DRAKE GENERAL PRACTICE REVIEW
EMPLOYMENT LAW CASE UPDATE

2016-17 EMPLOYMENT LAW UPDATE

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SUPREME COURT CASES

Green v. Brennan., Postmaster General No. 14–613 (USCC 5/23/2016)

(https://www.supremecourt.gov/opinions/15pdf/14-613_15gm.pdf)

After allegations of racially discriminatory refusal to promote made by the Plaintiff, the Employer charged him with the crime of delaying the mail (as if anyone would notice). The Plaintiff then negotiated an agreement that in exchange for the PO not pursuing criminal charges the Plaintiff would retire or accept a demotion. The agreement was reached about three months before the Plaintiff signed paperwork resigning. He brought suit alleging constructive discharge and the issue was the timeliness given the short deadlines applicable to federal employees. The circuit court ran the limitations period from the date the paperwork was signed. The Supreme Court reversed on a 6-1 vote with Justice Alito concurring in the judgment.

The question is this case very much involves the "inevitable consequence" doctrine developed under *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U. S. 618 (2007), *Delaware State College v. Ricks*, 449 U. S. 250 and *United Air Lines, Inc. v. Evans*, 431 U. S. 553 (1977). Under this doctrine the limitation period once the discriminatory event occurs and is not lengthened by consequences of that discriminatory event. For example, in *Ricks* the discriminatory refusal to offer a terminal contract triggered the filing period not the inevitable end of that terminal contract. " Green's resignation, by contrast, is not merely an inevitable consequence of the discrimination he suffered; it is an essential part of his constructive-discharge claim. That is, Green could not sue for constructive discharge until he actually resigned." Slip op. at 13. Instead the general rule is that "a limitations period commences when the plaintiff has a complete and present cause of action." Slip op. at 5. A complete and present cause of action does not exist until the plaintiff can sue and obtain relief. Slip op. at 5-6. In a constructive discharge case this does not happen until the resignation takes place, just as in an ordinary discharge case a wrongful discharge action does not accrue until the actual discharge. As the Court explained:

> A claim of constructive discharge therefore has two basic elements. A plaintiff must prove first that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign. [*Suders*], at 148. But he must also show that he actually resigned. Ibid. ("A

> constructive discharge involves both an employee's decision to leave and precipitating conduct . . .” (emphasis added)). In other words, an employee cannot bring a constructive-discharge claim until he is constructively discharged. Only after both elements are satisfied can he file suit to obtain relief.

Slip op. at 7. This being the case the cause of action was not "complete and present" until the Plaintiff actually resigned and this is the trigger for the limitations period.

In footnote 4 the Court explains that while the federal employee filing period has different language than for other workers filing under Title VII the EEOC treats the two as identical. The decision strongly suggests this holding will apply in Title VII cases as well.

Encino Motor Cars v. Navarro No. 15-415 (USCC 6/20/2016)

(https://www.supremecourt.gov/opinions/15pdf/15-415_mlho.pdf)

This case has more to do with federal administrative law than employment law. The effect on employment law is the final ruling and little else. The FLSA has an exemption for “any salesman, parts-man, or mechanic primarily engaged in selling or servicing automobiles” at a covered dealership." For many years DOL rules and handbooks have included "service advisors" in this exemption. Such advisors sell maintenance and repair contracts, but not cars. In 2011 the DOL passed a rule taking away the service advisor exemption, but according to this opinion failed to give adequate reasons for the change. The Court thus instructed the statutory salesman exemption must be construed without giving any weight to the regulation, and remanded for this.

***McClane Co v. EEOC*, No. 15-1248 (USSC 4/3/17)**

https://www.supremecourt.gov/opinions/16pdf/15-1248_new_o7jp.pdf

A charging party claimed discrimination when she went on pregnancy ;eave, returned to the physically demanding job she had done for 8 years, and then could not pass a required fitness for duty test. The EEOC investigated and sought the personal information of workers who had been subjected to the test. The Employer refused, and EEOC sought to enforce its subpoena. The district court refused to enforce the subpoena, and this decision was reviewed *de novo* by the Ninth Circuit, which reversed. On appeal to the USSC the legal issue is whether the decision of the district court concerning a request to enforce a subpoena is reviewed *de novo* or for abuse of discretion. The Supreme Court held unanimously that review is for abuse of discretion, and so it reversed and remanded for consideration under the correct standard [although Justice Ginsburg would have held that the subpoena be enforced as a matter of law].

***Perry v. Merit System Protections Board*, No. 16-399 (USSC 6/23/17)**

https://www.supremecourt.gov/opinions/16pdf/16-399_5436.pdf

In a case of very limited application the Court faces a “mixed case” brought by a federal employee. This is a case where a federal employee appeals an adverse action in part based on a challenge of unlawful discrimination, but also based on violations of protections of the Civil

Service Reform Act of 1978. An unlawful discrimination case is appealed to a US district court after exhausting the administrative process. A challenge based only on violations of the civil service law proceed through the Merit Systems Protection Board and thence to the U.S. Court of Appeals for the Federal Circuit The Supreme Court held that when the MSPB dismisses a "mixed case" on jurisdictional grounds the appeal lies with the district court. So the upshot is mix case dismissed by MSPB on merits, on procedural grounds, or on jurisdictional grounds are all appealed to the district court not to the Federal Circuit.

IOWA APPELLATE COURT CASES

Haskenhoff v. Homeland Energy Solutions, No. 15–0574 (Iowa 6-23-2017)

https://www.iowacourts.gov/media/documents/150574_AFE1331263C34.pdf

Case-In-Tweet: When retaliation 'plays a part' in a decision it is not necessarily a 'motivating factor.' Who knew?

If you ever wonder whether you get your money's worth by having Iowa Supreme Court cases summarized in legal seminars wonder no more. The opinion in this case was 173 pages long, with three separate opinions that need a chart to keep track of. The decision written by Justice Waterman, found on pages 1-73, is supported by Waterman, Mansfield, Zager and an intermittent Cady. Justice Cady's decision, explaining where his mittens is inter, is found on pages 74-80. Then from 81-173 it's the opinion by Appel, supported by Appel, Wiggins, Hecht, and the remaining mittens in Cady's intermittitude. Now the chart, in which I highlight votes that are in a majority:

Holding/Issue	Wa.	M	Z	Cady	A	Wi.	H
A plaintiff may pursue a hostile-work-environment claim against an employer under the Iowa Civil Rights Act based on supervisor harassment under a legal theory of direct negligence and the employer has no Farragher/Ellerth affirmative defense.	Y	Y	Y	Y	Y	Y	Y
In a direct negligence case the employee must establish BOTH (1) that a reasonable employer knew or should have known of the harassment and (2) the Employer failed to take reasonable action to stop the harassment within a reasonable period of time. Thus here remains an issue on remedial efforts, although the failure of the plaintiff to act is no longer the key factor.	Y	Y	Y	Y	≈Y	≈Y	≈Y
Causation standard for retaliation under ICRA is same as for personal characteristic discrimination under ICRA	N	N	N	Y	Y	Y	Y
Standard for causation in retaliation cases is "motivating factor"	N	N	N	Y	Y	Y	Y
"Motivating Factor" means more than "played a part"	NA	NA	NA	Y	N	N	N
An adverse employment action is one that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"	Y	Y	Y	Y	Y	Y	Y
Error on constructive discharge instruction was not harmless because it could have caused confusion between retaliation constructive discharge (where retaliatory motive making conditions intolerable is required) and sexual harassment constructive discharge (where motive beyond sexual harassment is not an element)	Y	Y	Y	Y	N	N	N
The Employer does not have to want the employee to quit in order for plaintiff to prove a constructive discharge case	Y	Y	Y	Y	Y	Y	Y
The determination of whether conditions are intolerable is not proven just by proving that the plaintiff subjectively found them so.	Y	Y	Y	Y	Y	Y	Y
An employer need not *always* be given a chance to correct the situation before a constructive discharge be shown	N	N	N	Y	Y	Y	Y
No error for the Court to allow an expert to testify on the requirements of an effective harassment policy and whether the Employer's system satisfied such requirements.	Y	Y	Y	NA	NA	NA	NA

The Plaintiff was sexually harassed by her supervisor, Howes, and co-workers. After some months of harassment the plaintiff reported her supervisor to the plant manager. Although the Plant Manager wanted to fire Howes the CEO, Wendlend, spoke with the Plaintiff telling her the company was like family and they didn't want to do this to family. In a subsequent meeting with HR the plaintiff said she did not want Howes fired, and the investigation halted. Wendlend later removed the plant manager and elevated Howes to the job. About eight months after the meeting with Wendland the Plaintiff overheard Howes say in reference to her, "Yep, she's getting married. And for a good reason (pause) for money." Slip op. at 5. The Plaintiff became upset and "walked into the control room and told another employee, 'Okay. Kevin is a [f&#%!@"g] asshole. I am leaving. I will be back tomorrow.'" Slip op. at 5["&#%!@" in original]. The Plaintiff sent an email to Howes complaining. Howes meanwhile emailed back saying he did not mean to offend, but later that night Howes emailed Wendland, HR, and others sayings he wanted to discipline Howes for calling him names, and for leaving without permission. The Plaintiff met with Howes, and another manager, the next day and apologized for the swearing. Howes described the swearing as insubordination. The Plaintiff responded by describing harassing behavior from co-workers. Meanwhile the Employer commenced a harassment investigation. So basically two tracks were running, an investigation of harassment, and movement to discipline the Plaintiff over

the cursing and leaving. The Employer warned Howes, and then during a meeting with the Plaintiff explaining the warning to Howes, Howes enters the room and presents Plaintiff with a performance improvement plan. The Plaintiff then quit in short order.

The Plaintiff sued for sexual harassment and retaliatory constructive discharge. After a three week trial the jury awarded 1.4 million dollars, and the Employer appeals raising only slightly fewer than 1.4 million issues.

Direct Negligence Versus Vicarious Liability

The employer tried to get two different instructions one for co-worker negligence ("knew or should have known") and one for supervisors which imposed strict liability but had the affirmative *Faragher/Ellerth* defense. The Plaintiff just wanted to go with negligence for everyone. She proposed "knew or should have known" but without an explicit "and failed to take appropriate and prompt remedial action." The Trial Court went with plaintiff.

The Supreme Court unanimously concluded that supervisor harassment can be addressed either through vicarious liability or through a direct negligence theory. As explained by Justice Waterman "Merely because vicarious liability is available in cases of supervisor harassment does not mean the negligence standard in place before *Ellerth*, *Faragher*, and *Farmland Foods* has been abrogated. To the contrary, *Ellerth* expressly states that the direct negligence standard, set forth in subsection (b) of the Restatement of Agency, remains an alternative ground for establishing employer liability for supervisor harassment…" Slip op. at 23-24. The logic, moreover, is pretty clear. An employer is liable for its own negligence. Slip op. at 26. Being *also* strictly liable for those whose torts are aided by the existence of the employment relationship does not abrogate this general rule. It would make little sense for an employer to be liable under a negligence theory if the harasser is a co-worker, but not liable under strict liability if the harasser has *more* authority.

The negligence theory, however, does encompass the idea that the Employer unreasonably failed to take corrective action. The district court did not instruct on this, and a majority of the Court found this to be error. The dissent on this point doesn't necessarily disagree that such prompt action would negate a finding of negligence, but insists that a general instruction on reasonable care encompasses the failure to take prompt action and so the instruction was no error.

Causation Standard For Retaliation

The next big issue was whether the district court " erroneously adopted the lower 'motivating factor' causation standard used in discriminatory discharge claims ... rather than the higher 'significant factor. causation standard used in retaliatory discharge claims..." Slip op. at 37. Looking to Federal law Justice Waterman would have used the higher standard in retaliation cases. The majority disagreed - sort of.

"[T]he jury was instructed that Haskenhoff need only prove that her report of sexual harassment 'played a part' in HES's decision to take adverse employment action against her to prevail on her retaliation claim. The jury

was further instructed that to 'play a part' the report need only have been "a factor" in HES's employment action but "'need not be the only factor.'" Slip op. at 122-23. Justice Appel's decision basically found this correct, declining to follow federal law for various textual and policy reasons. He questioned whether there is a difference between "substantial factor" and "motivating factor," but in the end found the *DeBoom* motivating factor formulation more accurate. And then we have Justice Cady whose decision on this point is best understood with its quote:

> Nevertheless, the district court instruction modified this standard to only require that the discrimination "played a part." This change in the standard was not justified
>
> In *DeBoom v. Raining Rose, Inc.*, we explained that a motivating factor must only have "played a part" and "need not have been the only reason." 772 N.W.2d 1, 13 (Iowa 2009). Yet, this was only done to aid the jury in applying the standard, not to eliminate the central concept of the standard that the protected activity be a motivating factor in the employer's decision. See id. **A motivating factor is one that helped compel the decision**, and the "played a part" language exists only to clarify that the motivating factor need not be the only factor.

Slip op. at 75-76. Again the instruction was that "The plaintiff's harassment complaints played a part in her treatment if those complaints were a factor in the defendant's employment actions toward her. However, her harassment complaints need not have been the only reason for the defendant's actions." Slip op. at 13. So Justice Cady says a factor "that helped compel the decision" is different than "a factor in the defendant's employment actions towards her." Somehow "helping to compel" a decision is different that "playing a part" in a decision. The only possible explanation for this lexical conundrum seems to be that if the existence of the complaints actually made the employer **more** cautious then those complaints "played a part" albeit in the other direction. This seems farfetched since the jury is instructed concerning what caused the decision to terminate and the usual understanding of "played a part" would not encompass negative factors - we would not saying applying the brakes "played a part" in a wreak just because the braking was an unsuccessful attempt to *prevent* the accident.

Still for plaintiffs the lesson is say the magic words "motivating factor that helped compel the decision" and never again use the words "played" or "part" - or "a."

Constructive Discharge Standard & Chance To Correct

On the constructive discharge instructions the opinions agree that the standard for adverse action is that the action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Slip op. at 76. Everyone agrees, also, that giving examples of adverse actions was error. Justice Cady broke the tie on whether the error was harmless by finding it was not. Significantly Justice Cady objected that the examples included constructive discharge. But constructive discharge can occur as a separate claim " in extreme cases of hostile work environments" or as retaliation " when the employer deliberately makes an

employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Slip op. at 77. These two fact patterns are different theories, and the Plaintiff did not advance a theory of constructive discharge caused by extreme sexual harassment. Thus the example, Justice Cady decided, could have confused the jury with a theory not advanced by the Plaintiff.

Two more points of agreement are set out by Justice Cady: " Both opinions agree that the district court did not err in the constructive discharge instruction by explaining that an employer does not need to want the employee to quit. Both opinions also agree the district court erred by using a subjective standard in the constructive discharge instruction. I concur on both of these issues." Slip op. at 78. On the "subjective standard" Justice Appeal explained " the suggestion in the instruction that constructive discharge may be shown if the employee subjectively believes conditions are intolerable is not in accord with the law." Slip op. at 170.

The big issue on constructive discharge was whether the trial court should have instructed that "conditions will not be considered intolerable unless the employer has been given a reasonable chance to resolve the problem." Slip op. at 170. The answer from Cady and the Appel opinion is "no." Presumably this "no" does not apply in the case of constructive discharge caused by "extreme" harassment as described by Cady. Otherwise we could have a situation where the failure to complain insulates the employer from harassment liability, but not from constructive discharge liability for a quit caused by the harassment. Presumably where the Plaintiff unreasonably fails to take advantage of a complaint process then no court could conclude that it was objectively reasonable to resign. Thus Justice Appeal wrote "That said, the failure of an employee to pursue available remedies with the employer may be evidence for the fact finder to consider in determining whether a work environment was truly so intolerable as to satisfy the requirements of a constructive discharge" and Justice Cady wrote ""At times, it would not be reasonable for an employee to quit without giving the employer a chance to resolve the problem…But, at other times, it would not be reasonable to require an employee to remain in intolerable working conditions... But, at other times, it would not be reasonable to require an employee to remain in intolerable working conditions." Slip op. at 79.

***Godfrey v. State*, No. 15–0695 (Iowa 6-30-2017)**

https://www.iowacourts.gov/media/documents/150695_C9F5D8DC6F6C7.pdf

Case-In-Tweet: Run free oh constitutional plaintiffs yearning for the lush fields of state court! Run free! Let no law restrain your joyous suit! (Almost).

This is the case brought by the former Workers' Compensation Commissioner against the former Governor, and just about all his staff, for forcing out Mr. Godfrey by cutting his pay to the statutory minimum, and for discrimination based on sexual orientation. The basic legal issues are (1) whether there is an implied cause of action for violations of Iowa's constitution, and (2) if so whether such a cause of action can be preempted by the legislature, and (3) whether an existing cause of action can supplant the constitutional one.

The Plaintiff brought suit on four legal theories relevant to the decision: (1) Deprivation of property without due process of law because of partisan politics and/or his sexual orientation (2) Damage to his protected liberty interest in his reputation without due process by falsely claiming poor work performance (3) Denial of equal protection of the by discriminating because of sexual orientation, and (4) the individual defendants deprived him of equal protection of the laws by treating homosexual appointed state officers or homosexual individuals differently than heterosexual appointed state officers or heterosexual individuals. Ultimately, a majority of the Court holds that there can be an implied cause of action for constitutional violations and that the due process claims were improperly dismissed. A majority finds, however, that in the circumstances of this case the Iowa Civil Rights Act provides an adequate remedy and the equal protection counts were properly dismissed.

Implied Cause of Action

Justice Appeal set out the standard for determining if a constitutional provision is self executing, "if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, . . . and it is not self-executing when it merely indicates principles..." Slip op. at 49. The majority (Appeal plus Cady) found both the Iowa due process and equal protection provisions to be self-executing.

Pre-Emption By The ICRA

The Court next took up whether the preemption provision of the ICRA would prevent an implied suit. Common law remedies are generally preempted by the ICRA "when a common law claim requires 'proof of discrimination,'" Slip op. at 57. This said, "The long-settled principle is that a constitution trumps legislative enactments." Slip op. at 58. Based on this idea the Court had little trouble finding pre-emption did not apply. "If we held that a statute might preempt an otherwise valid constitutional action, this would in effect grant ordinary legislation the power to cabin constitutional rights. The Iowa Constitution would no longer be the supreme law of the state....We thus refuse to apply classic preemption doctrine to the question of whether a *Bivens*-type damage remedy is available under the Iowa Constitution." Slip op. at 59.

Adequate Remedy & the ICRA

The Court thus moved on to "whether the court believes the remedy provided by the Iowa Civil Rights Act should be considered sufficiently robust that the court should, as a matter of discretion, decline to allow" an implied cause. The majority here ruled against the plaintiff. The Waterman Three would deny an implied cause of action, and Justice Cady found the ICRA an adequate remedy in this case, even though he would generally otherwise back the Appel Three. The key to Cady's decision was the question of the lack of punitive damages in the ICRA. He found that "when the claimed harm is largely monetary in nature and does not involve any infringement of physical security, privacy, bodily integrity, or the right to participate in government, and instead is against the State in its capacity as an employer, the ICRA exists to vindicate the constitutional right to be free from discrimination." Slip op. at 71. Justice Cady vote thus result in dismissal of the sexual orientation counts against both State and individual defendants.

***Simon Seeding & Sod INC v. Dubuque HRC*, No. 16-1014 (Iowa 5-19-2017)**

https://www.iowacourts.gov/media/documents/161014_C2023DFB3B7E3.pdf

Case-In-Tweet: Company tried to dodge civil rights law by claiming seasonal workers are not "real" employees. Big baby cry "Waaah! I'm too sm-wall!" Loser!

In this puny 48-page decision a unanimous Court takes up how to count workers under the Dubuque anti-discrimination ordinance. The employer was a seasonal landscaping business and was charged with racial discrimination and harassment. The ordinance only covered business who regularly employer four or more people. After a finding by a hearing panel finding discrimination both sides appealed to the full commission. The full commission affirmed but tripled the emotional distress award to $45,000 without explanation.

On appeal to the Supreme Court the first issue was how to count employees. Like the ICRA the ordinance exempts employers " who regularly employs less [sic] than four (4) individuals..." Slip op. at 13. After citing to the law governing local commissions the Court held that " The phrase 'regularly employs' under Dubuque's ordinance therefore must have the same meaning under the ICRA's exemption..." Slip op. at 13-14.

As an initial matter the defense argued numerosity is jurisdictional, and the Court had little trouble rejecting the argument based on the USSC case so holding. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515, 126 S. Ct. 1235, 1245 (2006). Turning to the meat of the matter the Court started with the precedent including the key case of *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207, 117 S. Ct. 660, 664 (1997) which adopted the "payroll test" for federal employee counting. Then the Court turned to the ICRA citing, of course, the usual observation that the ICRA is broadly construed. In construing "regularly" the Court also emphasized that the provision focuses on the action of the employer who "regularly employs" not on the status of the worker as being a "regular employee." The Court thus held " that an employee is counted for purposes of the small-business exemption if that employee has an employment relationship with the employer—that is, if he or she is on the payroll." Slip op. at 27. The Court declined to import the requirement that the worker be employed for twenty weeks since that requirement is the result of express federal statutory language not present in Iowa. The disposition on this issue was thus " Simon Seeding is subject to the Dubuque ordinance if it had four or more employees on its payroll (not counting its owner) during the landscaping season." Slip op. at 32. Notably this is a corporation. Thus the parenthetical exclusion of the "owner" should not be glossed over. The Court takes great pains to construct situations where the workforce could be manipulated to avoid coverage, yet fails to distinguish the business form here from a sole proprietorship or partnership. Can coverage be avoided by being "employee owned" in the sense of stock being part of compensation? If not then we face a case for the future where we must decide who is an uncounted "owner" of a corporation - stock, assets, majority stock, - and what about class shares equally distributed, or S-corporations? Of course, this is not an issue here since there's four even without the owner and the remark may simply end up being ignored in future cases.

The Court upheld the finding of numerosity against a substantial evidence challenge. It was important that proper payroll records had not been kept and that an adverse inference was therefore appropriate.

The remainder of the ruling was a fairly unremarkable application of the law of substantial evidence supporting an agency ruling. It is notable on emotional distress that at the second-level appeal the agency did not have to explain its rationale for tripling the award, and also the Court noted " Stapleton was in a halfway house and suffering from drug addiction relapses. Those stressors could make him more vulnerable to mental trauma from Leo's slurs," slip op. at 41, thus apparently adopting an eggshell skull approach.

***Viafeld v. Engels*, No. 15-1663 (Iowa App.7-27-2016)**

https://www.iowacourts.gov/media/documents/151663_473BB803B1954.pdf

In this unpaid wages claim the employer won because the wages were not actually due. "Engels argues Viafeld failed to pay him wages in the form of unused 'paid time off' that he had accrued prior to his termination." Slip op. at 2. The employer had employee handbooks that described its PTO policy. The policy set out how PTO was calculated and that employees "shall be paid regular pay for all unused accrued leave, providing that they give a proper two weeks['] notice of resignation." Slip op at 2. Where termination was for just cause the CEO decided if unused accrued PTO would be paid.

The Employer fired the Plaintiff while he had 19K in unused PTO, but the employer never paid this. When the Employer eventually sued for breach of contract and fraudulent conversion, the worker countersued for his 19K. The worker won on the main suit, but lost on the countersuit. The countersuit failed because the jury found the termination was for "just cause" and the trial court found this mean the unpaid PTO was not due under the handbook. On appeal the worker argues that the handbook was not a valid contract, and that he never got the thing.

The Court of Appeals agreed the handbook did not create a contract, but this did not alter the outcome. The fact is the law does not require the payment of accrued but unpaid PTO [vacation] unless the employer's policies say that it will pay such amounts upon separation. "Section 91A.2(7)(b) provides an employee is entitled to payment of wages due to an employee 'under an agreement with the employer or under a policy of the employer.'" Slip op. at 5. Since the evidence supported the finding that the worker got the handbook, "[t]here is no evidence of an agreement or employment policy that required Viafield to pay Engels his unused accrued PTO as wages upon termination." and thus the worker failed in his burden of proving that the unpaid wages were actually due.

***Couch v. IDHS*, No. 15-0432 (Iowa App. 10-12-2016)**

https://www.iowacourts.gov/media/documents/150432_9728E12AEC9BA.pdf

After being fired from her job at DHS the plaintiff brought suit claiming race and retaliation discrimination in the discharge, and harassment based on the same.

The Plaintiff was recalled from layoff and Personnel Manager Chris Silberhorn recognized her name as one of the class representatives in a lawsuit that alleged the State of Iowa's employment practices had a discriminatory effect on African-American employees. Silberhorn made repeated comments indicating that it was good the Plaintiff's supervisor was also African-American in the event of discharge. He also said things suggesting that the Plaintiff was destined for termination. After she was indeed terminated she brought suit but got dismissed on summary judgment on her discharge and harassment claims.

On appeal the Court had little trouble finding direct evidence of discrimination is Silberhorn's statements. The case turned on Silberhorn's involvement in the decision. Notably, the Court did not, as the 8th Circuit often does, just take the Employer's word for it that the offending person had no role in the adverse employment action. Instead, it was a matter of reasonable inferences. For example, SilBerhorn had drafted a termination letter. But there was no paper trail showing who had requested the letter. But "Because Silberhorn was able to include what appear to be specific details of Couch's performance in the draft, it is reasonable to infer Gonzales communicated those details to Silberhorn during the same discussion or in others, or that Silberhorn knew the information based on his involvement in the meetings with the income maintenance supervisors. Regardless, one can reasonably conclude Silberhorn had conversations with other management employees about Couch's performance and termination." Slip op at p. 12, n. 7. Such involvement was enough to generate an issue for trial on whether Silberhorn, and with him discrimination, played a role in the termination decision.

On the harassment allegations the Court held that "a reasonable person could find a superior's comments anticipating a new employee's failure based on discriminatory animus or in retaliation for that employee making a civil rights complaint to be severe and humiliating." Slip op. at 16.

***Hollinger v. State*, No. 15-2012 (Iowa App. 12-21-2016)**

https://www.iowacourts.gov/media/documents/152012_DFA285BD71C99.pdf

In this disability discrimination case a Plaintiff verdict was set aside on the ground that the Plaintiff had not proven she had a disability. The Court of Appeals reinstated the verdict.

The Plaintiff worked at Glenwood and was kicked in the knee by a resident. She received permanent restrictions of no squatting, kneeling, or crawling. She was also restricted to an eight-hour workday. "Glenwood did not allow employees with permanent restrictions to work, instead instructing those employees to apply for long-term disability benefits. Once the employees were approved for long-term disability benefits, Glenwood terminated their employment." Slip op. at 2. After being laid off she was to be recalled but ultimately was not because the agency thought she could not be accommodated. In setting aside the verdict the District Court relied on one sentence from *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915 (Iowa 1997) which said that "although Bearshields is totally precluded from squatting and twisting, we do not view these movements as major life activities." Slip op. at 7. The Court of Appeals declared it against public policy to exclude protection from discrimination under Iowa law when federal law would provide that protection. To do so would be to contravene the directive to broadly construe the ICRA. " Because an interpretation of

the ICRA that excludes those impaired from performing acts such as squatting, kneeling, or crawling does not broadly effectuate the purposes of the ICRA, we decline to apply the statement in *Bearshield* relied on by the district court to the case at bar." Slip op. at 11. Further review was denied.

Walmart v. ICRC, No. 15-1691 (Iowa App. 12-21-16)

https://www.iowacourts.gov/media/documents/151691_27E33E7CF3790.pdf

The respondents in a discrimination case moved for summary judgment before the Administrative Law Judge and won. The ICRC representative appealed the dismissal to the full commission. The full commission reversed the grant of summary judgment and remanded to the Administrative Law Judge. The respondents then filed a writ of certiorari. The Court of Appeals affirmed dismissal for failure to exhaust. First, certiorari was plainly the improper means to proceed, and the Court so ruled citing to a spate of cases from nearly forty years ago. Second, the Petitioners had failed to exhaust administrative remedies. "Clearly, administrative remedies have not been exhausted here: the ICRC remanded the case for further proceedings before Davenport and Wal-Mart appealed. Second, review of the final agency action would provide an adequate remedy. It would allow for review of the decision on the merits. This case, no matter how it is labeled, cannot proceed." Slip op. at 3. Finally, the Petitioners objected to the idea of the agency being able to appeal an adverse proposed decision to the full commission. The Court rejected this claim as well, explaining the process has been adopted by regulation and that "[o]ur supreme court has implicitly approved the scheme…" Slip op. at 4.

***Nath v. Pamida*, No. 16-0001 (Iowa App. 1-25-2017)**

https://www.iowacourts.gov/media/documents/160001_BAD21BB7F53D4.pdf

A scene that plays out every day in Wal-Marts and convenience stores across America leads to a lawsuit claiming extortion. The Plaintiff worked at ShopCo and a bottle of water, part of a case worth four dollars and ninety-nine cents, went missing. Loss prevention then leapt into action seeking the nefarious mastermind of the pilfering. Suspicion, followed hard on by accusation, then fell upon the Plaintiff. She was confronted by the long arm of authority, in the person of the Acting Store Manager and a loss prevention leader. Witnesses were invoked, repayment demanded, all in spite of the Plaintiff's denials. The Plaintiff resisted, but the specter of police action, and the attendant and inevitable incarceration, was conjured before her by the imaginative accusers. Whereupon the Plaintiff, who figured it was only five bucks, was finally badgered into submission, signed the proffered paper and handed over a fiver. Consequently the triumphant Acting Store Manager, with a zeal worthy of Javert, fired her for the admitted theft.

The Plaintiff's claim for unemployment benefits was denied by the fact finder and she appealed. The Plaintiff happily produced the witness the Employer had claimed saw the theft. The witness testified she saw no theft, and had not even known who Nath was until the hearing came up. Benefits were, of course, allowed since the Employer never proved any theft by Plaintiff. ALJ Teresa Hillary noted "The claimant, who was 69 years old at the time of the meeting, was badgered by Ms. Simpson until she admitted taking the water and signed the paper put in front of her so she could

leave the store." The ALJ appeared indignant because Employer had told the Plaintiff it had witnesses, but never even interviewed them, and the only witness identified actually didn't witness anything. The administrative law judge wrote: "A coerced alleged 'confession,' especially when accompanied by extortion (the threat to have [the] employee arrested and prosecuted), is not a credible statement of events."

The Plaintiff sued for extortion and lost on summary judgment. In her resistance to summary judgment she tried to use the transcript from her unemployment hearing where the witness denied seeing any theft. The district court would not permit it since Iowa Code §96.6(4) specifies that unemployment findings are not binding in other proceedings. The Court of Appeals held that "[s]tatements made under oath in a prior administrative hearing, particularly when it involves the same parties and similar issues, appear to us to be equivalent to 'pleadings, depositions, answers to interrogatories, and admissions on file,' all of which can be considered in deciding a motion for summary judgment together with affidavits." Slip op. at 9. It was thus error not to consider the transcript in the summary judgment proceedings. Not resolved by this case, because very few people in private practice are aware of it, is Iowa Code §96.11(6)(b)(3): "Information obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review under chapter 17A…. The information may be used by the interested parties in a proceeding under this chapter to the extent necessary for the proper presentation or defense of a claim."

The Court also ruled that since employment is at will the extortion claim would not support a claim for lost wages, and that the Workers' Comp. law did not pre-empt a claim for pain and suffering.

***Fitzgerald v. Hy Vee*, No. 16-0462 (Iowa App. 3-8-2017)**

https://www.iowacourts.gov/media/documents/160462_08539C9504051.pdf

The Court affirms summary judgment for the defense in a case claiming discrimination based on disability. The Plaintiff was terminated for calling a manager the c-word. At the meeting to discuss the termination the Plaintiff mentioned substance abuse issues. They discussed his looking for a transfer before the termination was finalized. The termination was finalized several days later.

The Plaintiff "alleged Hy-Vee discriminated against him due to his disability when it denied an accommodation and benefits and terminated his employment. Fitzgerald identified his disability as '[a]lcohol and chemical addiction' and '[j]oint issues in my knee which led to addiction and abuse of pain killers.'" Slip op. at 9.

While the Plaintiff argued he was terminated after he brought up alcoholism, he did not even identify when he thought the termination was until his reply brief. The Court ruled that he "cannot rely upon mere allegations that his termination from employment occurred after August 31, 2012." On allegations that disability actually motivated the discharge ultimately the Plaintiff's admitted bad actions, and the admitted swift response of Hy Vee doomed his case. The Court also rejected a claim of

failure to accommodate the chemical addictions because the request for accommodation only came after the decision to terminate.

The Plaintiff's failure to accommodate claim, based on his knee injury, was time barred. The Court ruled that " each day that Fitzgerald continued to work without an accommodation is not a 'separately actionable' discriminatory act but the continuing effect of an alleged past discriminatory act—Roberts and Hy-Vee's alleged denial of Fitzgerald's request for an accommodation for his knee injury." Slip op. at 21.

***McCrea v. City of Dubuque*, No. 16-0183 (Iowa App. 3-8-2017)**

https://www.iowacourts.gov/media/documents/160183_362CDE8B7597F.pdf

The Plaintiff brought suit claiming retaliatory discharge and disability discrimination. After a bench trial the Court found for the defense and the Plaintiff appealed. The Court of Appeals affirmed on the claimed retaliation, for asserting FMLA and ICRA rights, because the causal link was not proven. Key was that "The documentation of the concerns increased after McCrea filed her complaint, but the issues themselves were not new, and McCrea had been counseled on the issues multiple times before." Slip op. at 19. Further the complaints tended to be over the application of existing, though harsh rules, and "Poor treatment by an unreasonable boss which is merely harsh, unjust, or rude is not, by itself, legally actionable." Slip op. at 21. Likewise on termination timing alone was not sufficient to show causation. The Court affirmed the finding that anxiety attributable to this single workplace was not sufficient to constitute a protected disability.

***Ackerman v. State*, No. 16-0287 (Iowa App. 5-3-2017)**

https://www.iowacourts.gov/media/documents/160287_BBA3EFBBEDD15.pdf

In this case the Plaintiff worked as an Administrative Law Judge for Iowa Workforce and was fired. She brought suit claiming a common law wrongful discharge and the State moved to dismiss because she had a contract right limiting discharge to "just cause," that is, she was not at-will. The State argued that only at-will employees are able to sue for wrongful discharge in violation of public policy. In a word, the Court of Appeals rejected the argument and reversed dismissal. More detail of the analysis is omitted here since further review has been granted, oral argument was November 13, and the Iowa Supreme Court will be issuing its own decision.

Notably the *Ackerman* case involves a general proposition concerning at-will employees and should be contrasted with arguments of failure to exhaust a termination remedy. Such an exhaustion argument was successfully made last year and resulted in dismissal of suit brought by a trooper who did not appeal his termination to the Employment Appeal Board. *Wright v. State*, No. 15-0782 (Iowa App. 6/15/2016)("Section 80.15 may be considered a special rule governing the discipline and dismissal of most public employees who are members of the DPS."). Judge Tabor was on both panels in *Ackerman* and *Wright.*

***Vetter v. State*, No. 16-0208 (Iowa App.5-17-2017)**

https://www.iowacourts.gov/media/documents/160208_C25ED58E8ED6A.pdf

[further review denied]

The state appeals the award of almost 700K to a disability discrimination plaintiff. After injuring his back at work the Plaintiff underwent a functional capacity exam conducted by the state while the Plaintiff worker there. In reaction to the FCE the state developed possible accommodation for the Plaintiff to do his job as a DNR technician at the state forestry. Unfortunately nobody talked to the Plaintiff when developing the accommodations. Then nobody talked to him about whether he needed the accommodations. Then they fired him because the accommodations he did not ask for and had no input on were too expensive.

The first issue was whether the Plaintiff had a disability. He suffered a back injury which affected his ability to lift, sit, stand, walk, climb, or bend each day as much as the average person. This the Court found sufficient to be a disability. After all the state agreed that the average person could do the job without accommodation and that the Plaintiff needed accommodation to do the job.

As far as the reasons for termination the evidence was stark. "The DNR provided only one reason for terminating Vetter. In the letter terminating his employment, the DNR disclosed that it was discharging Vetter because the cost of accommodating his restrictions would be unduly burdensome. Those permanent restrictions were issued because of Vetter's disability. Therefore, the adverse employment decision was based on Vetter's disability." Slip op. at 15. On failure to accommodate the State argued failure to request accommodation. The Court rule "Vetter was not required to inform the DNR of a disability it already had knowledge of or to request accommodations that the State had been providing." Slip op. at 16-17. Finally, the Court found that the trial court abused its discretion in denying Vetter's request for an award of expenses for scanning, copying, printing, electronic research, long-distance phone charges, mileage, postage, meals, and parking.

The point of the dissent is that the Plaintiff underwent surgery to *correct his impairment* and not just alleviate his limitations and therefore his impairment was "temporary" and thus not a disability. Notably even the dissent was mad at what he called "inept managers."

***Tibodeau v. CDI, LLC*, No. 16-0560 (Iowa App. 6-21-2017)**

https://www.iowacourts.gov/media/documents/160560_B8A6F83A50BE5.pdf

The sexual harassment Plaintiff had pre-existing mental health issues and the district court instructed on the "egg-shell skull" doctrine. After losing the defense appealed. The most significant issue on appeal was the egg-shell skull issue.

"As a general rule, the instruction is applicable when the pain or disability arguably caused by another condition arises after the injury caused by the defendant's fault has lighted up or exacerbated the prior condition." Slip op. at 12. Here the Court found sufficient evidence that "Tibodeau's depression was asymptomatic or dormant when she returned from her leave" to the harassing environment. Slip op. at 13.

***Sedlacek v. University of Iowa*, No. 16-1200 (Iowa App. 6-21-2017)**

https://www.iowacourts.gov/media/documents/161200_2429E873CF438.pdf

The Plaintiff in a disability discrimination suit appeals the grant of summary judgment which was based on the conclusion that the Plaintiff could not generate a genuine issue on whether she was a "qualified individual." She also alleged her termination for attendance violations was retaliatory, and the Court of Appeals affirmed dismissal of that claim as well.

The Court found the long-term failure to be able to come to work was dispositive. "[T]he district court stated the obvious—that 'regular attendance at work is an essential function of employment.'" Slip op. at 9. The Court held that "Because Sedlacek's requested accommodation is in reality a request for open-ended intermittent absences for an indefinite period of time, the requested accommodation is not reasonable." Slip op. at 12. On retaliation much the same reasoning applies since the University "took every reasonable step to make [Sedlacek]'s employment as a Custodian I work out for [Sedlacek], and [Sedlacek]'s inability to meet the attendance requirements of the position was the basis for the termination." Slip op. at 14.

***Plato v. Anderson Erickson*, No. 17-0222 (Iowa App. 8-2-2017)**

https://www.iowacourts.gov/media/documents/170222_8D661108A5979.pdf

In this case alleging discriminatory termination based on sex the Court of Appeals, finding genuine issues of fact, reverses the grant of summary judgment to the defense. The plaintiff worked as an HR administrative assistant and applied for a representative job. She did so at the suggestion of her direct supervisor Stacy Henson. Joel Abbott, the head of HR, did not select the Plaintiff opinion that "he didn't think that the plant environment would be a good environment for a female to work in." Slip op. at 3. The preferred candidate Van Hauen was promoted to Henson's position when she left, and now became the plaintiff's supervisor. But no one told the Plaintiff she reported to Van Hauen and she thought she worked for Abbott. As a result she was not as responsive to Van Hauen as he expected. Van Hauen also disliked the Plaintiff's "attitude," for example correcting him when he introduced her as a receptionist. He fired the Plaintiff, but with no specific triggering event. The Plaintiff brought a sex discrimination case and was dismissed on summary judgment. Analyzing the evidence the Court of Appeals found genuine issues for trial. On the failure to hire claim the Court pointed to the fact that the Plaintiff met the objective criteria, that Abbot indicated to the Plaintiff that she was qualified during the interview, and that Henson thought the Plaintiff was "half-trained" already. The Court also found the "no women in the factory" was not a stray remark. On the termination the Court again focused on Abbot, and found his expressed beliefs about women at the plant was sufficient for a *prima facie* case. As far as pretext the claim was poor performance but this was contradicted by Henson who had supervised the Plaintiff for most of her time at the Employer. Thus there was a genuine issue on whether the reason given for termination was a pretext.

***Cote v. Derby Insurance*, No. 17-0222 (Iowa App. 8-2-2017)**

https://www.iowacourts.gov/media/documents/160558_F3A6CBA50F562.pdf

This case confronts the small employer issue left dangling by *Simon Seeding*: does the "owner" of the closely held corporation count as an employee or is she excluded by the exception. The employer has applied for further review and the issue is of sufficient interest it may be granted. Notably neither the application nor resistance seems to cite the remark on page 32 of *Simon Seeding* "Simon Seeding is subject to the Dubuque ordinance if it had four or more employees on its payroll (not counting its owner)."

The employer is an S-corporation with president and sole shareholder Patricia Dorn, who is married to the alleged harasser Kevin. The claims of harassment alleged repeated instances of exhibitionism including exposure of genitals. The motion for summary judgment included grounds for lack of numerosity and timeliness. It was denied an interlocutory appeal was granted, although the case was assigned to the Court of Appeals.

The defense argued that the term "employer" used in the prescriptive language includes corporations, and so the word "employer" in the phrase "employer's family" found in the exception must also include corporations. The Plaintiff rather sensibly pointed out that corporations are not *really* "people my friend," and do not have families. Citing to insurance law the Court finds convincing cases that find to be void references to family members in policies issued to corporations. Basically, one can argue fictitious legal entities have the same rights as individual human beings but no amount of argument or fiction will endow corporations with the ability to procreate, and no one has ever argued they have the ability to adopt or to marry. Although not discussed there is, of course, something untoward about saying you personally are really the same as the corporation for purposes of the exemption, but limiting liability to corporate assets when it comes time to pay up.

On the timeliness the key was whether the Plaintiff raised a genuine issue of discriminatory incidents occurring with the filing period. The Court found that given the history of exposure, the allegations that the harasser would come into Cote's office early, when no one else was there, and stand with his groin close to her face was sufficient to generate an issue even though the Plaintiff was careful not to look. "Given his repetitious behavior, Cote did not need to confirm that Dorn again had an erection to establish his discriminatory acts constituted a hostile work environment that stretched into the requisite time period." Slip op. at 18.

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

https://www.iowacourts.gov/media/documents/160954_859A0FFD384F8.pdf

A woman with depression sued her employer for workplace harassment, for retaliation, and discriminatory discharge. Summary judgment was granted and the Court of Appeals affirmed. The Court resolved the non-harassment disability claims on the ground that the Plaintiff was not qualified even with accommodation. The Plaintiff had applied for SSDI and her psychiatrist had opined that she was incapable of sustained competitive employment and also found no workplace accommodations would enable her to do her job. Her restrictions were inconsistent with her job, and were not the sort that could be accommodated. The Plaintiff tried a creative argument that disability harassment had caused a more severe emotional reaction and this in turn made it so the Plaintiff could not be accommodated. She argued it was unfair to find against her for inability "when the person cannot complete the essential functions of the job because

of the violations of the disability laws…" Slip op. at 13, n. 5. The Court rejected the argument holding that the Plaintiff's "status as a qualified employee does not depend on the cause of her disability, but rather on the extent of her disability." *Id.* In the end the extreme nature of the incapacitation doomed the failure to accommodate claim. On harassment the Court found the conditions not to be intolerable. Key, of course, was the use of the objective standard under which the Court ruled that the alleged conduct was "rude, unprofessional, and offensive, but even in the aggregate, the actions are not so severe or pervasive as is necessary to meet the demanding standard of 'extreme conduct.'" *Slip op.* at 22. As for the supervisor's conduct the Court found the Employer's actions to be prompt and adequate as a matter of law. On retaliation the movement to another assignment, which was switched back at the end of the same day, was not severe enough to be an adverse employment action. Slip op. at 23-24. On some interest is that the Court of Appeals seemed to give significant consideration to the *screening decision* of the ICRC.

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

https://www.iowacourts.gov/media/documents/162154_FFA4A3F5BC918.pdf

A former chief of the weights and measures bureau of the Iowa Department of Ag brings suit claiming wrongful discharge in violation of public policy. He was dismissed in district court and the Court of Appeals reverses in part. The State claimed the Plaintiff did not meet his supervisor's expectations for managing staff time and scheduling annual gas tank inspections. After about six weeks on the job the Plaintiff accused an oil company of possible consumer pricing fraud, and the company management complained to an industry lobbyist about this. The Plaintiff continued to pursue the matter and drafted a cease and desist letter which he shared with his supervisor. The supervisor "advised Manahl that the allegations concerning mislabeling and pricing violations fell into a 'gray area' of the law and asked him to delete such accusations from the letter…" Slip op. at 4. As this issue faded another one with the same company arose, including a TV interview by the Plaintiff, leading to complaints directly to the Secretary of Agriculture. While this conflict with the oil company continued to escalate, along with involvement of and complaints to upper management, the Plaintiff also experienced problems with managing his staff. The oil company issue culminated in a meeting of the Plaintiff's supervisor with the oil company executives, and an industry lobbyist. Two weeks later the Plaintiff was fired for unsuccessful completion of his probationary period. After summary judgment was granted the Court of Appeals reversed in an analysis that had a "focus on causation." Slip op. at 12. The Court applied the "determining factor" analysis, saying, "The employee's protected conduct does not need to be the main reason behind the adverse employment decision, but it must be the factor that makes a difference in the outcome." The Court was unwilling to find, as a matter of law, that performance was the reason for the discharge. "While the department may not have been fully satisfied with Manahl's performance, Manahl still deserves a chance to have a trier of fact assess whether the aggravation that Manahl's enforcement efforts caused fuel-industry representatives, which they forcefully communicated to his bosses, was the straw that broke the camel's back." Slip op. at 17. Although the State relied on timing the Court of Appeals noted, "[o]n the same day as the firing, Moline sent the watered-down letter to Hasken, [the oil company executive]. And although the letter did not include the apology Hasken had

requested, Hasken was nevertheless satisfied." Slip op. at 19. This too supported the reversal of summary judgment.

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

***Deeds v. City of Marion*, No. 16-1666 (Iowa App. 10-11-2017)**

https://www.iowacourts.gov/media/documents/161666_43DDBFD0B71E2.pdf

The plaintiff appeals the grant of summary judgment in a disability discrimination case. The Plaintiff has MS which was asymptomatic at the time at issue. He applied for a firefighter job with the City of Marion and was sent for a medical exam. Iowa law requires the Municipal Fire and Police Retirement System of Iowa (MFPRSI) to set the standards for entrance physical examinations. The Unitypoint physician learned that the plaintiff had had active MS symptoms in the last year and determined he was not medically qualified. She based this on the National Fire Protection Association (NFPA) standards since the MFPRSI standards do not mention MS. The form she provided to the City contained no further details about the Plaintiff's medical condition. The fire Chief rescinded the offer without knowing any details at all and had no idea why the medical report came back the way it did. The job offer was rescinded and the plaintiff brought suit for failure to hire. The Plaintiff's theory was that the physician discriminated by consulting NFPA, which exclude from service any firefighter candidate with MS who has experienced symptoms during the three years preceding an examination for fitness. The City had never adopted the NFPA protocol and the applicable MFPRSI protocol makes no reference to NFPA standards. The Court rejected the claim that the physician's reliance on NFPA constituted discrimination by the City. "Assuming the use of the NFPA guidelines was inappropriate, the problem with Deeds' argument is that the City never instructed UnityPoint or Dr. McKinstry to use the NFPA guidelines in determining whether any applicant for a firefighter position was medically qualified to perform the essential functions of the job. There is no evidence to support a finding that the City knew UnityPoint or Dr. McKinstry utilized these guidelines to determine Deeds' job eligibility." Slip op. at 7. Instead the City contracted with UnityPoint to complete medical evaluations and then relied on those evaluations in making its final hiring decisions. But the City expected the doctor to use the statutory standards and could not be found liable for discrimination just because the doctor unexpectedly used the wrong standards. The conclusion of no discrimination by the City led to dismissal of the aiding and abetting claim against UnityPoint. They key holding on aiding and abetting was that "[i]n order to impose liability on one who aids and abets an employer's participation in a discriminatory employment practice, the plaintiff must first establish the employer's participation in the

discriminatory practice." Slip op. at 9. In her dissent Judge Vaitheswaran, would allow suit to go forward against the City, but not UnityPoint.

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 4/30/98 with case number 971234P.pdf the URL would be http://www.ca8.uscourts.gov/opndir/98/04/971234P.pdf.

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

Jenkins v. Swem, (8th Cir. 10/3/2016) (153273P.pdf) (Perry, Author, Murphy, Shepherd) - In this "upside down" summary judgment case the defendant appeals denial of summary judgment arguing that he is due qualified immunity. The Plaintiff sued the University of Minnesota and one of its professors for a rather remarkable case of sexual harassment. The Plaintiff was a doctoral student whose proposed course of study on the peregrine falcon required her to, basically, take over the work from Swem, the leading researcher in the field. The "field" in question was the Colville River area in the Alaskan tundra. Thus when they were in the field the Plaintiff was to learn how to study the falcons, and also how to stay alive in the wilderness. It was in such a setting that Swem staring making requests for a relationship, telling sexual jokes, bathing in front of the Plaintiff, etc.. His claims that what he said did not rise to level of harassment fell principally because of the unique setting. "Here, the geographic isolation of the conduct is of paramount importance. Actions that might not rise to the level of severe or pervasive in an office setting take on a different character when the two people involved are stuck together for twenty-four hours a day with no other people – or means of escape – for miles around... Swem and Jenkins were dropped by plane in an extremely remote region. They slept in tents with a shotgun close at hand, to protect themselves from bears. Jenkins, who had never been to the region before, was dependent on Swem for her survival in the harsh Alaskan conditions. She had no reasonable way to physically distance herself from Swem for the length of the trips, during which he kept up a continuous stream of unwanted harassing conduct." Slip op. at 9-10. To make matter worse Swem was *the expert* whose research the Plaintiff was going to take over. She needed him absolutely for her career. "If she chose to call for a plane to leave the site early, or refused to go on the second excursion, she would have been forfeiting her research pursuits. She could not go alone, and she could not stay behind." Slip op. at 10. The utility of the case for Plaintiff's would seem to be limited by such unique facts, and indeed Defendants might get more use out of it using the lack of such circumstances as a contrast.

Grant v. City of Blytheville, (8th Cri. 11/14/2016) (152427P.pdf) (Wollman, Author, Melloy, Colloton) - The Court grant summary judgment for failure to generate a *prima facie* case in a race/age termination case. The case seems to have been brought *pro se*. The Plaintiff, a Black man, worked a three man crew, but one member died and one retired. The Plaintiff drove the truck and had no one to drive. He was then told than a new man was coming to drive the truck. The Plaintiff then basically refused to work on

a crew if he couldn't drive even though there was no difference in pay or hours or even duties once the vehicle stopped. He was fired for insubordination. There is very little of interest in the case except that the court in an orderly issue-by-issue fashion goes through each way of proving pretext and finds nothing there.

Oehmke v. Medtronic, Inc., (8th Cir. 12/22/2016) (161052P.pdf)(Beam, Author, Gruender and Shepherd) - The Plaintiff brought suit for disability discrimination and retaliation and was dismissed out on summary judgment. The Plaintiff is a cancer survivor having had Hodgkin's lymphoma. This affected her immune system and caused her to miss a number of days of work. Despite this she was a good performer and was in line for a promotion when she applied for another job. In conversation about this her supervisor, discussing Plaintiff's desire for more power, referred to Nazi's or Hitler. Being of German heritage the Plaintiff took exception and their relationship suffered. The supervisor selected someone else - also a cancer survivor - for the job the Plaintiff had applied for. The employer subsequently received some customer complaints and decided not to move the Plaintiff into the promotion she had been in line for. Following a long history of problems, but also health-related attendance issues, the Plaintiff was fired. The Court found no casual link between the disability and/or protected activity and the termination. The nondiscriminatory reasons included "incorrect and potentially life-threatening advice concerning a patient's pacemaker; she was perceived by her managers as insolent, threatening, and she admitted to attempting to undermine their authority; she failed to follow Medtronic's procedures such as using objective language in call notes and sticking to call scripts; and she was repeatedly present in interactions with customers that gave rise to complaints." Slip op. at 14-15. The Court conceded that the Employer had concerned about absenteeism, but the Plaintiff presented no competent medical evidence linking her need for absences to her cancer.

Sieden v. Chipotle Mexican Grill, Inc., (8th Cir. 01/26/2017) (161065P.pdf) (Stand, Author, Benton, Shepherd) – The Court affirmed a grant of summary judgment to the defense in a retaliation case. As usual, "The fact that Chipotle expressed concerns about Sieden's performance both before and after the protected activity undercuts the significance of the temporal proximity between that activity and the adverse employment action." Slip op. at 6. Claims that the Plaintiff received increased scrutiny, that the Employer did not follow policy, and that the Employer had shifting reasons were not supported by the record. "A plaintiff claiming shifting explanations to support pretext must show that the reasons are completely different, not minor discrepancies." Slip op. at 7. With these shortcomings the fact that the reasons for termination were largely subjective was not sufficient to get to the jury.

Raymond v. Board of Regents of the U of MN (8th Cir. 01/31/2017) (153575P.pdf) (Strand, Author, Benton, Shepherd) – A fitness instructor and wellness director at the University was investigated for various infractions including harassment, and then was terminated. He utilized the extensive University review processes including a hearing. Ultimately he withdrew from the hearing giving as his reasons "the futility of the process and its inherent unfairness and bias towards him, and because of the University's bad faith in its dealings with him." Slip op. at 4. He brought suit claiming a due process violation of property and liberty interests. The employer claimed a failure to exhaust. For post-

deprivation denials of due process available procedures must be exhausted. The Court first of all had to address pre-termination due process under Loudermill. The Court found due process was satisfied since he was told of the allegations and evidence, and was allowed to respond. The Court rejected the Plaintiff's argument that post-termination procedures would be futile since "None of the allegations establish, with certainty, that the final outcome of the process would have been adverse to Raymond" Slip op. at 10-11. The Court specifically rules that "Even if the opportunity to cross-examine witnesses at the OCR hearing was ambiguous, that does not justify foregoing the process altogether on grounds of futility." Slip op. at 11.

Nash v. Optomec, Inc., (8th Cir. 03/01/2017) (162186P.pdf)(Riley, Author, Loken, Benton) - An age discrimination case was dismissed on summary judgment with very bare bones analysis. The most interesting issue was that *temporary* assignment of duties to younger workers was not sufficient to show replacement by those workers which might give rise to an inference of age discrimination. Also the Court refused to make anything out of the fact that managers did not argue with the Plaintiff we he claimed age discrimination at his termination meeting. "Allowing for any sort of adverse inference would be unsupported by law and seemingly require employers to risk further escalation of an already tense situation by engaging with a distressed employee upon termination." Slip op. at 9.

Liles v. C.S. McCrossan, Inc., (8th Cir. 03/21/2017) (153801P.pdf)(Shepherd, Author, with Gruender and Beam) - The Plaintiff claimed discriminatory discharge based sex and retaliation and sexual harassment. She worked as a project manager at a construction firm. She had turned down the advances of a co-worker, been harassed by him as a result, and incurred the ire of his father who was a long term management level employee although not in her chain of command. He told another worker to "put the screws to her" in about early 2011. Meanwhile she had been assigned to another project and was harassed by another co-worker, who kept telling her she was good looking, and who would ask if he aroused her. She reported the behavior in March 2011. Meanwhile she started on a new project and her new supervisor, Walk, decided she was overwhelmed. She was transferred to the field to get field experience. She had continued performance problems and was put on a corrective action plan, and was eventually fired in January 2012. Summary judgment for the defense was granted. The timing issues doomed most of the retaliation claims, and the Court decided that the Plaintiff could not show the harassment had affected a term or condition of her employment. Also while she may have shown animus by the harasser's father, she did not show he had influence on the decision, and while she showed Walk had influence she did not show animus. Finally the Court again imposes the impossible mindreading standard on a Plaintiff through the overuse of the "good faith" doctrine. The Court said it was not enough to prove that the Plaintiff's performance was not actually deficient. "To prove that the employer's explanation was false, Liles needs to show that CSM did not actually believe that her performance was deficient. ... This she has not done as she points to no evidence indicating that CSM's belief that she was not adequately performing her duties was insincere." Slip op. at 13. The Court continues with the idea that proof that something is not true does not tend to prove that those professing to believe it to be true can be thought insincere. The Court makes reference in passing to the difference between "the motivating factor" and "a motivating factor" with a citation to Wright v. St. Vincent Health Sys., 730 F.3d 732, 739 (8th Cir. 2013) - which makes no mention of

the issue. The Court injects an whiff of "sole cause" into Title VII jurisprudence.

Dindinger v. Allsteel, Inc., (8th Cir. 04/03/2017) (161305P.pdf) (Kelly, Author, Loken, Murphy) – In this Iowa case the Court affirms a plaintiff verdict to three women who brought an equal pay claim. The great majority of the decision deals with whether certain specific instructions were properly given, or not given, and with evidentiary rulings. Most interestingly "Allsteel argues that it is entitled to a new trial because the district court incorrectly instructed the jury that Allsteel could not rely on economic conditions to establish its affirmative defense that a factor other than sex justified the pay discrepancies between the plaintiffs and their male comparators." Slip op. at 6. Allsteel argued that economic conditions had forced slower merit increases and that this resulted in lower wages for the Plaintiffs. The district court would not prevent this because the USSC had ruled that exploiting the fact that women were willing to work for less was not a defense under the federal EPA. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974). But, Allsteel argued, its argument was based on overarching conditions not sex-based markets. The Court seemed to acknowledge that in some circumstances economics might be a defense but dodge the issue for lack of proof. "Allsteel points out that the economic downturn caused layoffs, the restructuring of job duties, and a freeze of merit-based pay raises. But Allsteel offered no evidence at trial showing how these cost-saving measures caused the plaintiffs to be paid less than their male comparators." Slip op. at 9. The Court next ruled it was no error to allow pattern proof of discrimination from other female Allsteel employees who are not parties to the case were also paid less than male Allsteel employees. Most of this analysis was very detail specific, but the general principles applied were that the key question is not whether she was similar to the plaintiffs in every way, but whether her testimony was 5 relevant "in the context of the facts and arguments in the case," and that such pattern evidence "should normally be freely admitted at trial because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination." Slip op. at 11. Meanwhile exclusion of a favorable OFCCP audit was no error because of the likelihood of usurping the role of the jury. On fees the Court allowed costs for RealTime transcript feed, redundant deposition transcripts and video depositions of the same witnesses.

Faidley v. United Parcel Service, (8th Cir. 04/04/2017) (161073P.pdf) (Murphy, Author, Kelly, and Montgomery, District Judge (dissenting)) – In this Iowa case the Plaintiff alleges failure to accommodate his various limitations based on work-related injury. The district court dismissed on summary judgment and the Court of Appeals mostly affirmed. The Court affirmed the finding that the Plaintiff failed to raise an issue on whether he was qualified to work as a delivery driver since that job required 9.5 hours of work a day, and the Plaintiff could only do 8 hours of driving. But he did generate an issue on his qualification to work as a feeder driver which was fewer hours of work. The Court ruled this way on the feeder job even though one was not open at the time. The Court adopts the standard that considers as "available positions that the employer reasonably anticipates will become vacant in the fairly immediate future." Slip op. at 5.

Stone v. McGraw-Hill Global, etc., (8th Cir. 05/15/2017) (153299P.pdf) (Wollman, Author, Smith, Chief Judge, Benton) - An African-American book sales executive appeals summary judgment granted on his claims of race discrimination in pay differences, racial harassment, and racially discriminatory discharge. The pay differences were adequately explained by one of the comparators having more experience, and the other being hired away from a competitor and being assigned to a different territory. The Court did not consider it significant that this second comparator also did not have to meet the minimum qualification advertised for the position. Racial harassment was dealt with quickly since only one "stray" comment was identified ("I wish I had never hired his black ass.") The termination claim as usual was defeated by the articulation of a legitimate non-discriminatory reason. "Stone has produced evidence to show that his performance was not actually deficient, but he has not produced evidence showing that Wildes did not believe that Stone's performance was deficient based on the reports she received." Slip op. at 12. Once again the Court uses a doctrine developed in a very specific setting in a totally different way. The "good faith doctrine" developed where the allegations were of discrete acts of misconduct that an employer may mistakenly have thought the plaintiff did. If the employer relied on reports from reliable sources then the fact that the reports turned out to be wrong would not give rise to an inference of discrimination. But now the 8th circuit applies this to any articulated reason whatsoever, even if subjective, even if based largely on the employer's own assessments and reports.

Aulick v. Skybridge Americas, Inc., (8th Cir. 06/19/2017) (162648P.pdf) (Shepherd, Author, Wollman, Melloy) - Summary judgment was granted to a company sued for age discrimination in failing to promote and then eliminating the position of a well-qualified IT professional. In evaluating the evidence the Court found that a reference to a "new face" could not be reasonably taken as a reference to age and was not direct evidence of discrimination. The articulated reasons for the promotion was that the preferred candidate had undoubtedly more relevant experience, and that an independent audit had subsequently recommended a consolidation which left the Plaintiff's position superfluous. The Plaintiff's most intriguing argument is that management seemed confused over who decided to terminate. "The record on appeal does not clearly show who at Skybridge made the decision to terminate Aulick. At their depositions, both Morris and Cattoor testified that Whitmore made the recommendation. Yet Whitmore testified that he played no role in Aulick's dismissal, nor did he recommend that Aulick's position be eliminated. In fact, Whitmore was surprised when Cattoor told him that Aulick had been terminated." Slip op. at 7. The Court said, basically, "nice try" and affirmed the dismissal because "No reasonable juror, however, could infer pretext from these facts because there has been no substantial change in the *reason* given for Aulick's termination." Slip op. at 11.

Edwards v. Hiland Roberts Dairy, (8th Cir. 06/27/2017) (163071P.pdf) (Riley, Author, Beam, Shepherd) - The Plaintiffs, two African-American men, admittedly misused the company badges so that one of them could clock out the other one, thus committing the notorious offense of "theft of time." Naturally the Plaintiffs relied on comparative evidence arguing that White co-workers were not fired for a single instance as they were. The Court of Appeals found that the comparitors were not similarly situated in all relevant respects because the Plaintiffs undoubtedly worked in concert to carry out a dishonest scheme while the two white employees who had committed "theft of time" were in more ambiguous circumstances. One had

fallen asleep, and it was not certain that he actually had, and he was not guilty of "nesting." The other failed to clock out over lunch, but in his supervisory position he did not have to do so unless he left the premises and he claimed he did not understand this. That both of these workers were only warned would not therefore lead a reasonable juror to conclude discrimination explained the difference in treatment.

Donathan v. Oakley Grain, Inc., (8th Cir. 06/28/2017) (153508P.pdf) (Melloy, author, Colloton, Shepherd) - A woman complained about pay discrimination, was laid off, was not recalled, and summary judgment was granted. The Court of Appeals reversed with Colloton predictably in dissent. The Plaintiff who worked at a grain facility sent an email to the owner Oakley complaining about why she was not paid certain bonuses and concluding " "I see no difference in my position and the ones performed by the grain department at Pendleton for example except the fact that I am female." Slip op. at 2. Within ten minutes the email was forwarded to facility manager Porter. Then Oakley called Porter before Porter had even read the email. Porter read the email while on the phone and then told Oakley he was planning on layoffs to save money once the corn was in. Within eight days the Plaintiff was laid off along with four others because of a claimed seasonal downturn. While seasonal layoffs were common, the office staff in the Plaintiff's position had not been laid off seasonally for the seven years the Plaintiff worked there, or during the term of her predecessor. The termination letter gave that Friday as the last day and the Plaintiff thus left. The five laid off included the Plaintiff, three seasonal workers, and a manager who was let go at least in part for performance reasons. The employer had no performance issues for the Plaintiff. On the following Monday the three seasonal workers were hired back, and a replacement, a woman, was hired for the Plaintiff. This replacement could not grade grain which was an essential part of the job. So she forged the Plaintiff's signature. "The office position occupied by Donathan, therefore, was filled the first working day after Donathan's termination and remained filled thereafter." Slip op. at 5. The reason given by the Employer for recalling on Monday was a "surprise" order on Saturday that was not, however, documented in a contract. The reason given for not recalling the Plaintiff was that she had left early on Friday. The Employer's case was doomed by its overwhelming fishy smell. The timing itself was found to be powerful evidence by the Court of Appeals. The only thing close was the reason for not recalling, but since the letter terminating did not say to stay until the end of the day, and the Plaintiff had no prior discipline the Court ruled that a reasonable juror could find this reason was but pretext. For anti-McDonnell-Douglas crowd footnote four says "[a]lthough our court occasionally notes that the burden-shifting framework need not be applied on a fully developed summary judgment record, the framing of arguments and logical inferences nevertheless remain the same...The final step, regardless of how it is characterized, empowers the court to view the record with insight gained from the parties' articulation of their positions and in view of the employer's explanation for its actions." Slip op. at 8.

Pena v. Bob Kindler, (8th Cir. 07/20/2017) (162756P.pdf) (Melloy, Author, Wollman, Shepherd) - In a brief discussion of a due process claim the Court assumed that the Plaintiff, who had been fired from his State job, had a property right in his job. Even so "the months-long pre-termination notice, the repeated opportunities for Pena to tell his side of the story, the availability of the state's post-termination certiorari-based review procedure, and Pena's actual utilization of these opportunities easily pass

constitutional muster." Slip op. at 7-8. The case provides a quick summary of various well-established doctrines applicable to employment-based due process claims.

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

Non-Summary Judgment/Verdict Review Cases

Wilson v. Arkansas DHS, (8th Cir. 3/1/2017) (161174P.pdf) (Benton, author, with Beam, Loken, dissenting) – In this case the Plaintiff's case was dismissed on the pleadings and she appeals. The Court let stand dismissal of a count premised on the allegation that discipline was "on account of her race, when she was disciplined for something that a Caucasian female employee did not accomplish." Slip op. at 3. The problem was "Wilson's claim of discipline "…does not allege that the Caucasian employee was not disciplined or received less discipline." Slip op. at 3. The Plaintiff also alleged race and retaliation because she was fired after filing an EEOC complaint. The Court found the allegations of retaliation adequately alleged "but for" termination since "Wilson alleges she was a "victim of . . . retaliation, after having complained about discrimination based on race, when she was . . . ultimately terminated." Slip op. at 6.

McLeod v. General Mills, Inc., (8th Cir. 05/11/2017)(153540P.pdf)(Benton, Author, with Shepherd and Strand, District Judge) - The question in this ADEA case is whether a severance package which required waiver of claims can force arbitration of any claim that the release did not comport with the OWBPA. The issue was largely resolved by the USSC which has held that "The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance." 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265-66 (2009). This being the case the agreement to arbitrate did not have to comply with the OWBPA. Next the Plaintiff's argued that since the OWBPA states that the validity of waivers must be determined by a "court of competent jurisdiction" this means that the issue is not arbitrable. The Circuit Court dodged the issue since it was presented in a request for declaratory relief. The Plaintiffs had not brought a claim in court and had the defense raise the waiver, but instead filed suit seeking a declaratory judgment. The Court decided no Article III controversy was present and dismissed.

Karlson v. Action Process Service, etc., (8th Cir. 06/26/2017) (153322P.pdf) (Loken, Author, Riley, Benton) - In this FLSA case the district court submitted to the jury, with the parties' consent, the ultimate legal issue of whether the Plaintiff was an employee or independent contractor. The jury found he was an independent contractor, and the Plaintiff appeals. The first question is how to review the

verdict. The Court of Appeals explained "If a district court with the parties' consent submits an ultimate FLSA issue of law to the jury, such as whether plaintiff was an employee or an independent contractor, and then adopts the jury's verdict, we must affirm on this issue if the evidence, viewed most favorably to the jury's verdict, is sufficient to support that verdict... we do not independently analyze the various economic realities factors the jury was instructed to consider, because neither the jury nor the district court made specific findings relating those factors to their ultimate determination" Slip op. at 6. On the merits the Court found sufficient evidence to support the verdict of independent contractor. The key factors in the economic realities test here were "the fact that Plaintiff could choose to accept assignments or refuse them based upon his personal criteria, that he could leave for vacation without permission from the Defendant, that he accepted assignments from other companies at one time, and served process at hours which were convenient to him and not controlled by the Defendant..." Slip op. at 8.

MikLin Enterprises, Inc. v. NLRB, (8th Cir. 7/03/2017) (143099P.pdf) (Loken, Author, for the Court En Banc) - The NLRB petitions for enforcement of an order, and it is denied in part and allowed in part. Two issues are of the most interest to those outside the government. First, the posters made by Jimmy John's workers to protest the lack of sick days were not protected. The posters had identical pictures of sandwiches saying one was made by a sick worker and looked identical to the other sandwich. Of course, disparagement of the employer's product is not protected by the NLRA. NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464 (1953) ("Jefferson Standard"). Unprotected are "sharp, public, disparaging attack[s] upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." 346 U.S. at 471. Here the sick sandwich posters fit that bill and were not protected. In reaching this conclusion the Court of Appeals rejected the NLRB's suggestion that the attack have a subjective malicious motive. The second issue, more 2017 than 1953, dealt with Facebook attacks launched by management. A rank-and-file worker created and anti-union Jimmy John's Facebook page and the page grew to include members of management. Remarkably childish and personal posting were made. One included a feces covered photo of a union supporter, and another included his name and phone number along with the suggestion that he be texted with complaints. The Court held, "[w]e conclude that substantial evidence supports the Board's conclusion that the supervisors' public effort to disparage and degrade union leader Boehnke restrained or coerced MikLin employees in the exercise of their Section 7 rights, by causing other employees to fear they would incur similar treatment if they supported the IWW." Slip op. at 23.

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

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