# DRAKE GENERAL PRACTICE REVIEW
# EMPLOYMENT LAW CASE UPDATE

2023-24 EMPLOYMENT LAW UPDATE

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## SUPREME COURT CASES

### *Groff v Dejoy, Postmaster General*, 600 U.S. 447 (6/29/2023)

https://www.supremecourt.gov/opinions/22pdf/600us1r55_3dq4.pdf

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

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

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

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

expenditures." But the Court seems to eschew a "favored synonym for undue hardship." Instead "[w]e think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." Slip op. at 18. This decision must be made "in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer." *Id.*

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

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

***Dept. of Ag. v. Kirtz*, 601 U. S. 42 (2/8/24)**
https://www.supremecourt.gov/opinions/23pdf/601us1r03_4gcj.pdf

This case finds that the Fair Credit Reporting Act overcomes sovereign immunity. Like the Iowa Civil Rights Act the FCRA does this through the definition of "person." The Court reiterates the "clear statement" rule, permitting suit against the government only when "the language of the statute" is "unmistakably clear" in allowing it. One such situation is "when a statute creates a cause of action and explicitly authorizes suit against a government on that claim." *Kirtz* at 49.

Here this unmistakable waiver was based on the creation of a cause of action against "[a]ny person" who violates the statutes, and the definition stating that "person" means "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 84 Stat. 1128. Notably Iowa Code §216.2(12) defines "person" to mean "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the state of Iowa and all political subdivisions and agencies thereof." The language is, obviously, extremely similar. Iowa Code §216.6(1)(a) then prohibits discrimination by any "person." And while portions of §216.6 are directed at "employers" the definition of employers is even more specific as far as immunity: "the state of Iowa or any political subdivision, board, commission, department, institution, or school district thereof, and every other person employing employees within the state." Iowa Code §216.2(7). *Kirtz* was explicit, and unanimous, that such a definition is sufficiently clear to overcome claims of immunity (which makes the government directly subject to the applicable procedures and remedies without resort to a tort claims procedure to overcome immunity).

***Murray v UBS Securities LLC*, 601 U.S. 23 (2/8/24)**
https://www.supremecourt.gov/opinions/23pdf/22-660_7648.pdf

In this decision, the Court finds that "retaliatory intent" is not an element in a Sarbanes-Oxley whistleblower claim. That act "prohibits publicly traded companies from retaliating against employees who report what they reasonably believe to be instances of criminal fraud or securities law violations. The provision establishes that no employer may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of " the employee's protected whistleblowing activity. §1514A(a). *Murry* at 27. The Act incorporates an explicit burden shifting analysis of the issue of retaliation, a framework originally found in Whistleblower Protection Act of 1989, 5 U. S. C. § 1221(e).

Under that framework, the plaintiff must show that the protected activity was a "contributing factor" is the employment action. If this is done the Employer then must prove by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity. This framework was intended to avoid the then-existing "'excessively heavy burden'" … of showing that their protected activity was a " `significant', `motivating', `substantial', or `predominant'

" factor…" *Id.* at 28. Under this new framework the goal was that "[w]histleblowing should never be a factor that contributes in any way to an adverse personnel action." *Id.*

After a verdict for the plaintiff in this case the Circuit Court reversed on the basis that "retaliatory intent" was not proven. According to that court "a whistleblower-employee must prove that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent." 43 F. 4th at 259-260. The Supreme Court treats retaliatory intent as meaning where the employer acts out of prejudice, animus, or hostile intent.

The Court rejected the idea that "discriminate" would have this meaning. The word "discriminate" in the Act appears in the phrase "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of…" *U.S. Code* §1514A(a). The court observed that this wording was meant to capture other adverse employment actions that are not specifically listed. (Notably Iowa Code §216.6(1)(a) uses a similar placement of "otherwise discriminate…because of" following a laundry list of employment actions).

The Court goes on to directly address "whether the word 'discriminate' inherently requires retaliatory intent" and concludes "[i]t does not." *Murray* at 34. To "discriminate" is to treat differently and it does not matter what the *motive* for the retaliation was. "It does not matter whether the employer was motivated by retaliatory animus or was motivated, for example, by the belief that the employee might be happier in a position that did not have SEC reporting requirements." *Id.* at 35.

The Court indicate that the Title VII standard may be higher by "requiring the plaintiff to show that his protected activity was a motivating or substantial factor in the adverse action" but the Act here only requires "contributing factor." *Id. at* 36 (*Citing EEOC v. Abercrombie & Fitch Stores*, Inc., 575 U. S. 768, 772–773 (2015)). The Court also remarks, without any elaboration, that "the contributing-factor framework that Congress chose here is not as protective of employers as a motivating-factor framework." *Id.* at 39. Just exactly how a motivating factor differs from a contributing factor, but it not the same as a "retaliatory" factor the Court does not explain in any detail.

***Bissonnette v LePage Bakeries Park St., LLC*, 601 U.S. 246 (4/12/24)**

https://www.supremecourt.gov/opinions/23pdf/23-51_6647.pdf

In yet another of recent FAA cases the Court takes up what it means to be a transit worker. The Plaintiff's bring suit for violation of state and federal wage laws. They had signed an arbitration agreement, and the defense moved to compel arbitration. The Plaintiff's argued they fell within the "transportation worker" exemption. But the lower court decided that this exemption only applies to the transportation industry – not bakeries who ship their goodies nationwide.

The Plaintiff's were franchisees who delivered the baked good to various outlets in their region, but also "found new retail outlets, advertised, set up promotional displays, and maintained their customers' inventories by ordering baked goods from Flowers, stocking shelves, and replacing expired products." 601 U.S. at 250. Back in 2022 in this update we discussed *Southwest Airlines Co. v. Saxon*, 596 U. S. 450 (2022) which held that a "class of workers" is defined based on what a worker does for an employer, not what the employer does generally. The Circuit Court nevertheless concluded that the exemption only applies if the employer "pegs its charges chiefly to the movement of goods or passengers." Naturally there is no pegging mentioned in the statute. And the Supreme Court also mentioned how complicated the discover would be to find out what got the most pegging – does Dominoes make its money off pizza or delivery? Such extended discovery is anathema to the FAA in the first place.

The test devised by the Supreme Court back in *Saxon* is still good enough: The worker must be "actively engaged in transportation of goods across borders via the channels of foreign or interstate commerce, [that is they] must at least play a direct and necessary role in the free flow of goods across borders." *Id.* at 256 (cleaned up). That said, the rule remains that a "transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by § 1 of the Act." *Id.*

### ***Muldrow v St. Louis*, 601 U.S. 346 (4/17/24)**

https://www.supremecourt.gov/opinions/23pdf/22-193_q86b.pdf

In this decision, in which ultimately all justices concur, the Court addresses the standard of what constitutes actionable employment action.

This is review of the 8th Circuit decision in *Muldrow v. City of St. Louis*, 30 F. 4th 680 (8th Cir. 2022). The Court of Appeals found no triable issue on whether the Plaintiff suffered an adverse employment action. She was transferred but that transfer "did not result in a diminution to her title, salary, or benefits [and plaintiff] offers no evidence that she suffered a significant change in working conditions or responsibilities and, at most, expresses a mere preference for one position over the other." *Id.* At 689. This was found insufficient to be adverse action. Similarly, failure to obtain another transfer was found to be not adverse. It was insufficiently material to be an adverse action where at most "she would have been seen as having a higher profile, been privy to more information, and perhaps been given a laptop or iPad." *Id*. At 690. On race she complained of three other transfers citing that she wanted them and could not be discriminated against in getting them. In quotable language the Court said "However, an employer is not tethered to every whim of its employees." *Id*. at 692. Just wanting the transfer was not enough. Of most interest is analyzing away the Plaintiff's concerns the Court dismissed her complaint about not getting a more favorable schedule because the "mere fact" of not getting a preferred schedule without material harm is not sufficient.

The Supreme Court granted certiorari and reversed. The issue on review was "whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm—be it dubbed significant, serious, or something similar." 601 U.S. at 353.

The Court, as always, starts with the statutory language. Here the most important language is the phrase "discriminate against." "The words 'discriminate against,' … refer to differences in treatment that injure employees…[o]r …[to] practices that 'treat[ ] a person worse' because of sex or other protected trait." *Id.* at 354 (citations omitted).

The Court explains that a plaintiff must show "some harm respecting an identifiable term or condition of employment…" *Id*. at 355. But the Court reverses because more than this is not required:

> What the transferee does not have to show, according to the relevant text, is that the harm incurred was "signifcant." 30 F. 4th, at 688. Or serious, or substantial, or any similar adjective suggesting that the

> disadvantage to the employee must exceed a heightened bar.

*Id.* at 355. Significantly, the court distinguished the significant harm standard used in retaliation cases like *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U. S. 53 (2006). In such cases the requirement of significance is linked directly to the sort of conduct that would tend to deter the exercise of protected rights. If the conduct would not have this tendency then there is no need to outlaw it. In contrast, "[t]he anti-discrimination provision… simply seeks a workplace where individuals are not discriminated against because of traits like race and sex." *Id.* at 358.

The Court takes pains to set out some examples, and to contrast with Justice Thomas, who thinks the case will not change outcomes. The Court says explicitly – oh yes it will change outcomes, and then listed a few. *Id.* at 355-56. One of those examples is this case, and the Court found Muldrow met the standard of "some harm" with room to spare. *Id.* at 359.

### ***Smith v. Spizzirri*, 601 U.S. 472 (5/16/24)**

https://www.supremecourt.gov/opinions/23pdf/601us2r22_o7jq.pdf

One more case in the endless stream of FAA cases takes up the burning issue of whether a court, asked to stay the action pending FAA-mandated arbitration proceedings, may instead say "Oh what the heck, I'm dismissing." Turns out, they can't.

This is an employment law misclassification case brought against a delivery company that asserts mandatory arbitration. The employees conceded that arbitration had to be ordered, but argued that stay was the proper remedy rather than dismissal. The Supreme Court agreed because the statute says that upon application the court "shall…stay the trial of the action…" The word "shall" "creates an obligation impervious to judicial discretion." *Smith* at 476. The Court then moves along in the disputed sentence with the scintillating observation that "Just as 'shall' means 'shall,' 'stay' means 'stay.'" *Id.* The clairvoyant reader has no doubt divined that "shall….stay" means, well, "shall stay" and there is no discretion to dismiss. *Id.* at 478 ("When a district court finds that a lawsuit involves an arbitrable dispute, and a party requests a stay pending arbitration, §3 of the FAA compels the court to stay the proceeding.").

***Starbucks v. McKinney (NLRB)*, No. 23-367 (6/13/24)**
https://www.supremecourt.gov/opinions/23pdf/23-367_f3b7.pdf

A group of Starbucks employees held a media event, at a store after hours, to promote their organizing efforts. Store management learned of this, decided that company policy was violated, and went *venti frappuccino* on the workers' a**. The union, in coordination with fired workers, filed charges with the NLRB. The NLRB investigated, issued a complaint, and then sought a preliminary injunction that would require reinstatement. The district and circuit courts both applied a special two-part NLRB test: (1) is it caffeinated? and (2) is it delicious? Or stated another way, the test was (1) whether "there is reasonable cause to believe that unfair labor practices have occurred," [caffeinated] and (2) whether injunctive relief is "just and proper" [delicious]. The Supreme Court found the order too bitter and returned it.

The Supreme Court ruled that the usual standard for preliminary injunctions applied to NLRB actions. Even though courts were empowered by the NLRA to grant preliminary relief "as it deems just and proper," the presumption is that such equitable powers, set out in statutes, will be governed by traditional principles of equity. Since "[n]othing in [the NLRA] overcomes the presumption that the four traditional criteria govern a preliminary-injunction request by the Board" the Court adopted those four factors as applicable to this sort of case. Those factors are: "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Slip op. at 4.

## IOWA APPELLATE COURT CASES

[Supreme Court of Iowa]

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

On the eve of the change in Iowa public bargaining law the Union voted to ratify a contract with the state. The State took the view that it didn't have to abide by the contract. The Supreme Court of Iowa under the obscure "a deal is a deal" doctrine found otherwise back in 2019. The State had in the meanwhile not

withheld dues, in part because it doubted there was a contract and in part because it was afeared that the State would be violating the new collective bargaining law if it did. The State did offer to withhold dues upon the conditions that the Union get a *new* written authorization from each person dues is to be withheld from, *and* agree to indemnify the state for any damage resulting, *and* agree to waive claims for back dues. The offer likes not, so the Union continues to try to collect dues on its own and sues for the difference. This case is the suit for the missing dues.

The first issue up for the Court is whether the failure to collect dues was a violation of the CBA. The Court read the written words of the applicable contract. These required that the state withhold the dues "upon receipt." The Court found that the phrase "'upon receipt' is broad enough to include all authorizations that the State received regardless of whether they were received before or after the effective date of the 2017–2019 contracts." Slip op. at 9. The bulk of the remainder of the analysis on this point was standard contract interpretation, all pointing to the idea that the contract terms align with the parties previous understanding: past elections would be honored in the future unless withdrawn according to the pre-2019 statutory process.

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

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

***Selden v. DMACC*, 2 N.W.3d 437 (Iowa 2024)**
https://www.iowacourts.gov/courtcases/18689/embed/SupremeCourtOpinion

The Plaintiff complained to her employer of unfair pay practices because her male co-equal was payed more than she. The Employer did not act on the complaint. The Employer explained that the co-worker, who had the same job, had been there 15 years longer and this explained the disparity. A few months later the Plaintiff applied to a vacant supervisory position but was screened out, as the Employer explained it, for a lack of the educational requirements. She filed suit claiming pay discrimination, and retaliation in the failure to hire. She prevailed on both claims before the jury but the Supreme Court of Iowa reversed the verdict.

On equal pay the Court found that the Employer had proven (as a matter of law) that factors other than sex explained the pay difference. The key to the ruling was that "no one disputes" many of the important facts: The workers performed the same jobs; the man was paid significantly more; the man had fifteen years of seniority; the seniority system functioned in a gender-neutral way; and that the seniority system accounted for much of the difference in pay.

To the Court this added up to a man with more seniority getting paid more for that based on a gender-neutral system of pay. However, the Plaintiff's argument wasn't based on the raw disparity in 2019, but in the disparity of the hiring rate, when expressed as a percent of the applicable pay range. The Court, while signaling a level of doubt, nevertheless chose to "pass over the question of whether the starting salary of someone hired in 1998 can be compared to the starting salary of someone hired in 2013." *Selden* at 444. Instead, it turned to the employer's claim that market conditions in 1998 differed from those in 2013. Market conditions are a neutral reason for pay difference, although "an employer can't argue that men should receive more simply because it is harder to hire male employees." *Id.* at 445. But here the employer's expert established that the IT labor market was much tighter in 1998 than in 2013. (The "Y2K bug" raising the demand for IT staff in 1998).

In analyzing the evidence in support of the affirmative defense the Court seemed to give the employer a break on proof given the time that had past since the hiring of the comparator. "[G]iven

the years that had passed, DMACC's combination of expert testimony about market conditions in 1998, direct testimony about the same, direct testimony from [the male comparator], and documentary evidence about [the male comparator]'s hiring was more than enough to establish an unrebutted affirmative defense." *Id.* at 447.

On retaliation, the case turns inevitably on the issue of causation. Again, the key is "undisputed" evidence, here that the plaintiff was screened out for failure to meet an educational requirement. All candidates screened out lacked such a degree and the person hired had the degree. Although there was a comparator who did not have such a degree, this person was hired before the requirement was added, that is, before DMACC added the requirement to the job description – some 12 years before the protected activity. The Court noted that the requirement being neutral, and imposed years before the protected activity, and then being applied neutrally, it was not up to the Court or the jury to decide if the requirement was smart.

***Board v. Neff* 5 N.W.3d 296 (2024)**
https://www.iowacourts.gov/courtcases/19593/embed/SupremeCourtOpinion

An attorney disciplined for sex harassment raises First Amendment defense, treated at some length by the Court.

The Court acknowledges that "no doubt that punishing a lawyer for sexual harassment based solely on offensive speech can create tension with the Supreme Court's First Amendment jurisprudence." *Neff* at 308. After detailing some of the concerns, which the Court views as significant, the Court thinks the issue can be resolved "in the attorney disciplinary context by requiring a showing the nonexpressive impact of the speech resulted in objective harm beyond mere adverse emotional impact on the audience." *Id.* at 309. "Objective harm is measured from the viewpoint of a reasonable person and not based on mere subjective offense of the listener." *Id.*

Relevant to this seminar the Court made clear that this objective harm requirement is satisfied in employment cases:

> Requiring a showing of objective harm is not a new concept in sexual harassment law. For example, in the employment discrimination context, liability can be imposed on a defendant for a hostile work environment only where the expressive speech is severe or pervasive enough to create

> an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.

*Neff* at 310. The Court went on to be very clear that the attorney discipline standard for harassment is *lower* than the one used to impose civil liability. Since the Court upheld its rule against the constitutional challenge it seems likely the same would result in employment cases brought against the person engaging in the objectionable speech.

### ***White v. State, 5 N.W.3d 315*** **(Iowa 2024)**

https://www.iowacourts.gov/courtcases/19074/embed/SupremeCourtOpinion

The Supreme Court reversed a jury verdict for an HHS (DHS) social worker who alleged sexual harassment. The main issue was the proper use of so-called "me too" evidence.

The key to the Court's ruling was that "[t]he law is well settled that me-too evidence about which the plaintiff is unaware cannot be used to prove she experienced severe or pervasive harassment." *White* at 325. This meant that "we give no weight to the considerable me-too evidence that White first heard at trial." *Id.*

The Court commences it's analysis of the evidence by emphasizing that "the harassment must permeate the workplace so much that we can say it altered the terms and conditions of the plaintiff's employment and created an abusive working environment." *Id.* at 326.

The Court recounted one offensive joke the Plaintiff had directed towards her personally. The remainder of the comments the Plaintiff dealt with were about other women. After recounting these the Court reached the opinion that "[t]hese comments collectively were insufficient to show White suffered objectively severe or pervasive harassment." *Id.* at 327. Playing into the Court's weighing of the severity was that the comments occurred over 3 or 4 years with six months between them. "This is not ongoing and repeated conduct…and it does not constitute a steady barrage of opprobrious [sexual]comment" *Id.* at 328 (cleaned up).

Next, the Court took up comments the Plaintiff did not hear, but rather heard about later. The holding here was that "[s]econdhand reports are of relatively little value … particularly those that

she learned about through her official duties as a supervisor." *Id.* Otherwise, the Courts analysis was very fact-bound with it finding the sum total of the Plaintiff's experience of offensive comments – whether first or second hand – to be insufficient as a matter of law to alter the terms of employment.

The Plaintiff attempted to push the idea that these issues should be left to juries given the changing social mores. The Court, hedging a bit on the age of cases it would look at, "declin[ed] to hold that the #MeToo or #timesup movements undermine twenty-first century precedent on the proof required to show objectively severe or pervasive harassment." *Id.* at 331. Finally, the Court refused to find that a supervisor having an "in crowd" and an "out crowd," and implementing employment conditions accordingly, was sufficient to violate the ICRA.

In the end, the Court opined that affirming would run afoul of "established precedent setting a high bar for proof of objectively severe or pervasive harassment, and it would expose Iowa employers to costly liability for sporadic vulgarities and common personality conflicts." *Id.* at 331-32.

### ***Peterzalek v. District Court*, 7 NW 3d 37 (Iowa 2024)**

https://www.iowacourts.gov/courtcases/20578/embed/SupremeCourtOpinion

Although a discrimination case, the issues in this matter are related to civil litigation in general, the issue being "whether parties to civil disputes may depose attorneys who have provided legal services to an opposing party." *Peterzalek* at 39.

The Court adopts the three-part test from *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). The test:

> "the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case."

*Peterzalek* at 45. Applying the test to one of the attorneys the Court found that the documents sought were privileged, and also that the relevance was to matters which could be determined by other means.

As to Jeff P. the Court found that he was not involved in this particular matter as opposing council and so the *Shelton* test does not apply at all. Even so, "it may still be appropriate to

prohibit or at least limit depositions of attorneys." *Id.* at 46. The Court then cites to standard sources for discovery law, the Rules of Civil Procedure on discovery and subpoenas. Even when *Shelton* does not apply "[i]n many cases, an attorney's relevant knowledge will consist largely of information that falls within the work-product doctrine, the attorney-client privilege, or both." *Id.* at 47. Also, lawyers should be able to serve their clients without fear of being interrogated by adversaries.

Thus even outside *Shelton* when an attorney is deposed special considerations should apply. The Court should "consider whether the information sought could be obtained through other means, such as depositions of nonattorneys, requests for production of documents, or interrogatories" and "it may be appropriate to limit the deposition's scope to topics on which the attorney can provide relevant testimony without raising significant concerns about the disclosure of privileged information." *Id.* The Court qualifies by pointing out this is not a concern in cases (like malpractice cases) where there is waiver of the attorney-client objections.

[Iowa Court of Appeals]

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

A supervisor of social workers at DHS (now HHS) was fired back in 2016 and had her claim of sex and sexual-orientation discrimination dismissed on summary judgment. The Court of Appeals heard the matter *en banc* but it was decided by eight judges since by the time of decision Judge Vaitheswaran had retired and Judge Langholz was yet to be appointed. The eight judges of the Court of Appeal unanimously affirmed.

With the benefit of *Feeback* the Court is the first since that case to apply the new (ish) summary judgment standard. The Employer articulated that the Plaintiff was fired for shortcomings in supervision of social workers. The Employer states this was discovered after an investigation into the death of a child who died during the pendency of a child protective assessment, which was to be conducted by one of the Plaintiff's subordinates. The Employer reviewed this case and randomly selected cases under Plaintiff's supervision. Employer claimed that as a result the Employer terminated the Plaintiff. The Employer argued that it identified violations of HHS's code of

conduct and work rules in the case of the death, and in seven others a failure to follow HHS's policies, procedures, best practices, and the guidelines contained in HHS manuals. Five members of the leadership team who conducted the investigation asserted they had never seen such an egregious case and that termination was warranted.

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

Quoting from the District Court (Judge Huppert of Polk County), and with no further analysis, the Court of Appeals affirmed. The key district court observation was "[t]aking the record in a light most favorable to Avery, it is clear that McInroy did harbor feelings that were not favorable to her, and made statements accordingly. Not all of these feelings or statements were tied to her status within a protected class, however…Likewise, the adversarial nature of the [HHS] investigation and the claim that Avery "had a target on her back" long before the N.F. case have not been tied to any improper discriminatory motive; to the contrary, the nature of the investigation and its ultimate conclusion are undisputedly tied to only the circumstances of the N.F. case." Slip op. at 9.

***Hampe v. Charles Gabus Ford,* No. 22-1599 (Iowa App. 1/10/2024)** (fr granted 3/8/24, oral set for 11/14/24)
https://www.iowacourts.gov/courtcases/19690/embed/CourtAppealsOpinion

Inasmuch as the Supreme Court granted further review and heard oral argument in November, the details of the Court of Appeals opinion may not matter much in the end. The case is a drug testing case under Iowa Code §730.5. The Court of Appeals found triable issues on three aspects of the Employer's drug testing. First, the Employer conducted random tests using the entire population at a work site as the pool for selection. But the Employer did not exempt out workers not scheduled to be at work at the time the testing is conducted, and made no effort to determine such workers. Because a number of workers were off

that day, thus necessitating the use of alternates, the Court found an issue of fact on whether the failure to limit the list to scheduled employees aggrieved the Plaintiff who was an alternate. Second, the Court found a triable issue on whether the only supervisory employee involved in the drug test received training on neither (1) the documentation and corroboration of employee alcohol and other drug abuse, nor (2) the referral of employees who abuse alcohol or other drugs to treatment. Third, the employer did not have a uniform discipline policy because the word "may" vested discretion in the decision-maker for a violation. It did not matter if the policy was applied uniformly because it still vested discretion in the Employer by its terms. The Court found a triable issue on whether the Plaintiff was aggrieved because there was evidence of other employees who were *not* terminated for similar violations.

The issues highlighted in the further review application were the three things found triable, namely, the random selection issue, the supervisor training, and the issues with the discipline policy. Further review was granted, and as all three implicate compliance it seems likely all three issues will be addressed by the Supreme Court.

***Sandry v. PERB*, No. 22-2046 (Iowa App. 2/7/2024)**
https://www.iowacourts.gov/courtcases/19809/embed/CourtAppealsOpinion

This is a petition for judicial review of a PERB decision regarding the termination of a merit covered employee. The main legal issue is the standard of review of the issue of "reasonable cause." On the facts the Court found substantial evidence that the Employee stole money from the till, saw her supervisor come in, questioned him about what he was doing there since he had the day off, and then replace the money (all on camera). Despite the Employee's claim that she was making change, the Court affirmed the finding of theft.

The Iowa Administrative Procedures Act two-point-oh, that is, as amended in 1998 changed the standard of review somewhat. The statute now makes a difference between review of "issues of law" and "application of law to fact." Agencies rarely get deference on issues of law, but do get deference on "application of law to fact" so long as the factual issues are commended to the agency. Prior to 1998 the Code merely provided for reversal if the decision was "affected by other error of law." Iowa Code §17A.19(8)(e) (1993). In many instances the concept of "application of law to fact" was largely subsumed under this

concept of "other error of law." At the same time the deference given to agencies on this broader concept of "issues of law" was correspondingly broader. *E.g. Dico v. Employment Appeal Board*, 576 N.W.2d 352, 355 (Iowa 1998). Under the revised IAPA the concept of "law to fact" was created to separate out pure legal issues, like interpretation of a statute, from application of a legal standard even to uncontested facts. *See e.g. Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10-11 (Iowa 2010) ("the General Assembly's intent to vest the discretion to interpret the laws…"); *Jacobson Transp. Co. v. Harris*, 778 NW 2d 192 (Iowa 2010) (utilizing the deferential application of law to fact standard where "There is no factual dispute" relevant to the contested factual issues). Here the Court found that when determining if "just cause" for termination exists the agency was applying the law to the facts, and no issue of law appears. Thus review is deferential, and applying it (and substantial evidence) the Court of Appeals affirmed the agency.

The Court also rejected the novel argument that both the deciding-agency and the employer-agency must file briefs to "preserve" their arguments. Of course, it is the Petitioner who has the burden of proving error under §17A.19(8), and default is not a ground for reversing agency action. Hartvigsen v. DOT, 426 N.W.2d 399, 402 (Iowa 1988); *R & V, Ltd. v. Iowa Dept. Of Commerce*, 470 NW 2d 59, 64 (Iowa App. 1991)(cannot reverse for lack of substantial evidence just because agency lost part of the record).

***Koester v. Eyerly-Ball Community Mental Health*, No. 23-0300 (Iowa App. 3/27/24)**
(FR granted 6/5/24)
https://www.iowacourts.gov/courtcases/20444/embed/CourtAppealsOpinion

Inasmuch as the Supreme Court granted further review and heard oral argument in November, the details of the Court of Appeals opinion may not matter much in the end (again).

A plaintiff appeals dismissal of her 91A and wrongful discharge claim. The Court of Appeals reinstates the wrongful discharge. Taking the allegations of the Petition as true the employee received overtime pay, the employer found out about it and fired her for "dishonesty." The Employer's claim was that this is OK since the worker got all the money coming. The Court of Appeals ruled that process integrity meant that the receipt of the overtime was protected, not just non-receipt. Importantly, a claim that the Employer violated the anti-retaliation provision of 91A was time-barred. So this points up the Employer's basic

argument of why would antiretaliation be in the statute twice – once explicitly and once implicitly?

The issue on further review will likely be focused on whether someone who has received their wages can claim the protection of 91A independent of the antiretaliation provision in 91A.10(5).

***McClure v. Corteva Agriscience LLC*, No. 23-0628 (Iowa App. 7/24/24)** (FR granted 9/26/24)
https://www.iowacourts.gov/courtcases/20676/embed/CourtAppealsOpinion

The Plaintiff was a long-term employee working most recently as a production technician – a fork lift operator. For most of his time he worked third shift or overnight, but this was restricted following a heart attack in 2014. The Employer then implemented some changes and initially required the Plaintiff to work night shifts. This prompted an extended round of demands for doctor's notes, followed by doctor's notes, new demands, new notes, etc. All in 2017. During this period the Plaintiff was given written warnings over the stated issues of performance and phone usage. This was followed by a "below" performance rating. The Plaintiff then had another heart attack in 2019. After additional discussion at the employer over his night restrictions, these restrictions continued. The Employer continued to raise some performance issues regarding safe driving by the Plaintiff. Then Plaintiff was involved in a two-forklift crash. Both were going backwards. The parties disagree about what happened to cause the crash. The Plaintiff claims he stopped and then was hit, and the Employer claims the Plaintiff backed right into the other forklift. The Plaintiff was fired over alleged ongoing safety issues, the other driver was not, and the Plaintiff sued alleging age, disability, and retaliation discrimination. Summary judgment was granted and the Plaintiff appealed. In this case the Court has to untangle the forklifts.

The Court discusses the *prima facie* case and finds enough evidence of qualification was produced to satisfy this prong of the *prima facie*. The defense pointed to the exact same reason it gave for termination and argued that it showed the plaintiff was not "qualified." The Court largely reserved the issue for later in the analysis. This is quite sensible as arguing over a not well-establish standard for "qualified" when the issue is identical the "pretext" seems pointless.

Of course, the issues are more substantial with disability discrimination as existence of disability is shoved into the

*prima facie* case. Here the Employer argued the fact that the Plaintiff could work *with* accommodation meant he was not disabled. The Court of Appeals rejected the argument holding that this goes to whether he was qualified for his position, not whether he was substantially impaired. Slip op. at 14. The Employer more directly attacks the credibility of the Plaintiff's medical restrictions, but the Court of Appeals noted such issues were for the jury not the court.

The preliminary skirmishes resolved, the case now moves the main engagement: pretext. On this point the Court made the rather provocative remark, that "Discrimination claims that advance to step three of the Feeback framework [discriminatory motive] are tough to square with summary judgment because the focus is on discerning discriminatory animus from the evidence." Slip op. at 16. The Court then found helpful to the Plaintiff that other workers reported similar scrutiny of their accommodation requests. The Court then turned to the issue of similarly situated employees. The Plaintiff cited younger employees who remained undisciplined for the same violations. The Defense argued that "they are not useful comparators because of McClure's disciplinary history." Slip op. at 18. The Court ruled that "this argument takes a wrong turn; the extent and accuracy of McClure's safety record and discipline is itself a factual dispute here…" Slip op. at 18. Finally, on the "honest belief" rule the Employer argued that the Plaintiff "must provide evidence that Corteva did not in good faith reasonably believe McClure's continued employment was a safety risk." Slip op. at 20. The Court noted that "the fact that an employer's belief is objectively false or unreasonable can provide evidence of its dishonesty depending on the circumstances." *Id.* Despite this the Defense could still prevail if "despite the factual disputes swirling around McClure's safety history, if [the Employer] could demonstrate the absence of a similar dispute on whether management honestly and reasonably believed McClure was a safety risk." Slip op. at 20. The Court found the employer could not demonstrate the lack of a factual issue on the honesty of its belief that the Plaintiff was a safety risk.

The Employer's further review application was granted. The application emphasized the "honest belief" rule, the comparator evidence, and the existence of disability issue. As the Court has left behind the 90's trend of curing people with the "laying on the gavel," as comparator issues are boring, and as the "honest belief" rule was only recently articulated, the issue on FR will very likely be the "honest belief" rule.

***Shamrock Hills v. Wagoner*, No. 23-1864 (Iowa App. 10/2/24)**
https://www.iowacourts.gov/courtcases/21412/embed/CourtAppealsOpinion

An employee brings a class action 91A claim as a counter claim. The Court assumed without deciding that this was a thing, but then affirmed denial of certification. The Court focused on the "predominance" factor. The Plaintiff's allegations are essentially misclassification of salespeople as independent contractors rather than as employees. The Court agreed with the District Court, that this determination in the case at hand would be highly fact specific. "Potential members for both classes will vary significantly in the facts regarding what type of hours they worked, how they operated, what Shamrock employee they reported to, and what their understanding of the Agreement was." Slip op. at 7. The analysis of this issue involves, "in every case…the parties' intention as it reflected upon the employment relationship." Slip op. at 8-9. Although all salespersons signed the same agreement the issue of intent, and control, remained individualized as does damages. "Even if we were inclined to decide that question differently ourselves, we find no abuse of discretion in the district court's analysis." Slip op. at 9. Further review was applied for on 10/22/24.

***International Assoc. of Firefighters, Local 1366 v. City of Cedar Falls & PERB*, No. 23-1368 (Iowa App. 10/2/2024)**
https://www.iowacourts.gov/courtcases/21744/embed/CourtAppealsOpinion

This recent decision pertains to the specifics of a PERB order. A prohibited practice complaint, based on anti-union animus, was founded by the PERB. The case then proceeded to the remedial phase, and PERB's interpretation of its order resulted in no monetary relief. The employees appeal, and the Courts decided PERB's two orders were inconsistent, and remanded to devise a consistent remedial order. Further review was applied for on 10/22/24. If the case remains remanded there will be contested issue that will come for adjudication before my client, the Employment Appeal Board whose is the successor agency to PERB. For this reason, and since the issues are very case-specific, I leave additional observations, if any, to a later update.

Standards For A Discrimination Plaintiff To Survive Summary Judgment & Present Submissible Case/Survive MTD on Pleadings

*Anderson v. KAR Global*, (8th Cir. 08/25/2023) (Kelly, Author, Gruender, Arnold) (222808P.pdf) – The Plaintiff was hired as an outside sales representative tasked with maintaining accounts ("farming") and generating new sales ("hunting"). Plaintiff was hired for his skills as a "hunter." A merger took place a year after hire and outside sales were basically separated into hunter and farmer positions. The Plaintiff was offered an expanded hunter position. The he had a seizure which meant he couldn't drive to his appointments. He was accommodated by having someone drive him to his appointments 2 days a week. A week later the Employer told him that they may not be able to continue this. The Plaintiff offered to have his father-in-law drive him 2 days a week. He received no response, but continued to receive the initial accommodation. As management was feeling out if the accommodation would work long term, other members of management were assessing possible termination related to the merger. When a decisionmaker with no personal knowledge of the Plaintiff's abilities, but knowledge of the need for accommodation, asked if he was "good" the response from the front line manager was that he had some issues but "In a pure hunter role though I think he would be pretty darn good." Slip op. at 3. Still, the Plaintiff was slated for termination and then fired with the stated reason being that others had met their sales goals and he had not, and they had one hunter role too many in his region. The district court found a lack of causation, and for the first time in two years the Court of Appeals found a triable issue of fact in an employment discrimination suit. The course of events was particularly important to the Court. The merger happened, *then* the Plaintiff was told he was envisioned as a "hunter" going forward, *then* Plaintiff told management about the seizure, and then within 10 days he was identified for termination. Noting no temporal bright line on such things the Court nevertheless explained "[h]ere, the interval was ten days. That is sufficient to establish causation based on temporal proximity at the prima facie stage for Anderson's disability discrimination claim and his retaliation claim." Slip op. at 8. On pretext most interesting was that the Plaintiff did not dispute he underperformed compared to his peers. Yet management could not

identify when they discovered this. The Circuit Court felt that "[a] reasonable jury could conclude that Hopkins looked into Anderson's job performance only after she learned of his disability and accommodation request and had decided to terminate him." Slip op. at 9-10. "A reasonable jury could conclude that Hopkins was unaware of Anderson's professional shortcomings at the time she first identified him for termination, and thus this post hoc rationale could not have factored into her termination decision." Slip op. at 10. In essence the case boils down to timing – causes precede effects, and the closer in time the better the inference.

*Strategic Technology Institute, Inc v. NLRB*, 87 F.4th 900 (8th Cir. 12/6/2023) (Benton, Author, Loken, Wollman) – In this NLRA case the company petitions for review of a NLRB finding that it retaliated against three employees by firing them for their union activities. In the midst of organizing talk, the Air Force complained to the employer about mistakes that had been made which posed serious safety issues. The Employer Had had previous issues and taken action in the form of training, but the issues persisted. In late August of 2019 a resigning worker told management that there was talk of a Union. A couple weeks later the Air Force again issued a corrective action reports based on a screwdriver left in an engine. The Company responded that training had not been effective and that corrective actions would be needed. The next day the company picked out 41 employees and had them ranked by the site supervisor. Meanwhile, the company found the three employees who had "screwdrivered" up. The site supervisor initially reprimanded the three for the error, but the higher ups decided termination was correct. Union activity increased and an organizer held an on-site meeting, and 35 Union authorization cards were signed within the week. About two weeks later (after the site supervisor returned from vacation) the fourteen lowest ranked employees were fired. After this the company did even worse, but told the Air Force it was because of "union litigation." In the end, the Air Force swiped left and got another contractor.

Applying the *Wright Line* test the Court of Appeals reversed the finding of union animus in the terminations. For the three the company obviously had a legitimate reason for the termination. Under Wright Line the GC had to prove that the firings were a "substantial or motivating" factor in the termination. On the three the mere fact that the company "knew some STI employees were discussing unionizing at the time of the three firings is not substantial evidence that the firings were motivated by anti-

union animus. At most it creates a suspicion…" *Strategic Tech* at 908.

On the 14 the Court decided that since the complaint to the Air Force about "union litigation" was made after the ULP complaint was filed it was no direct evidence of anti-union animus before the complaint was filed. Lacking direct evidence, the court found insufficient indirect evidence. The fact that there was a Union meeting, and organizing cards, and a generally a buzz of activity following the initial firings was not necessarily known to the off-site decision maker. The meetings were not in the employer's premises, and there was no other evidence, other than the smallness of the plant, that the decisionmaker knew of the activity. Since 1980 the Eighth Circuit has required such knowledge in addition to the "small plant doctrine." The problem with timing was that between getting general knowledge of activity and the 14 firings, the Air Force CAR intervened.

*Lightner v. Catelent*, 89 F.4th 648 (8th Cir. 12/26/2023) (Grasz, Author, Colloton, Kobes) – The Plaintiff was a long-time manager who had four employees quit, in two waves, identifying her as the reason. After the first two the Plaintiff was rated low on performance. Then her long-time manager left and was replaced. The next two resigned, citing the Plaintiff, and management told Plaintiff she could accept a PIP, a demotion, or resign. She emailed back that she would take the PIP, but also complained about age discrimination. But two days later, in response, she was told the PIP was no longer an option. She took some time off and was eventually fired when she did not report to work. The Plaintiff attempts to get summary judgment reversed first by citing to a younger manager who had employees quit. But they did not identify the manager as the reason. "Fleeting" references to retirement did not support an inference of discrimination either. Retaliation was a different thing. First, the timing was "very close" between complaining about discrimination and the removal of the PIP. *Lighter* at 656. Second, the employer's (late produced) text messages forwarding the complaints to higher management also asked whether the PIP could be now removed.

*Ingram v. Arkansas Dept. of Correction*, 91 F. 4th 924 (8th Cir. 1/26/2024) (Smith, Gruender, Grasz, author) – A wrongful termination case alleging race and sex discrimination was dismissed on the pleadings and the Circuit Court affirms. The Plaintiff plead she was a director in charge of hobby crafts at a prison, that she is supposed to keep keys and money safe. She also plead that an inmate broke into the office and stole keys and money, and then she was fired. The Plaintiff plead

comparators were not discipline for violation of the key policy. The Court of Appeals decided that this did not generate an issue *at the pleading stage* because the comparator did not have the same job title. "Ingram's allegations that ADC subjected her to a stricter level of scrutiny than her coworkers are naked assertions without further factual enhancements…. Therefore, Ingram's minimal factual allegations are insufficient, even at the motion to dismiss stage…" *Ingram* at 929.

*Colins v. KC Schools,* 92 F.4th 770 (8th Cir. 2/12/2024) (Loken, Arnold,author, and Stras) –A "longtime friend" of an "attendance ambassador" left the district, and then turned in the district for this fraud. The plaintiff was fired as he was an attendance ambassador and admits that he engaged in attendance fraud. In such a setting the only hope is a similarly situated person who was treated better. *E.g. McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976)("[W]hile crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination…It may be that theft of property entrusted to an employer for carriage is a more compelling basis for discharge … but this does not diminish the illogic in retaining guilty employees of one color while discharging those of another color.") The Plaintiff has no details on just how his comparator (an IT person) was involved in the scheme, and so loses on summary judgment.

*Noon v. City of Platte Woods*, 94 F. 4th 759 (8th Cir. 3/4/2024) (Smith, Gruender, Grasz, Author) – Police officer wrote a letter to the mayor complaining about the police chief. Surprisingly they were thereafter fired. And even more of a shock they sued over it. The district court refused qualified immunity, the defendants appeal, and the Circuit Court affirms. Importantly on this appeal the only factual dispute is whether the letter constituted protected activity. Here the letter was about supposedly corrupt billing practices. That is a matter of public concern and would generally be protected unless with the officer's job duties. The Court found that police officer's job duties did not encompass reporting corrupt billing, explicit images, or favoring one organization over others. The final issue then was whether the protected speech had a sufficiently adverse effect of the operation of the department. The Court did find disharmony was caused, and so this had to be subjected to *Pickering* balancing against the public and societal importance of the speech. The "first amendment balancing test cannot be controlled by a finding that disruption has occurred where such disruption occurs because a public employee blows the whistle on the corruption of public officials." *Noon* at 766 (quotation

omitted). Here the disharmony was not severe enough to override this strong public interest.

*Norgren v. Minnesota Dept. Of Human Services*, 96 F. 4th 1048 (8th Cir. 3/21/2024) (Erickson, author, Melloy, Stras) – Two workers, Joseph and Aaron, father and son, bring claims alleging that workplace training on gender identity and racisim violates their religion. The case is dismissed on the pleadings for failure to state a claim. The Court of Appeals reinstates Aaron's claim that promotion was denied based on retaliation and/or religion. On retaliation the State argued that the Plaintiff was not qualified for the promotion. However the Plaintiff had plead in the past he had applied for jobs with similar qualification, and yet was interviewed. The claim that he was objectively unqualified and this defeats any causal connection. But "[t]o the extent that DHS is proffering a legitimate non-retaliatory reason for its conduct, Aaron does not need to defeat the claim on the face of his complaint because the burden-shifting framework is not appropriate at the motion to dismiss stage." *Norgren* at 1055. "Aaron alleged that he met the qualifications for both positions, that he was declined an interview after he filed his EEOC charge, and that DHS deviated from its past practice in choosing not to interview him. His complaint is sufficient to raise a plausible inference of discrimination." *Id.* Also the fact that the employer claims lack of knowledge of protected activity is not appropriate for resolution at this stage. The same facts supported a charge of religious discrimination. On this analysis the Court added the instruction that "courts generally do not inquire about comparators until the 'pretext stage' of the inquiry, which arises at summary judgment." *Id.* at 1056. Joseph's claim of constructive discharge failed primarily because he announced plans to retire *before* his request to be exempted from the training was denied. Both failed on compelled speech claims because "while the pleadings alleged that the trainings advanced expressive messages that the Norgrens objected to, the Norgrens failed to plausibly allege that Commissioner Harpstead compelled them to adopt those messages as their own speech." *Id.* at 1057.

*Meinen v. Bi-State Development Agency*, 101 F.4th 947 (8th Cir. 5/16/2024) (Loken, Erickson,author, And Grasz [concur/dissent]) – The Court affirms dismissal of a harassment and retaliation case on the pleadings. The male plaintiff reported a female rubbing her backside on him on one occasion, and the remark to him (who was out of uniform) that "You know you look good without clothes on, (pause) I mean not in uniform." And then he heard one that "It's not cheating if it's not in your race." The

Plaintiff eventually wrote of the employee and was fired about a month later. Critically the complaint related that he was given an alternative explanation for the post-protected-activity termination, but "no facts are ever alleged that give rise to an inference of a retaliatory motive beyond temporal proximity." *Meinen* at 951. The majority thus affirmed the dismissal. If any case stands for the idea that temporal proximity alone is not sufficient this is it. On harassment the events were simply not severe enough even if taken as true.

Goosen v. Minnesota Dept. Of Transp, 105 F. 4th 1034 (8th Cir. 6/24/2024)( Erickson, Melloy, author, And Stras) – Plaintiff worked as a heavy equipment mechanic working on heavy equipment used for road construction, maintenance, and snow and ice control. He suffered an on the job injury, reached MMI, and was released with restrictions. His Employer determined he could not do the essential job functions with those restrictions, and the issue in this summary judgment appeals is whether they were right as a matter of law. The District Court found they were, granted summary judgment, and on appeal the Circuit Court agrees. The dispute is over three specific job functions which, Plaintiff admits, are inconsistent with the permanent effects of his arm injury. In finding for the defense the Circuit Court reiterated the rule that " preemployment testing is not dispositive when determining a job's essential functions," and so the lack of these function in preemployment testing was insufficient to generate a jury question. *Goosen* at 1041. While plaintiff argued for a transfer to a different position as accommodation, he provided no job posting or job description to show that the essential functions were different.

*Clobes v. 3M Co.*, 106 F. 4th 803 (8th Cir 1/5/24) (Colloton, , Shepherd, author, and Stras) – The Plaintiff worked for a manufacturing plant that implemented a mandatory COVID-19 vaccine policy, which Plaintiff objected to on religious grounds. He was questioned about his basis the objection, and required to wear a mask. The company also made daily announcements of the policy. After a few months the policy was lifted when the federal rule in question was enjoined. The district court dismissed on the pleadings for a lack of adverse employment action, and a lack of a causal link between the religion and claimed harassment. The Plaintiff appealed the harassment ruling and the Circuit Court affirmed. While the Plaintiff described why his religious beliefs caused him to object to the vaccine, and to react negatively to the questioning and the announcements, this did not mean that was the reason the defendant engaged in the conduct. "[Plaintiff stresses the

connection between *his* reservations about the vaccine and *his* religious beliefs — a connection that says nothing of 3M's motivations." *Clobes* at 807. The Court also found any alleged harassment, including threats of possible termination, as insufficiently serious to be illegal.

*Ringhofer v. Mayo Clinic,* 102 F.4th 894 (5/24/2024)( Benton, author Erickson, And Kobes) – Plaintiffs sued Mayo Clinic claiming that a vaccine requirement violated their religious beliefs and that Mayo had not accommodated those beliefs. The Petition was dismissed for on the pleadings, and the Plaintiffs appeal. The Circuit Court reinstated the case. Two of the plaintiffs has suit dismissed for failure to exhaust. These plaintiffs had filed charges based on a final written warning for failure to get vaccinated. They were fired based on the same failure, but did not file charges. Citing to its 2006 precedent the Court found that the relationship between the termination and the warning – that failure to comply would result in termination – was such that a second charge was not required. Three other plaintiffs were dismissed for failure to plausibly plead a violation of Title VII. The district court premised dismissal on a failure to connect the vaccine refusal to religious beliefs. Reading the complaints broadly and given all inferences to the plaintiffs the Court found a plausible pleading of this relationship. All three in question cited use of fetal cells in developing vaccines. The last two were given an exemption but required to undergo weekly testing. These two claims a religious belief that unnecessary testing was a violation of divine directive, and the Circuit Court, giving the claim credence at the pleading stage, reinstated suit.

*Howard v. City of Sedalia,* 103 F.4th 536 (8th Cir. 6/4/2024) (Loken, author, Erickson, Grasz) – Last year's update discussed *Hopman v. Union Pac. R.R.*, 68 F.4th 394 (8th Cir. 2023) and the limitation that a reasonable accommodation is only required if it is needed to make the person with a disability able to perform the job. If the person can do the job without accommodation then the accommodation is not legally required even if the person is more comfortable with the accommodation. The holding in *Hopman* were that "mitigating pain is not an employer sponsored program or service" and that accommodation "does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability." In *Howard* a pharmacist wants to bring her dog to work. But unlike Mr. Hopman, her dog is not for psychological well-being, but physical. Ms. Howard suffers from type I diabetes hypoglycemic unawareness, meaning she cannot know when her blood sugar drops

dangerously low. When hired she was on a waiting list for a diabetic-alert service dog to help with this. She needed to have to dog by her side for six months to train it, and thereafter she could work without the dog. The issue for the employer was infection control. A team of professionals concluded that the risk was too great, and the request for accommodation was denied. The plaintiff had been performing her job, without the dog, for 14 months. The Plaintiff sued under the ADA, and won before the jury. The 8th Circuit reverses under *Hopman.* Most clearly, the Court rejected the invitation to limit *Hopman* to emotional support animals. Instead, the rule in *Hopman* means that better job performance through accommodation is not required where the worker performs satisfactorily without the accommodation. Here the Plaintiff could monitor her blood sugar mechanically, and the dog "in a sense frees up my mind a bit in not having to be quite as on top of my sugars ... and not be so anxious." *Howard* at 541. This is a "better job performance" argument that will not show failure to accommodate under *Hopman.* Moreover, the Plaintiff's argument pertained to an adjustment that assists the individual throughout daily life and is thus considered a personal item the Employer does not have to provide. "Providing a service dog at work so that an employee with a disability has the same assistance the service dog provides away from work is not a cognizable benefit or privilege of employment." *Howard* at 542 (quoting *Hopman*, 68 F.4th at 401).

*Johnson v. Westinghouse Air Brake Technologies,* 104 F. 4th 67 (8th Cir. 6/13/2024) (Benton, author, Grasz, Stras) – This is yet other COVID-19 policy case. The plaintiff was the only Black salaried worker in his plant. He was given a last chance warning for not complying with policies on reporting positive results and interacting with those known to have tested positive. Subsequently, the employer received an anonymous tip that the Plaintiff may have reported to work without disclosing close contact with someone who had tested position. Investigation ensued. The plaintiff failed to disclose the contact with initially questioned but fessed up later. He was fired for the stated reason of coming to work after exposure but not telling anyone, and then lying during the investigation. In order to show pretext the plaintiff has only that he didn't violate *all* of the COVID policies. In other words, the fact that he made some required disclosures did not alter that the facts clearly showed, without dispute, that he failed to make other required disclosures. With no similarly situated comparators the Court of Appeal affirmed the dismissal.

*Cole v. Group Health Plan, Inc.*, 105 F.4th 1110 (8th Cir. 6/28/2024) (Erickson, author, Grasz, Kobes) – A Plaintiff with religious objections to COVID-19 vaccines has his claim that was dismissed on the pleadings reinstated. Here the critical issue was sufficient pleading of an adverse employment action. The district court relied on the standard revered in *Muldrow v. City of St. Louis*, 601 U.S. 346, 144 S. Ct. 967, 218 L.Ed.2d 322 (2024). The Circuit Court applies that standard directly and reinstates the suit. The Plaintiff is a member of the Eckankar religion and plead that she had religious objections to the COVID vaccine. She worked in health care, and her employer imposed a vaccine mandate in 2021. Plaintiff was given a religious exemption but required to wear a medical grade mask in all areas. The vaccinated could remove the masks using orange "badge locks" but the Plaintiff had no lock. Nothing more happened but she brings suit over the stigma of the mask, and the questions she had to field from upset co-workers. Following *Muldrow* the circuit court ruled that the discomfort from co-worker criticism, and reassignment to areas where infection would not be an issue, were sufficient to plead adverse action. "Whether these changes resulted in 'some harm' to a term or condition of Cole's employment requires further factual development. In addition, the denial of a requested religious accommodation absent a showing of undue hardship may itself constitute an adverse action…" *Cole* at 1114. On discrimination the Court relied on the *Norgren* rule that comparators are not assessed until summary judgment.

*Carter v. Secretary, Dept. Of Labor,* 108 F. 4th 1028 (8th Cir. 7/18/2024) (Smith, Wollman, author, Grasz)- A railroad worker alleged that his workplace injury, and his FELA lawsuit over that injury, were contributing factors in his discharge. The DOL disagreed and he petitions for review. "A `contributing factor' includes any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse] decision." *Carter* at 1033 (*quoting ultimately Gunderson v. BNSF Ry. Co.*, 850 F. 3d 962 (8th Cir. 2017)). The employee had lied on his job application, and this was only discovered during the court of the FELA case. The employee was then terminated over the falsification. Initially 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. Back in 2017 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." *Carter I* 867 F.3d at 946. On remand, a new ALJ found that there was no relationship between the injury and the *decision* to discharge (other than the injury leading to the discovery of the falsehoods). The main problem for the employee was the yearslong gap between the injury (and even the lawsuit) and the decision to discharge. The key witness that would support the allegation of retaliation was found not credible by the ALJ, and such findings are not going to get reversed on appeal.

*Collins v. Union Pacific R. Co.,* 108 F. 4th 1049 (8th Cir. 7/24/2024) (Smith, Wollman, Shepherd, author) – The Court of Appeals remands a grant of summary judgment on retaliation claims because the district court had relied on the standard revered in *Muldrow v. City of St. Louis*, 601 U.S. 346, 144 S. Ct. 967, 218 L.Ed.2d 322 (2024). The harassment claim, however, was dismissed on lack of pervasiveness. As a procedural warning to plaintiffs, this plaintiff waived this ground for resisting summary judgment. She "did not direct the district court to evidentiary materials setting out specific facts showing a genuine dispute as to the severe or pervasive harassment element, nor did she provide meaningful legal analysis.." and this meant she could not now argue for pervasiveness in opposition of summary judgment.

*Sanders v. Union Pacific,* 108 F.4th 1055 (8th Cir. 7/25/2024) (Colloton, Author, Benton, Shepherd) – The Plaintiff was a foreman who oversaw mechanics and whose job required some heavy lifting from time to time. He had a bleeding ulcer, this resulted in cardiac arrest. He was operated on and fully recovered. The railroad required a return to duty exam which included a treadmill test that the Plaintiff could not complete – because of bad knees. He suggested a bike test instead. The employer apparently doesn't like bikes, and instisted on the treadmill test, upon which they concluded he had low aerobic capacity and restricted him from his old duties. Lawsuit follows. The jury found in favor of the Plaintiff in this ADA case and the Eighth circuit affirms the verdict. Given that the Employer would not let the Plaintiff return to work because his heart might be impaired the Court found that the Plaintiff had a triable issue on whether he was *perceived* as disabled. Importantly, the Court jettisoned precedent refusing to attribute a perception of disability from physician to employer. This decision was premised on the 2008 amendments to the ADA. *Sanders* at 1061. There was plenty of evidence that he was in fact capable of the occasional lifting described by the job performance, including

from his own physicians. The company tried to escape the conclusion of discrimination on disability by arguing it didn't dislike disabled people and lack anti-disability animus. "[A]nimus…[in] the ADA does not require evidence of prejudice toward the disabled. Rather, 'animus' in this context means simply that the employer was motivated by the employee's disability. …[which is satisfied]…in this case because the defendant acknowledges relying on the plaintiff's impairment in reaching the employment decision." *Sanders* at 1062. The Court also affirmed on the failure to accommodate the arthritis by allowing the Plaintiff to use the bike. In the end it is not good for an employer when the medical testimony is that the decision was "completely uncalled for, completely wrong, and not based on any medical principles at all." *Id.*

*Black v. Swift Pork,* 113 F. 4th 1028 (8th Cir. 8/28/24) *rehrg denied* 10/17/24 (Loken, Kelly, Stras, author) – In this FMLA case out of Iowa a split panel (Loken dissenting in part), splits the ruling. It affirms dismissal of the discrimination claim and reverses on the interference claim. The Plaintiff had a wife with cardiovascular disease for which he had taken intermittent leave for many years. After being sick with pneumonia for a week the Plaintiff came to work to find himself given a different assignment. He did it, and asked what happened to his old one. The Employer responded that other workers were being trained on it so they could back up. The Plaintiff became upset and accused the company of punishing him for being out with pneumonia. The Employer responded it was more than that, and it was about his absences prior to that. The Plaintiff then asked for his accrued vacation days while they "figured it out," but the request was denied because he did not request in advance. As his wife had been sick he then took intermittent FMLA the next two days. The Employer, apparently, didn't believe it and fired him. The issue on the interference claim is was medically necessary for the the Plaintiff to care for his wife that day. The Circuit Court allowed the interference claim to go forward since the Plaintiff testified his wife was reporting chest pains that day. Since the evidence of a snit by Plaintiff was thus contested the Court allowed the case to go to trial on this theory. The discrimination theory was defeated, inevitably, by the 158 times he successfully took FMLA without incident.

*Henderson v. Springfield R-12 School District* (8th Cir. 9/13/2024) (231374P.pdf) (Loken, Colloton, Author, and Kelly)- Employees sued claiming that being forced to attend "equity training" violated their First Amendment rights. Dismissal was based on a lack of injury, and hence no standing. The plaintiffs

were not directly punished by the school district, they received full pay and professional-development credit for attending the training. They were never disciplined for any of their remarks or actions during the training. While chilling of speech can be an injury here, the fact that "plaintiffs were required to endure a two-hour training program that they and others thought was misguided and offensive" was insufficient, moreover the trainers took pains to clarify that no was being called a white supremacist. Their fear of being punished if they spoke out was speculative, and not a ground for a lawsuit. As far as the requirement that employees select "correct" answers to get training credit "we are aware of no authority holding that simply requiring a public employee to demonstrate verbally an understanding of the employer's training materials inflicts an injury under the First Amendment…"

*Morris v. Department of Veterans Affairs*, No. 23-3548 (8th Cir. 10/10/2024) (233548P.pdf) (Benton, Arnold, author, Kobes) – The Court affirms a grant of summary judgment in a failure to promote based on race claim. The employer promoted a White female over the plaintiff citing better references. The Plaintiff alleged that pretext was shown by the fact that the Department (of Veteran's Affairs!) misapplied veteran's preference when making its decision. Circuit court didn't care if they did or not. "[E]ven if CAVHS should have followed these procedures, we fail to see, without more, how that failure suggests that Morris's race affected CAVHS's decision. Otherwise, disappointed employees could make a Title VII case out of any bureaucratic oversight…" Slip op. at 3. While the district court cited a lack of *animus* the Circuit Court disavowed that as "a Title VII plaintiff need not show that the defendant harbored animus, ill will, enmity, or the like…" Slip op. at 4. What is required is "a causal connection between her protected characteristic and the employer's decision." *Id.* The Court finds no issue on causality "on this record" with little more explanation. Perhaps the age of the decision – nine years ago – was a factor. On a pay upgrade claim arising years later, the Plaintiff claimed that the same person who suggested she should apply for this also sabotaged the process he had set in motion. This is not particularly convincing and the Court affirmed the dismissal. Of some interest, the Plaintiff cited to the fact that this alleged saboteur had said he gave her favorable performance reviews because he was afraid she would file discrimination or retaliation complaints against him otherwise. The Circuit Court found that "his admission suggests merely that he extended unwarranted favoritism toward Morris, an act that cannot give rise to an inference that Ballard was unfavorable to her

application." Slip op. at 5. This outcome suggests that a claim of "bureaucratic" screw-up by the federal government is so powerful that no juror could disbelieve it.

NON-SUMMARY JUDGMENT/VERDICT REVIEW CASES

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

*McDonald v. St. Louis University*, 109 F.4th 1068 (8th Cir. 7/30/2024)(Benton, Erickson, author, and Kobes) – A title VII suit was filed after the 90 days from the right-to-sue and the district court dismissed, rejecting claims of tolling. The Circuit Court ruled that the 90 days commences when the lawyer is *emailed the link* to the RTS in the portal. The email only has in the subject line that there was a "new decision" but makes no mention of the RTS. The lawyer had no access to the portal and tried to get access. But the Circuit Court thought he didn't do enough. And anyway once the letter was sent as an attachment to an email there were still 41 days left to bring suit.

*DeGeer v. Union Pacific Railroad Co.*, 13 F.4th 1035 (8th Cir. 2024) (Smith, Kelly, and Kobes, author) – The plaintiff was part of a class claiming that a fitness-for-duty exam violated the ADA. The class had shifting descriptions over the history of the

suit. And then the class was decertified by the 8th Circuit. The plaintiff filed his own individual charge and suit, and gets dismissed for being untimely. The key in the case is the *American Pipe* rule that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). Here the district court narrowed the class and so the question is whether this plaintiff had tolling end when the district court certified the class under a narrower definition than plead. "Whether the narrowed definition excluded DeGeer turns on the kinds of subtle distinctions in language that are fodder for lawyers and quicksand for laymen." *DeGeer* at 1040. This observation spelled doom for the defense argument since the class must "unambiguously exclude" the plaintiff to deny him tolling. "To hold otherwise would frustrate the purposes of the rule. *American Pipe* does not require bystander plaintiffs like DeGeer to follow the class action closely, looking for any change in the class definition and carefully parsing what it might mean." *Id.* At 1041 (citation omitted).

*Famuyide v. Chipotle Mexican Grill, Inc.,* 111 F.4th 895 (8th Cir. 8/5/2024) (Colloton, author, Shepherd, Stras) – The Employer seeks to compel arbitration and brings an appeal under the FAA. The Circuit Court rejects the attempt to compel under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. This Act governs disputes or claims arising or accruing on or after the law's enactment date of March 3, 2022. Pub. L. No. 117-90, § 3. The Employer claimed that the "dispute" arose before March 3, 2022, because on November 23, 2021, Plaintiff's co-worker sexually assaulted her in the restroom at the restaurant. Yet the Plaintiff had yet to bring this to Chipotle and Chipotle had not registered disagreement with any position of the Plaintiff. There was yet to be a dispute. Next Chipotle cites letters from the Plaintiff's lawyers warning the company to preserve information, and that civil litigation was being considered. "This sort of exploratory letter from counsel does not establish a dispute or inevitably lead to one. Sometimes a dispute ensues after this type of correspondence. But sometimes it does not…" *Famuyide* at 898. This shot down that claim on the timing, and the plaintiff was allowed to proceed.

## A Quick Look At Other Updates

AI Guidance from the DOL

As part of President Biden's Executive Order, the Department of Labor has developed principles and best practices for AI developers and employers … It requires taking proactive measures to retrain and reallocate workers in order to prevent worker displacement from the outset. It calls for both private sector employers and government to play their part to train workers in the new skills needed for an AI economy. And workers should share in the benefits and rewards of AI's adoption in their workplaces.

https://www.dol.gov/sites/dolgov/files/general/ai/AI-Principles-Best-Practices.pdf

[One is put in mind of the following exchange about car-building robots between a Ford exec and a union official: "How are you going to collect union dues from those guys [the robots]?" "And how are you going to get them to buy Fords?"]

ICRC Powers Reduced

The new boards and commission bill reduced the powers of the ICRC, the body of Iowans appointed by the governor for a term of years. The Commission is now just the final decision-making body for those few cases that go to contested case hearing. Very few indeed are employment cases. The regulatory authority, the responsibility to study the causes of discrimination, hold public forums on discriminatory practices, propose legislation, determine whether to proceed to hearing, are now all powers of the executive director, who serves at the pleasure of the governor. 90 GA ch. 1170, §§252-274.

EAB Takes Over the Functions of PERB

The section creating PERB was codified at §20.5 of the Iowa Code. Iowa Code §20.5 (1974). On July 1, 2024 Iowa Code §20.5 was struck. 90 GA ch. 1170 (SF 2385), §368. As of July 1, 2024, the EAB has been tasked with handling all functions formerly performed by PERB. 90 GA ch. 1170 (SF 2385). Section 513 of Senate File 2385 provides that "[a]ny cause of action, statute of limitation, or administrative action relating to or initiated by the public employment relations board shall not be affected as a result of this Act and shall apply to the employment appeal board." 90 GA ch. 1170, §513(4)(f).

EEOC Identifies Practices to Retain Persons with Disabilities at Federal Agencies

The EEOC released a report titled, "Retaining Persons with Disabilities in the Federal Workforce." https://www.eeoc.gov/newsroom/eeoc-identifies-practices-retain-persons-disabilities-federal-agencies

The EEOC issued its 2024-28 strategic enforcement plan for EEOC's AI and Algorithmic Fairness initiative.

https://www.eeoc.gov/sites/default/files/2024-03/23-161_EEOC_SEP_030124_508.pdf

Final Update to EEOC Harassment Guidance

Published September 29, 2023 the guidance would supersede the 25-year-old guidance. After a comment period the final guidance was published on April 29, 2024.

https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace

EEOC Pay Data Now Available

EEOC has made available a data dashboard featuring the historic, first-time collection of 2017 and 2018 pay data reported by about 70,000 private employers and certain federal contractors with 100 or more employees each year, representing over 100 million workers. The dashboard contains a unique collection of aggregated employer-level workforce demographic and pay data, reported by pay band. By aggregating this data, the EEOC is protecting the confidentiality of employees and employers.

https://www.eeoc.gov/data/2017-and-2018-pay-data-collection

FTC Issues Final Rule Banning NonCompetes – Now on hold

The Federal Trade Commission issued a final rule to promote competition by banning noncompetes nationwide. The U.S. District Court for the Northern District of Texas in *Ryan LLC v. Federal Trade Commission* issued an order enjoining the FTC from enforcing its Non-Compete Rule. On October 18 the FTC appealed a nationwide bar on the FTC's final rule or enforcement of the rule. This appeal followed another appeal by the FTC of an adverse ruling from *Properties of the Villages, Inc. v. Federal Trade Commission*.

https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf