to the precise words spoken by the

employee at the time of the request, and an employee need not even suggest what accommodation might be appropriate to have an actionable claim." Slip op. at 5. The Court found a jury issue where the Employer was aware of the disability, and the worker had asked for leave no less than four times. The Court also found a failure to engage in the interactive process of accommodation. Key was that the Employer acknowledged that it would have protected the Plaintiff's job and given her leave had she requested under the FMLA. "So it stands to reason that Dollar General could have found a way to make leave (or some other reasonable accommodation) work under the ADA too had [the supervisor] considered it." Slip op. at 6. The ruling on retaliation/constructive discharge makes a distinction that may be important going forward. The Court found that the decision to quit was not based on the employer's actions. "Rather, assuming that Garrison is sincere in her belief that she 'ha[d] to quit . . . to get better,' the reason would have been her worsening medical condition, not any intolerable working conditions that Dollar General itself created." Slip op. at 8. This was so even though she would not have had to quit if she had been accommodated. On the FMLA request the Court found the claim doomed by the failure to follow the employer's leave procedures. The Court found that telling the Plaintiff leave was probably not available was not an "unusual circumstance" excusing this failure to take the request further.

Rinchuso v. Brookshire Grocery Company, (8th Cir. 12/09/2019) (182494P.pdf) (Erickson, Author, Smith, Wollman) – The Plaintiff claims sex discrimination in his firing. He was fired for the stated reason of viewing pornography on his computer while at work. Given the good-faith defense it is not surprising that the Court ruled "The lack of conclusive evidence of Rinchuso's violations is insufficient to prove that Brookshire fired him with discriminatory intent where interviews with Rinchuso's coworkers and his own admissions provide a good-faith basis for termination." Slip op. at 5. As unsympathetic as the Plaintiff is, cases like this do seem to raise the specter of using the good-faith belief defense as a way of resolving credibility issues in favor of the *moving* party.

Rinchuso v. Brookshire Grocery Company, (8th Cir. 12/132019) (183230P.pdf) (Gruender, Author, Kelly, Erickson) – In this USERRA case the Plaintiff alleges his employer terminated him in retaliation for his military service and exercise of rights protected under USERRA. After an argument with his supervisor the Plaintiff requested a break to manage his PTSD. He was instead sent home, and fired four days later. As an initial matter the Court observes that "being ridiculed, belittled, and demeaned is by itself not actionable under USERRA." Slip op. at 4. The inference of discrimination in the discharge was weakened by the facts that the Plaintiff was hired more than four years after he retired from active duty. That the termination was triggered by the final exchange, in which the Plaintiff admittedly lost his temper with his supervisor, was not evidence of retaliation notwithstanding the request for a break to manage PTSD. This was because the Plaintiff admits "that his supervisor had no issue providing this accommodation and made no mention of McConnell's military status or need for accommodations during either the December 2014 call or the subsequent conversation in which Anixter fired him." Slip op. at 6.

Dakota, MN & Eastern Railroad v. U.S. Department of Labor, (8th Cir. 1/30/20) (182888P.pdf) (Loken, Author, Shepherd and Stras) - In a Federal Railway Safety Act case alleging retaliation for reporting an injury the Circuit Court reaffirms its rule that the contributing factor that an

employee must prove is intentional retaliation prompted by the employee engaging in protected activity. This means that a causal link is not enough. Specifically, just because an employer learns about an employee's conduct warranting discipline in a protected injury report this does not mean the employer is prohibited from taking action on that conduct. Here, the employees got into a fight, and later reported an injury because of the fight. Both were disciplined, one for the assault and one for delay in reporting. The federal OSHA found retaliation for making a protected injury report because the employer would not have learned of the misconduct without the report. This concept on retaliation had been rejected by the 8th Circuit already. In short, this "chain-of-events theory of causation is contrary to judicial precedent" and it is retaliatory motive that must have the causal connection, not merely the fact of a report.

Paskert v. Brent Burns, (8th Cir. 02/13/2020) (183623P.pdf) (Grasz, Author, Smith, Stras) - In this Iowa case a sex harassment and retaliation case is dismissed on summary judgment. The Plaintiff's supervisor "treatment of women was demeaning, sexually suggestive, and improper," Slip op. at 3, but not harassment according to this panel. This is because "Paskert only alleges one instance of unwelcome physical contact, one or two statements where Burns stated he could 'have Paskert,' and several statements about how he never should have hired a female and wanted to make Paskert cry." Slip op. at 6. On retaliation the case was disposed of for failure to exhaust. The notorious ICRC questionnaire figures prominently in the case:

> Question 18 of the ICRC Complaint Form asked, "If you have previously complained to anyone within the organization or the ICRC or reported discrimination or participated as a witness, do you believe you have suffered an adverse action or been treated differently since you complained about discrimination?" The subpart to this question specifically asked, "If yes, how were you retaliated against and by whom?" Paskert left both portions of Question 18 blank and did not specifically allege retaliation in any other portion of her ICRC complaint.

Slip op. at 7. The responses to narrative portions of the complaint were insufficient because they did not link the complaints of treatment to the discharge decision. "Because Paskert failed to answer Question 18, which directly asked about retaliation, and also failed to separately allege a retaliation claim before the ICRC, we conclude there was no distinctly-alleged retaliation claim before the ICRC." Slip op at 8.

Henry v. J. Johnson, (8th Cir. 02/20/2020) (183298P.pdf) (Grasz, Author, Shepherd, Kobes) – In this First Amendment retaliation case the Court affirms summary judgment based on the *Pickering* test. That test requires a balancing of the interests of the employee as a citizen commenting on public matters and the interests of the governmental employer in promoting the efficiency of its public services. Factors considered include "(1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of

public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties." Slip op. at 9. Here the Plaintiff was a state patrol officer, and his comments relate to the death of Iowan Brandon Ellingson who drowned while in custody of the Highway Patrol while on the Lake of the Ozarks. The speech in question include testimony before the legislature, and a deposition (collectively the "testimonial speech"). Also the Plaintiff spoke numerous times to the press and the decedent's family about what he said was a coverup by the patrol. He posted such comments, including speculation about corruption of the special prosecutor, on his Facebook page. The Court of Appeals, naturally, found the testimonial speech to be protected. The non-testimonial speech, however, was not. This was primarily because the Plaintiff was a law enforcement officer who needed to have a high level of trust with co-workers (and prosecutors) and because he spread unsubstantiated information by repeatedly speaking to a news reporter and on social media. The lawsuit was dismissed, even though some of the speech was protected, on causality. In short, "testimonial speech was not a substantial or motivating factor in the adverse employment actions against Henry." Slip op. at 13.

Bharadwaj v. Mid Dakota Clinic, (8th Cir. 04/03/2020) (182467P.pdf) (Stras, Author, Loken Shepherd) – A staff oncologist bring racial & disability, and claims for his discharge. The Employer cites an inability to get along for the decision, and the Plaintiff alleges pretext. The Court classifies the claims of pretext into "shifting-explanations evidence," "false-explanations evidence" and "others-were-treated-better evidence." On the first two the Court found no issue was generated on the claim. The Employer did not shift its explanations in any meaningful way, and any falsity issue that was generated was over unimportant details. On the comparative evidence, "This evidence fails for a different, more obvious reason. Dr. Bharadwaj cannot identify anyone else who engaged in the same conduct without any mitigating or distinguishing circumstances." Slip op. at 5. The retaliation claim was more interesting. The Plaintiff complained about certain racial comments made by a nurse, and claims he was fired for complaining. As he has no direct evidence he would fall back on the same circumstantial evidence already found insufficient. But he cites to the fact that another worker complained about the treatment of the Plaintiff, was fired, and got a million dollar verdict. He thus claims a pattern of retaliation discrimination. "To be sure, we sometimes allow plaintiffs to introduce evidence of discrimination against other employees to bolster their own claims. … But the question here is not admissibility, but rather whether the evidence could lead a reasonable jury to conclude that Mid Dakota's strong legitimate nondiscriminatory justification for its actions was a pretext for retaliation." Slip op. at 7. The Court found that the strong evidence of the legitimate reasons for the discharge was not overcome. In the Court's view, Dr. Roswick's action of writing a letter to the Board complaining of harsh treatment of the Plaintiff based on race is very different from the Plaintiff's own complaints about racial remarks made to him at work. "Retaliation against one employee is insufficient, standing alone, to prove retaliation against another employee when the underlying activity is so different." Slip op. at 8.

Couch v. American Bottling Company (8th Cir. 04/16/2020) (183648P.pdf) (Stras, Author, with Loken and Grasz) - In this Iowa case a 17 year employee who became plant manager with Dr. Pepper claims he was fired in retaliation for opposing discrimination. His troubles started around the same time that Dr. Pepper hired new management. At one point he had a

meeting with new management concerning an internal investigation involving the Plaintiff's wife (who is a Latina), which the Plaintiff has resolved in his wife's favor. The Plaintiff refused to discuss it, said it had already been resolved, and asked why it had come up. The supervisor, for unidentified reasons, warned Plaintiff that he "had better not accuse him of discrimination or else their working relationship would suffer." Slip op. at 2. The Plaintiff reacted with a charge of discrimination. Shortly after this the Plaintiff received his first ever poor performance review. The Plaintiff became angry during the meeting over the review, and was fired for it. The Court of Appeals found timing unconvincing because at the time the charge was filed the review had *already* been scheduled. Further this was this supervisor's first review of the Plaintiff, so "any potential inference of discrimination…is weakened substantially by another rational explanation: the shifting expectations of a different supervisor." Slip op. at 6.

Sherman v. Berkadia Commercial Mortgage, (8th Cir. 04/14/2020) (191373P.pdf) (Erickson, Author, Colloton, Shepherd) - The Plaintiff claims he was improperly terminated in retaliation for actions protected by the Missouri False Claims Act. The case failed of proof of discriminatory intent. Notably this act requires that the discharge be motivated "solely by" retaliation. This meant even though there was some evidence of retaliatory intent the fact that "there is also evidence that Sherman's supervisors disapproved of other parts of his job performance" was sufficient to grant summary judgment to the defense.

Carter v. Pulaski CO Special School Dist, (8th Cir. 04/24/2020) (191426P.pdf) (Benton, Author, Grasz, Stras) - An African-American woman claims her contract to supervise school cheer and dance squads was not renewed because of race discrimination. The three reasons given by the Employer were decline in participation (27 to 20) over the last year, inappropriate dance routines, and disruptive behavior by cheerleaders which the Plaintiff had not tried to quell. The Plaintiff pointed to a vulgar routine that a white leader had allowed in the past, Plaintiff had complained about, but no action resulted. This was not enough because the Plaintiff had multiple complaint and the comparator only one (the Plaintiff) and the Plaintiff had the two other problems not present in the comparator. The Plaintiff argued these were bogus reasons, citing the fact that the district renewed her contract after the conduct complaints of the year before. But the incident was clearly serious - the cheerleaders were prohibited from participating in the remainder of the tournament they had traveled to be in - and thus could be considered in the termination decision of the next year even though not by itself sufficient to discharge.

Thompson v. Kanabec County, (8th Cir. 05/05/2020) 191456P.pdf)(Erickson, Author, Grasz, Kobes) – The Court grants summary judgment in an FMLA case alleging retaliation and interference claims. The Plaintiff was placed on a paid leave of absence pending an investigation, and while on leave applied for FMLA. She claims interference based on improper notice of rights. But she experienced no prejudice because she was on PTO and "[e]ven if Thompson had received proper notice of her rights and Kanabec County acted immediately on her FMLA request, Kanabec County would have required Thompson to exhaust her PTO before placing her on unpaid leave, [and b]ecause Thompson was on PTO when she requested FMLA and remained on PTO until she resigned…" Slip op. at 8. The centerpiece of the retaliation/discrimination claim was an email from a non-Board member,

without termination authority, that he was "fed up" with the Plaintiff, and that "the sooner we are finished the better," after Plaintiff had submitted medical documentation. Since this staff member was not on the Board, and did not vote personnel issues, the Court did not regard this as direct evidence of discrimination. The biggest flaw in the indirect evidence of discrimination was that the Plaintiff was placed on leave the day the County discovered that she was the subject of a child-protection investigation. A month later she was told the recommendation was termination, but a final decision would be made at end of the investigation. It was two weeks later she applied for FMLA. "The undisputed sequence of events does not demonstrate a causal link between Thompson's FMLA request and the Board's decision to proceed with a meeting regarding whether to terminate Thompson's employment. The Board's actions were based on the maltreatment determination, not on Thompson's exercise of FMLA rights." Slip op. at 13.

Main v. Ozark Health Inc, (8th Cir. 05/11/2020) (191393P.pdf) (Shepherd, Author, Colloton, Erickson) – Delving once again into the area of science fiction the Court finds that the Plaintiff did not generate a legitimate issue on whether she had behaved inappropriately at a meeting merely because she submitted evidence from herself, *and others*, that she did not behave inappropriately. As it has in the past the Court conjures up thoughts of the Vulcan Mind Meld, when it says the Plaintiff cannot even get to the jury merely by proving that something didn't happen, but she must instead prove that the defense didn't believe it happened. The Court explains "[w]hile the testimony of other meeting attendees may show that those individuals did not find Main's behavior at the Athena meeting to be rude or inappropriate, that evidence is insufficient to show a genuine issue of material fact exists as to whether Moore, the decisionmaker, truly believed that Main's behavior at the meeting was rude or inappropriate." Slip op. at 8. The Plaintiff tried to argue that the "honest belief" rule only applies when a decisionmaker relies on reports from third parties in taking an adverse employment action. The Court of Appeals denied this limitation. "[W]hile a plaintiff may establish pretext by showing that the employer did not truly believe the employee engaged in the conduct justifying termination, a plaintiff may not establish pretext simply by showing that the employer's 'honest' belief was erroneous, unwise, or even unfair. This is true regardless of whether the employer's explanation is based on first-hand knowledge or third-party reports." Slip op. at 9. The demand for the services of Commander Spock will no doubt increase after such rulings. For the only other possible proof that someone didn't believe that something which didn't happened really did happen, would be direct evidence in the form of an admission and surely the 8th Circuit does not seek to slyly reverse *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000).

Findlator v. Allina Health Clinics, (8th Cir. 05/27/2020) (191142P.pdf) (Erickson, Author, Grasz, Kobes) - A black woman from the UK brings a race and national origin case against her employer over her discharge from her lab tech job. The Employer's stated reason for the discharge was an altercation the Plaintiff had with a white co-worker. The co-worker took off her lab coat and threw it at the Plaintiff, who in turn pushed the co-worker. The Plaintiff was fired, the co-worker placed on final warning. Why the difference is the whole case. The Plaintiff filed a grievance, reinstatement was offered, but she sued instead. First, the Court found that while race was taken into consideration "[t]he record demonstrates that Allina considered Findlator's race only to ensure that any corrective

action was not based on racial discrimination." Slip op. at 4. This left the differential discipline, and the Court found that the difference in throwing a coat and a shove were enough to dismiss the case.

Gibson v. Concrete Equipment Co., Inc., (8th Cir. 06/03/2020) (183009P.pdf) (Gruender, Kelly, Erickson) – A female Plaintiff who was reported multiple times for using sexualized language in violation of the Employer's harassment policy claims harassment and sex discrimination and retaliation in her termination. The sex discrimination claim fails because the Plaintiff could not generate an issue on pretext where none of her proposed comparators had a similar record of complaints. The harassment claim was defeated by the Plaintiff's admission that she "loved it…" This meant she could "not establish a genuine dispute of material fact as to the subjective component of her harassment claim." Slip op. at 7. One of the Plaintiff's allegedly protected complaints was her complaining about race discrimination in the reprimand of a co-worker. Since the write-up of the co-worker was not an adverse employment action, the Plaintiff did not did not have an objectively reasonable basis for believing that a Title VII violation had occurred. Thus the Court found the complaint not to be protected, (notwithstanding that the Plaintiff might have had a honest belief that the co-worker did suffer adverse employment action).

Curtis v. Christian County, Missouri, (8th Cir. 6/26/2020)(191213P.pdf)(Smith, Author, Colloton, Stras) – The Sheriff appeals from the district court's denial of qualified immunity on First Amendment wrongful-discharge claims brought by former Deputy Sheriff. The allegation was that the Sheriff dismissed the plaintiffs solely because of political affiliation. In the 8th Circuit "[a] government employer who dismisses an employee solely on account of the employee's political affiliation violates the First Amendment unless the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Slip op. at 7. The 8th Circuit has extended this analysis for cases where which political affiliation was a motivating factor in the dismissal, rather than the sole factor. This policymaking position defense is not based on titles, but rather "whether political loyalty is an appropriate requirement for the effective performance of the public office involved." Slip op. at 9. When looking at deputies the Court examines the role of a deputy sheriff under state law to determine whether political loyalty is a requirement. Under Missouri law, a deputy sheriff is the alter ego of the sheriff, and their employment is at-will. Further the deputies, of course, assist the sheriff in performing duties, and are law enforcement officers. Finally, the sheriff is liable for the actions of deputies. These factors, which were present in prior cases, cause the Court to hold the deputies were in "policymaking positions for which political loyalty is necessary to an effective job performance." Slip op. at 17. The Court therefore reversed the denial of summary judgment, and grants the defendants qualified immunity.

Williams v. United Parcel Service, Inc. (8th Cir. 06/29/2020) (191004P.pdf) (Kobes, Author, Erickson, Melloy) - In this case the Plaintiff alleges he was demoted because of race and retaliation. The retaliation claims fails because the Plaintiff concedes the decision makers didn't know about his protected activity at the time of the demotion. On the pretext issue in the race discrimination case, a plaintiff again produces evidence that two of the reasons for the decision were objectively and measurably untrue. And once again the United States Court of Appeals for the Eighth Circuit emphasizes that the reality of the plaintiff's job

performance is not all that important: "after-the-fact evidence like this does little to call into question whether the decision makers here honestly believed the asserted grounds at the time of the demotion." Slip op. at 7.

Button v. Dakota, Minnesota & Eastern, (8th Cir. 06/30/2020) (191398P.pdf) (Smith, Author, Colloton, Stras) – Dismissal of a FMLA, and gender bias claim affirmed by the Circuit Court. The Plaintiff first of all tried to get past two defense affidavits as shams. The Court simply found that any conflict between affidavit and testimony was not sufficient to make them shams. "Excluding the affidavit is limited to situations where the conflicts between the deposition and affidavit raise only sham issues." Slip op. at 7. The Plaintiff next uses a remark by a company supervisor that "the Kansas City desk was no place for a woman." This person was not the Plaintiff's supervisor and had no role in the RIF that resulted in the job separation. Thus it was not even indirect evidence of discrimination since no reasonable inference links this statement to the reduction in force. Slip op. at 11. Once again when faced with a claim of shifting reasons for the decision the Court finds the reasons did not shift, they "expanded." Slip op. at 12. The Plaintiff experienced similar lack of evidence on the FMLA claim, most notably that while some people who had taken FMLA got RIF'ed others who had taken FMLA had not been.

Yearns v. Koss Construction Company, (8th Cir. 07/01/2020) (191316P.pdf) (Shepherd, Author, Gruender, Wollman) - The Plaintiff failed to generate jury issue on retaliatory motive in violation of the EPA. The Plaintiff tried to show that there was not a lack of work that caused her to be terminated. Her purported proof was the hiring of another worker in the same position right after the Plaintiff left. "While immediately replacing a former employee may serve to rebut an employer's proffered reason that there was a lack of work for the former employee," the Plaintiff simply did not present enough proof that she was actually replaced. Slip op. at 7.

Pribyl v. County of Wright, (8th Cir. 07/13/2020) (183743P.pdf)(Kelly, Author, Loken, Benton) - The Plaintiff alleges sex discrimination in the failure to promote her. The Plaintiff worked in the Sheriff's office and applied to be a sergeant. She had bachelor's degree, a master's degree, and over twenty years of law enforcement experience. A man with less education and experience was hired instead. The fighting issue is whether defendant's proffered non-discriminatory reason for its decision - plaintiff's interview - was a pretext for discrimination. It was some rather offbeat responses to interview questions that kept the Plaintiff off the finalist list, and all three panelists had noted the same answers as being concerning. The Sheriff hired from this list, even though he could have considered others, because he was satisfied with the quality of the candidates. In deposition the Sheriff, who was the ultimate decision maker, opinioned that that a woman would likely not return to work after taking leave to give birth. But as the Sheriff selected from a list that did not have the Plaintiff on it, he had no occasion to act on this attitude, and so this did not prove discrimination.

Neylon v. BNSF Railway Company, (8th Cir. 07/31/2020) (192905P.pdf) (Benton, Author, Colloton, and Williams, District Judge) – In a Federal Railway Safety Act case alleging retaliation for reporting an injury the Plaintiff alleged that being fired for late reporting of an injury was causally related to the injury, and thus illegal. Citing to precedent (and common sense, one supposes) the Court reiterated that the "contributing factor that an employee must prove is intentional retaliation prompted by

the employee engaging in protected activity." Slip op. at 6. This means "he must demonstrate more than a mere factual connection between his injury report and his discipline in order to establish a prima facie case under the contributing-factor standard." Slip op. at 9. Fundamentally, the 17-month delay in reporting was too much for the plaintiff to overcome. The Plaintiff's attempt to do so with 5-year-old comments by someone whose name he does not recall, and the fact that the employer had a workplace safety rewards program, was not enough, and summary judgment was affirmed.

McKey v. U.S. Bank National Association, (8th Cir. 10/23/2020) (192638P.pdf) (Kobes, Author, Gruender, Wollman) - In this rather routine age and retaliation claim the Court picks off one by one asserted evidence of pretext. While the eight younger comparators all held the same title, there were different ranks within the title. Since the Plaintiff did not identify the duties of five of them the Court did not consider the five. The remaining three all were of different rank or had different duties than the Plaintiff. They were not similarly situated in all relevant respects. A lack of evidence that the supervisors knew of the discrimination report by the Plaintiff before deciding to fire her doomed the retaliation case.

Non-Summary Judgment/Verdict Review Cases

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

Johnson v. Humphreys, (8th Cir. 02/04/2020) (183578P.pdf) (Kobes, Author, Shepherd and Grasz) - The Labor Management Relations Act completely

preempted plaintiff's action alleging defendants fired him because of his race in violation of the Arkansas Civil Rights Act of 1993. "The LMRA completely preempts only claims founded directly on rights created by collective-bargaining agreements and claims substantially dependent on analysis of a collective-bargaining agreement. A claim is substantially dependent on the CBA if it requires the interpretation of some specific provision of a CBA. To determine if a claim requires interpreting the CBA, we begin with what a plaintiff must prove." Slip op. at 4. Following its precedent of *Boldt v. Northern States Power Company*, 904 F.3d 586 (8th Cir 2018) the Court found that most cases of "indirect" cases of discrimination which require the Plaintiff to prove he or she was meeting the employer's expectations are pre-empted by the LMRA. This is because if the CBA sets out what would be acceptable expectations by the employer then the plaintiff must prove compliance with the CBA as part of the discrimination case. In this case UPS fired the plaintiff after he made a "free fall" delivery – dropped stuff at the delivery site. The worker at the site complained of damage, the plaintiff claims the worker approved the free fall, and the employer investigated. The Employer determined it was an incident of "extreme seriousness" and terminated. Back to preemption the Court found that the decision whether Plaintiff was meeting the Employer's legitimate expectation "required, among other things, analysis of whether the CBA or its incorporated policies allow drivers to 'free fall' deliveries under the circumstances alleged in the complaint. Additionally,…whether Johnson's offense was one of 'extreme seriousness,' a term unique to the CBA, is inextricably bound up in the prima facie case." Slip op. at 5. The state suit was thus totally preempted.

Cook v. George's, Inc., (8th Cir. 03/11/2020) (183294P.pdf) (Melloy, Author, Kelly, Stras) – After the dismissal of an ADA claim on the pleadings the 8th Circuit reinstates the case. The Plaintiff had physical and mental limitation, but performed work for the Defendant with accommodations. He left the job and applied for rehire later. According to the Petition the Defendant and placed a code on Plaintiff's file saying do not hire due to medical issues. An interview was scheduled, but the Plaintiff missed it. He tried to reschedule but they would not. He alleged others who missed interviews were able to get rescheduled. The district court dismissed on the theory that the missed interview was a legitimate reason not to hire and so the pleading did not satisfy a *prima facie* case of discrimination. Citing to *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) the Court reiterated that the *prima facie* case was not applicable at this point. Instead the issue was whether the complaint alleged sufficient facts to state a facially plausible claim to relief. Here the Plaintiff alleged specific mental and physical impairment, he described their effects, and pleads he had done the job with accommodation. "Whether this can support a determination that Cook is a 'qualified individual' under the ADA must be left to a later stage in the litigation." Slip op. at 6-7. Moreover, "in detail, Cook alleges that managerial staff at George's documented Cook's disability through code '333' and instructed HR employees to not hire Cook on that basis. Cook alleges that based on these instructions, and code '333,' George's would not rehire him, or even reschedule his interview." Slip op. at 7. This was enough to plausibly allege discrimination.

Liscomb v. Henry Boyce, (8th Cir. 04/03/2020) (181314P.pdf) (Smith, Author, Beam, Erickson) – A former canine officer at the Sherriff's office was not hired by the prosecutor's office allegedly because he sought unpaid overtime after his termination by the Sheriff. He claimed, among other

things, retaliation in violation of the FLSA. The Court of Appeals found that the FLSA anti-retaliation provision does not cover prospective employees. "The FLSA provides that 'the term *employee* means any individual employed by an employer,' and no exception to that definition applies here. …Prospective employees are not 'employed by an employer,' so they do not satisfy the FLSA's definition of an employee. Thus as a prospective employee, Liscomb does not satisfy the definition and has no claim under the FLSA's retaliation provision." Slip op. at 5.