



THE MISSOURI BAR Labor & Employment Law Committee



David M. Kight, Chair
Brian J. Christensen, Vice-Chair
Jane Drummond, Vice-Chair

326 Monroe Street
Post Office Box 119
Jefferson City, Missouri 65102
573/635-4128

Nancy Jo Morales Gonzalez, Vice-Chair
Julia Kitsmiller, Vice-Chair
Stephen C. Thornberry, Vice-Chair

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THE DYNAMIC DOCKET

Presentation by the Significant Decisions Subcommittee

DISCRIMINATION

Gender Discrimination/Sexual Harassment

***Johnson v. University of Iowa*, 431 F.3d 325 (8th Cir. 2005)**

The University's parental leave policy granted biological mothers six weeks of pregnancy leave that could be charged against accrued sick leave. If the mother did not have enough sick leave, additional leave could be granted and charged against vacation or comp time. A similar policy permitted adoptive parents of both sexes to use paid leave for absences connected with the adoption. Johnson sued because the policy did not permit biological fathers to use sick leave for absences following the birth of a child.

The court found that the policy was not discriminatory on its face because the leave was *disability*-related leave, not for the purpose of caring for and bonding with the child. Even though the policy's stated purpose was, in part, to allow the "biological mother to . . . spend time with the newborn child," the court deemed six weeks an appropriate period for presumptive disability of a recent mother.

Johnson also argued that the policy was discriminatory as applied, since his wife was able to work part time for the last two weeks of her leave. She testified that her time off during those weeks was for the sole purpose of spending time with and caring for the child. The court found it unreasonable to infer that she was able to work without restrictions and deemed her partially disabled for that period because she was required to obtain a medical release for her part-time employment. Because of the differences in their jobs and the fact that Johnson's wife "had recently gone through the physical trauma of childbirth," they were not similarly situated, and Johnson could not prove that the reasons for denying him paid leave were pretextual.

The fact that adoptive fathers were granted paid leave was found to survive rational review on the grounds that adoptive parents face financial and administrative burdens not borne by biological parents.

***Simpson v. Merchants & Planters Bank*, 441 F.3d 572 (8th Cir. 2006)**

Simpson sued the bank for violating the Equal Pay Act. At trial, she presented evidence that her position was substantially similar to a male coworker's because it involved similar skill, training, responsibilities and work hours. The jury returned a verdict in favor of Simpson, deeming the bank's conduct with respect to her pay willful.

The 8th Circuit rejected the bank's argument that the two jobs were not the same. A reasonable jury could have concluded that Simpson and her coworker possessed the same experience, training, education and ability and that both jobs required the same effort and responsibility. The bank claimed the pay differential was based on factors other than sex, such as the coworker's college degree, after-hours work, activity in the community and efforts by other banks to recruit him. The court declined to overturn the verdict and held a reasonable jury could have found a willful violation of the Equal Pay Act based on comments by the Executive Vice President that men were needed at the bank and that men in town should be paid more than women.

***Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606 (8th Cir. 2006)**

Quick was fired as the photo lab manager the day she returned from maternity leave. She filed an action under the Pregnancy Discrimination Act. Five months prior to her leave, her supervisors met with her to discuss performance and conduct issues. During that conversation, they told her it did not make "good management sense" to take twelve weeks of maternity leave. While she was on leave, one supervisor expressed surprise that she expected to return to work.

Prior to the commencement of Quick's leave, the district manager implemented a new policy prohibiting lab managers from offering promotions or discounts without district approval. Quick testified that she understood the policy would permit her to continue an existing promotion, with district approval. She also testified she continued to offer a preexisting promotion without district approval. Wal-Mart learned of this practice while Quick was on leave and cited it as the reason for her termination.

The court found this a legitimate, non-discriminatory reason for her termination, shifting the burden to Quick to establish pretext. While the timing of her discharge was suspicious, the temporal proximity alone was not sufficient. The comments of her supervisors regarding her pregnancy leave were also deemed inadequate to undermine Wal-Mart's justification for firing her.

***Wilson v. City of Des Moines*, 442 F.3d 637 (8th Cir. 2006)**

Wilson sued the City of Des Moines, claiming sexual discrimination, sexual harassment and retaliation under Title VII. Viewing the facts in favor of the employer, which prevailed at trial, the record showed Wilson had a history of lodging complaints only when her performance was under scrutiny, and she did not take responsibility for her misconduct. Testimony also revealed she engaged in sexually explicit language and

behavior in the workplace. Wilson complained of sex discrimination in January 2001 and sexual harassment in October 2001. The City terminated her in June 2003 for misconduct, after she was found several miles off her work route, damaged a city vehicle (which she tried to cover up) and was absent without leave.

On appeal, Wilson argued that the district court erred in sustaining the City's hearsay objection to testimony of her coworkers about names she was called at work, because the testimony was offered to demonstrate the systematic discrimination she faced. The court agreed that the statements were not hearsay, but held the error was not prejudicial. Wilson also argued that the admission of testimony about her alleged sexual behavior and comments violated Federal Rule 412. The court noted that although Rule 412 applies in a Title VII action where the plaintiff has alleged sexual harassment, the evidence was properly admitted as an exception to Rule 412(b)(2). While an alleged victim's private sexual behavior does not change her expectations about the work environment, evidence of her behavior in the workplace may be probative of whether the complained-of conduct was welcomed. The district court carefully limited the testimony to Wilson's behavior at work. As such, it was highly probative of whether the alleged harassment was unwelcome. The court affirmed the district court's denial of a motion for new trial.

***Wedow v. City of Kansas City*, 442 F.3d 662 (8th Cir. 2006)**

Two female firefighters had previously sued Kansas City and were promoted to battalion chiefs following trial. They filed new EEOC charges in 1997, alleging that the City failed to provide them with adequate protective clothing and bathroom/shower facilities based on gender. They also claimed that the City had been and continued to retaliate against them. They prevailed at trial and the City appealed.

The City argued that plaintiffs' disparate treatment claims were time-barred because they were aware the City failed to provide adequate protective clothing and facilities as early as 1990, but did not file EEOC charges until 1997. The court held that each time Plaintiffs were required to don inadequately fitting protective clothing or serve a shift without adequate facilities constituted a new violation; thus, the claims were not barred.

The City also argued that Plaintiffs' retaliation claims were untimely because the alleged acts occurred between 1998 and 2000 and Plaintiffs did not amend their 1997 charges to incorporate the new acts. The court acknowledged the continuing violation theory of *National Railroad Passenger Corporation*, 536 U.S. 101 (2002), but refused to abandon *in toto* the theory that a plaintiff can sue over acts that are similar or related to claims asserted in a previous charge. Since Plaintiffs had alleged in their 1997 charges that the City's retaliation was ongoing, their charges were not closed-ended and implicated future conduct that might reasonably be covered by the scope of an EEOC investigation.

With regard to their disparate treatment claims, the City argued Plaintiffs failed to demonstrate any adverse employment action relating to protective clothing and facilities. Based on a fact-intensive inquiry of the dangers associated with inadequate protective gear, the court held that the City's actions were sufficiently adverse to be actionable.

Finally, the court agreed with Plaintiffs that the City had retaliated against them by refusing to assign them certain shifts, finding that Plaintiffs had been denied essential on-the-job training.

***Cottrill v. MFA, Inc.*, 443 F.3d 629 (8th Cir. 2006)**

Cottrill and a coworker sued MFA for under Title VII, claiming disparate treatment and hostile work environment. Their claims were based on their supervisors' construction of a peephole to the women's bathroom, through which he spied on Cottrill. Both women encountered a sticky substance on the toilet seat on numerous occasions and had isolated experiences of a burning sensation after using the restroom.

Cottrill's co-worker discovered the peephole and immediately reported it to management. Management requested that Cottrill participate in a sting, whereby the supervisor's actions would be caught on video. Cottrill was to act as bait. She was told that the company needed concrete proof in order to fire the supervisor. He was fired after MFA obtained video of him spying on Cottrill four times in one day.

Plaintiffs' disparate treatment claims failed on the grounds that they did not include them in their charges filed with the EEOC and thus failed to exhaust their administrative remedies. The first time they construed their complaints to include disparate treatment was in opposition to MFA's motion for summary judgment.

Plaintiffs' hostile work environment claims failed because they were unaware of the peeping until just before Adkins was fired. The activities they did subjectively perceive, such as the contamination of the toilet seat and burning sensation, were deemed not so objectively hostile to support a claim. Cottrill claimed that using the restroom to assist in catching Adkins subjected her to a hostile environment, but her consent to the scheme and admission that she did not believe MFA did anything improper defeated her claim.

***Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903 (8th Cir. 2006)**

Tenge was discharged when the wife of the company's owner suspected an intimate relationship between Tenge and her husband. The owner told her his wife was "making him choose between his best employee or her and the kids." Plaintiff claims she was terminated on the basis of her sex. The district court granted summary judgment to Phillips on her claims, and she appealed.

Plaintiff claims that arousing the jealousy of the boss's wife is an illegal criterion for discharge under Title VII, but admitted that she engaged in sexual conduct that could have led his wife to suspect an inappropriate relationship. Plaintiff did not claim she was subjected to sexual harassment. The Court had to decide whether Title VII is implicated when distinctions are made in the workplace based on an employee's admitted, consensual sexual conduct with a supervisor in a non-hostile work environment. The court determined that absent claims of coercion or widespread sexual favoritism, Title VII is not implicated when an employment decision is based on consensual sexual conduct with a supervisor because any actions taken based on the relationship are due to the sexual conduct, rather than the gender, of the employee.

Therefore, the stated reason for plaintiff's termination was not direct evidence of discrimination.

Tenge's prima facie case of sex discrimination also failed because she did not present evidence that any male co-employee had written explicit sexual notes to the employer or had engaged in consensual sexual conduct with the employer in his wife's presence.

Cooper v. Albacore Holdings, Inc., d/b/a Abiliti Solutions, Inc., 2006 WL 2472650 (Mo. App. E.D. 2006)

Cooper was the only female member of the company's executive business team. During a dinner party, Quick, the company's CEO, spilled wine on Cooper. Using his napkin to assist her, he touched her breasts, thighs and torso. Cooper asked him several times to stop but he continued to touch her. Quick touched Cooper several more times during the dinner party, suggested that she take off her shirt, and asked her to come home with him.

Cooper did not return to work, advise the company she was resigning or avail herself of its established procedures for filing a sexual harassment complaint. Several days later, her attorney did notify the company that she had retained him for claims of sexual harassment and battery.

The trial court entered summary judgment for Albacore on all counts. The Eastern District ruled that summary judgment for the company was proper because Cooper failed to follow the procedures for filing a sexual harassment complaint. The court reversed the grant of summary judgment to Quick, holding that the "plain and unambiguous language" defining "employer" under the Missouri Human Rights Act imposes individual liability. Relying on 8th Circuit precedent to define hostile work environment, the court found a genuine issue as to whether Quick's behavior was severe enough to alter the terms of Cooper's employment. Her claim of battery against Quick was similarly reversed.

Race

EEOC v. Trans States Airlines, Inc., 462 F.3d 987 (8th Cir. 2006)

Mohammed Hussein was fired from his position as a pilot for Trans States while a probationary employee after the airline received an anonymous report that he was in a bar on September 13, 2001, in uniform, and expressing pleasure at the September 11 attacks. Trans States' policy prohibited pilots from entering a bar while in uniform.

Hussein filed a charge of discrimination with the EEOC, which determined after investigation that he was fired on account of his religion, race or national origin. When the parties failed to settle during conciliation, the EEOC filed suit. The district court granted summary judgment for the airline.

On appeal, the 8th Circuit found no evidence of discrimination. The EEOC pointed to the proximity of the discharge to the September 11 attacks, the lack of investigation and alleged deviation from disciplinary procedures found in the employee handbook, but the court deemed such evidence circumstantial. While the employee handbook made no

distinction between probationary and non-probationary employees, the company's collective bargaining agreement expressly stated that the prohibition on discharge without just cause did not extend to probationary employees. To the extent the two documents conflicted, the collective bargaining agreement controlled. Additionally, the evidence showed that other probationary pilots had been terminated on the spot for violating the company's policy on entering drinking establishments in uniform.

Although Hussein's supervisor offered conflicting reasons for his decision to terminate Hussein, his testimony failed to give rise to an inference of pretext. While deemed "inherently incredible" by the EEOC, the court found that the EEOC failed to produce evidence sufficient to rebut his explanations and create a factual dispute.

***Young v. American Airlines, Inc.*, 182 S.W.3d 647 (Mo. App. E.D. 2005)**

American Airlines fired Young, an African-American, after he was involved in an altercation with two Caucasian coworkers. American did not fire the coworkers. Young admitted to the conduct, which violated a company rule, whereas the coworkers denied their involvement in the incident. The trial court granted summary judgment for American based on Young's failure to establish a prima facie discrimination claim under the MHRA.

American contended that Young failed to establish that he was meeting American's legitimate expectations because he had violated a work rule by fighting. The Court of Appeals held that the second prong of the prima facie case is satisfied based on an employee's overall work record and general ability to perform his duties. Whether the employee violated a work rule on one occasion is not part of the inquiry of a prima facie case.

American contended that the facts and circumstances did not give rise to an inference of discrimination under the *McDonnell Douglas* analysis. The court noted that the burden of establishing this prong at the prima facie stage is not onerous and can be satisfied by looking at how the employer treated similarly situated employees. American argued that Young and his Caucasian coworkers were not similarly situated because Young denied the conduct, while the others denied their involvement. The court found the evidence adduced by Young (his handwritten statement alleging that he and the two Caucasian employees were involved in the same incident, which was presented to American before he was fired) was sufficient to establish an inference of discrimination.

***Ash v. Tyson Foods, Inc.*, 126 S.Ct. 1195 (2006)**

In a brief, per curiam opinion, the Supreme Court vacated and remanded an 11th Circuit decision in a race discrimination case.

The plaintiffs prevailed at trial, at which they alleged that Tyson had failed to promote them because of race. The trial court reversed the verdicts (one on insufficient evidence and on the other granted a new trial). The 11th Circuit held that the trial evidence was insufficient to show unlawful discrimination against one of the plaintiffs.

The Supreme Court held that the 11th Circuit erred in its analysis in two respects. It had concluded that the decision-maker's use of the term "boy" to refer to the plaintiffs was

not evidence of racial discrimination because it was not modified by a racial classification. The Supreme Court rejected this analysis and held that the context of the statement had to be examined in order to determine whether the decision-maker used the word in a manner suggesting racial animus.

Second, the 11th Circuit held that when examining the relative qualifications of the plaintiffs versus Caucasian employees in order to determine the existence of pretext, the disparity in qualifications must be “so apparent as virtually to jump off the page and slap you in the face.” The Supreme Court found this standard unhelpful and imprecise. The court examined other Circuits’ methods of analyzing relative qualifications, but declined to define the correct approach more precisely.

***Ledbetter v. Alltel Corporate Services, Inc.*, 437 F.3d 717 (8th Cir. 2006)**

Ledbetter, who is African-American, worked for Defendant as a customer service supervisor. In February 2001, he was named acting manager of document services wherein he continued doing his old job, plus the additional duties of the new position. He repeatedly asked for a pay increase. Finally, in October 2002, Ledbetter’s supervisor told him that he would be reclassified to a higher pay grade, effective January 1, 2003. Ledbetter unsuccessfully attempted to be reclassified to a higher grade and/or have the increase made retroactive.

Ledbetter sued, claiming he was paid less than Caucasian managers and forced to assume the title of “acting” manager for 22 months while he attempted to get reclassified. The trial court found that the employer had discriminated against him and awarded him higher pay retroactive to February 2001.

In affirming the district court’s decision, the 8th Circuit held that the defendant’s failure to follow its own compensation management guide was evidence of pretext. Further, its treatment of Caucasian employees, who were reclassified quickly when their job duties changed, supported the finding of discrimination.

Alltel claimed that the district court was second-guessing its business judgment. The 8th Circuit held that while a court may not second-guess valid, non-discriminatory employment decisions, it still must analyze whether the proffered reason is a pretext for discrimination.

Alltel also argued that there was no adverse employment action, since only a job title was at stake. The 8th Circuit held that requiring Plaintiff to undertake additional job duties without additional pay constituted an adverse action.

Finally, Alltel claimed that the \$22,000 compensatory damages award was erroneous because it was based on Ledbetter’s testimony alone. The court rejected that argument and held that medical or expert testimony is not required to establish emotional suffering.

***Canady v. Wal-Mart Stores, Inc.*, 440 F.3d 1031 (8th Cir. 2006)**

Canady is African-American. His supervisor referred to himself as a “slave-driver;” called Canady his “lawn jockey,” and asked him, “What’s up, my nigga?” Several

months later, Canady violated a policy relating to eating in the food preparation area. He and a manager argued, during which Canady yelled in front of customers. He was fired and sued, claiming discriminatory discharge and hostile work environment based on race. The district court granted summary judgment for Wal-Mart.

In affirming the district court, the 8th Circuit held that even though the supervisor's statements could be considered racially offensive, they did not evidence discrimination because the supervisor was not involved in the decision to fire Canady. The court also held that the supervisor's comments did not evidence pretext (in the indirect case) for the same reason.

The court found that Canady had not established disparate treatment by merely stating his belief that Wal-Mart treated other insubordinate employees differently, noting that the company presented evidence of Caucasian employees who were terminated for conduct that was less egregious than his. The court did not say what was less egregious about the other employee's conduct, but its reference to Wal-Mart's evidence suggests that courts can consider qualitative differences in conduct when analyzing disparate treatment, and that parties are not limited to presenting evidence of virtually identical conduct to establish that the employer treated "similarly situated" employees differently.

Finally, the court found that Canady did not establish a hostile work environment because his supervisor's comments, while offensive, did not rise to the level required to be actionable.

The dissent found more than ample evidence to submit both claims to the jury and criticized the majority for ignoring the Supreme Court's recent unanimous decision in *Ash v. Tyson Foods, Inc.* (above).

***Richardson v. Sugg*, 448 F.3d 1046 (8th Cir. 2006)**

Richardson, a University of Arkansas basketball coach, appealed the district court's dismissal of his race discrimination and free-speech claims arising out of his termination. Defendants cross-appealed the district court's decision that a claims-release clause in his October 2000 employment agreement applied only to claims accrued before the execution of the agreement, and not prospective claims. Richardson was discharged after making comments to the media about the university buying out his contract.

Richardson's contract contained a provision purporting to waive any claims arising out of his employment or the termination of the agreement. Defendants argued he had waived any employment claims, accrued or prospective, he might have had against the university. The 8th Circuit held that under *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), there can be no prospective waiver of an employee's rights under Title VII.

Defendants also argued that Richardson ratified the waiver clause by retaining money under the terms of the contract, making it applicable to his prospective claims unless he tendered back the money he received. The 8th Circuit rejected this argument, finding

that because prospective Title VII claims may not be waived, they are not susceptible to ratification.

Richardson's Title VII race discrimination claims failed under the mixed-motive analysis and the *McDonnell Douglas* framework. The court also held that a comment he made about black players not attending the university because there was nothing for them to do in Fayetteville was not protected free speech because it did not address a matter of racial diversity and opportunity. Even if the comment did address a matter of public concern, Defendants' concerns about the statement's detriment to recruiting efforts outweighed Richardson's right to make them. There also was no evidence that his comment was a factor in the decision to terminate his employment.

***Carter v. Kansas City Southern Railway Co.*, 456 F.3d 841 (8th Cir. 2006)**

Carter appealed the district court's order setting aside his punitive damages award. Defendant cross-appealed, arguing Carter's claims should be precluded under *res judicata*, and that the race discrimination claims should not have been submitted to the jury.

Carter claimed he was confronted with racially offensive language (he heard the term "nigger" 10 to 15 times a day), racially offensive graffiti, and he was denied necessary tools. He had previously filed a race discrimination action against the employer in connection with a medical claim.

The court found punitive damages should only be awarded when the defendant operates with reckless indifference or malice, and should only be awarded to a plaintiff who directly suffered from the alleged conduct. Here, the employer conducted an investigation, terminated the employee responsible for the graffiti, had a policy in place, and the plaintiff was not the individual who suffered much of the wrongful conduct. The district court correctly set aside the punitive damages award.

The court held Carter's claims were not barred by *res judicata* because his previous lawsuit concerned a much narrower issue—his belief that the employer was discriminating on the basis of race by requiring him to produce a medical excuse for two work absences in October 2000. The court also found there was legally sufficient evidence for the district court to submit the race discrimination claims to the jury. While the employer took prompt action in removing the offending employee, a jury could determine that its response to the rest of the harassment was lacking, and there was testimony that the use of racially offensive language was so commonplace a jury could find members of management should have been aware of it and taken prompt remedial action.

Disability/ADA

***Simpson v. Des Moines Water Works*, 425 F.3d 538 (8th Cir. 2005)**

Simpson worked as an installer-repairer on hydrants, valves and pipelines until seriously injured in a work-related accident in April 1991. Two years later, he was able to return to work full-time, in a position created to accommodate his medical restrictions. In March 1996, Simpson was suspended for unexcused absences. A year later, he was

suspended after he was spotted at the Des Moines River while on approved sick leave. In October 1999, he failed a drug test, for which he was not disciplined, but received treatment and returned to work in December 1999. He was suspended in February 2000 for leaving work early without permission, and in August 2000, a female employee complained that he had sexually harassed her. An investigation into this complaint resulted in his termination.

After arbitration, his discipline was reduced to a 36-week suspension without pay. In August 2001, Simpson again tested positive for marijuana. He was terminated for failing the drug test and for driving a Water Works vehicle without a valid driver's license.

Simpson sued, alleging race discrimination, disability discrimination, hostile work environment and retaliation. The magistrate granted summary judgment for the employer. Simpson appealed only the disability discrimination claim.

Assuming without deciding that Simpson was disabled, the Court of Appeals held that he could not establish a prima facie case because he could not show a sufficient link between the alleged discriminatory conduct and the adverse employment action. He was unable to show his disability was a motivating factor in his discipline and eventual termination because it was undisputed that each adverse action he complained of was the direct result of his actions. He did not deny that he tested positive for marijuana and that his driver's license was invalid at the time he was terminated, and there was no evidence that the employer harbored animosity towards individuals with disabilities. The employer presented legitimate, nondiscriminatory reasons for Simpson's discipline and eventual termination, and he did not show that these reasons were pretextual.

***Battle v. United Parcel Service, Inc.*, 438 F.3d 856 (8th Cir. 2006)**

Battle became frustrated and depressed and eventually suffered a nervous breakdown after he was assigned to a new supervisor. When negotiations between the parties regarding Battle's return after a leave of absence and a reasonable accommodation were unsuccessful, Battle claimed UPS unlawfully failed to provide him with a reasonable accommodation and interfered with his FMLA rights.

The appellate court agreed that the "ability to perform cognitive functions on the level of an average person" and "thinking and concentrating" constituted major life activities under the ADA. The court found Battle demonstrated he was substantially limited in his ability to think and concentrate as compared to an average person based on his doctor's and his own testimony about the effects of his depression and anxiety. The court also explained that employers must engage in an "informal, interactive process" when employees request accommodation. After Battle's doctor stated that he could return to work with an accommodation to perform a "marginal" job function, UPS arguably acted in bad faith when it refused to eliminate that marginal function.

With regard to Battle's FMLA claim, the court stated that the FMLA does not require reinstatement of employees who are unable to perform the essential functions of the job. Unlike the ADA, an employer does not need to reasonably accommodate an employee in order to assist the employee with returning to work under the FMLA.

***Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006)**

Canny developed Stargardt's Disease, a degenerative eye disease that causes loss of central vision. He was rendered legally blind by this disease and could not qualify for the driver's license needed for his route driver position. Canny and the employer discussed several alternative positions, but Dr. Pepper ultimately decided that all positions at the facility included driving as an essential function.

Canny filed a lawsuit, claiming Dr. Pepper discriminated against him and failed to accommodate his disability. A jury awarded him compensatory and punitive damages. Evidence at trial demonstrated that he could perform a warehouse loader position, which required operating a forklift, as he had subsequently operated a forklift for other employers and passed the forklift operator certification test. Moreover, there was a merchandiser position that did not require the ability to drive or could have been accomplished if Canny arranged for his own transportation between customer locations.

With regard to his failure to accommodate claim, the court found evidence that Dr. Pepper acted in bad faith by discontinuing discussions about accommodations, by not contacting Canny about available positions, by not investigating his physical abilities, by not sending him for a medical evaluation, and by disregarding his offer to work at any of its facilities. Additionally, Dr. Pepper's perception that Canny could not perform any job did not relieve it of its obligation to discuss possible accommodations. Nevertheless, the court also held that the employer's actions did not rise to the level of malice or reckless indifference or warrant the imposition of punitive damages. Although there was evidence that Dr. Pepper intentionally and unlawfully discriminated against Canny by failing to accommodate him, punitive damages were improper, especially considering the significant safety issues and federal OSHA regulations, as well as Canny's concern that he could not safely work in a warehouse. Therefore, the court affirmed the award of compensatory damages but reversed on punitive damages.

***Medley v. Valentine Radford Comm., Inc.*, 173 S.W.3d 315 (Mo. App. W.D. 2005)**

Medley took a lot of time off work during her ten-and-a-half months as Valentine's media supervisor. Because "regular and reliable attendance is a necessary element of most jobs," the court held that she was not "disabled" pursuant to the MHRA's prohibition against disability discrimination. The employer determined that working part-time or from home was not a feasible option, and that Medley could not be accommodated in that manner. The court also mentioned that Medley's continued health problems and failure to comply with the leave policies created a situation where there was no reasonable accommodation that would have allowed her to perform the essential functions of the job. Medley missed an additional five weeks after her approved leave of absence expired, and she failed to provide a note excusing her for those five weeks. The court concluded that it was unreasonable to expect the employer to give her an indefinite leave of absence. Even though her health problems were severe, the employer was not expected to allow her to miss work regularly, especially when the requested accommodation (i.e., more time off) would not enable her to do her job, but only postpone her return. Even if Medley proved she was a "qualified individual with a disability," the employer had legitimate, non-discriminatory reasons for terminating her employment.

Age

***Igoe v. Dept. of Labor and Industrial Relations*, 2006 WL 3007072 (Mo. App. W.D. 2006)**

Igoe first applied for appointment to an administrative law judge or legal advisor position in 1997. When he was not selected, he filed complaints of age and gender discrimination with the MCHR and the EEOC. He applied again in 1999 and was again rejected. Igoe filed additional complaints with the MCHR, alleging age and gender discrimination, as well as retaliation for his prior charge. After receiving notice of his right to sue, he sued in the St. Louis City Circuit Court. An advisory jury awarded damages, and the court ordered that he be instated as an administrative law judge. The Supreme Court determined that venue was improper and ordered transfer to Cole County. That jury found in favor of the Department. Igoe's requests for a directed verdict, new trial or, in the alternative, judgment notwithstanding the verdict were all denied.

On appeal, Igoe contended that because the Department failed to disclose that the late Governor Carnahan and his appointments secretary were the decision-makers for the appointments at issue, the secretary should have been precluded from testifying. The Department did disclose the secretary's involvement via supplemental answers to interrogatories three days before trial. While Igoe denied speaking to anyone in the Governor's office about the position, the secretary testified that he spoke directly with Igoe during the interview process. Additionally, other witnesses had testified during discovery about the involvement of both the Governor and his staff in the appointments process. Therefore, the circuit court properly rejected Igoe's contention that he was unfairly surprised by the testimony. Moreover, Igoe elicited testimony from the secretary regarding the Governor's involvement on cross-examination and thus could not claim that it was erroneous to admit it.

Igoe also argued that the Department failed to articulate a legitimate, non-discriminatory reason for declining to appoint him by failing to identify the ultimate decision-maker and the reasons he was not hired. Applying the *McDonnell Douglas* analysis, the court found that Igoe had submitted a prima facie claim. However, the Governor's appointments secretary, in response to Igoe's questioning, testified that the Governor was the ultimate decision-maker based on recommendations made by him and other staff. The secretary did not recommend Igoe to the Governor because of a telephone conversation during which Igoe became "angry" and "offended" when asked why he believed he was qualified to be an administrative law judge. Because judicial temperament was important to the job, this was deemed a sufficiently legitimate and non-discriminatory reason to decline to hire Igoe. As Igoe was unable to prove pretext, the circuit court's judgment was affirmed.

TITLE VII/MHRA – PROCEDURAL, DISCOVERY-RELATED AND MISC. DECISIONS

***Luney v. SGS Automotive Services, Inc.*, 432 F.3d 866 (8th Cir. 2005)**

Luney filed a lawsuit claiming sexual harassment on October 14, 2003. The action was dismissed on February 23, 2004 for failure to file a proposed scheduling order. She re-

filed on May 12, 2004. That action was dismissed on the grounds that the dismissal of her first action was a dismissal on the merits, precluding her from re-raising her claims.

The 8th Circuit agreed that the dismissal was on the merits. An involuntary dismissal under Rule 41(b) is with prejudice unless otherwise stated by the district court, and there was no indication in the court's order that it was not an adjudication on the merits. The court also held that Luney's attempt to apply the Missouri Savings Statute failed because it only applied to actions under Missouri law, not to claims filed under Title VII.

***State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. 2005)**

Dean was employed by Rare International (Longhorn Steakhouse). She filed suit under the MHRA, alleging sex discrimination and harassment.

Defendant served interrogatories asking Dean if she had been treated by any healthcare professionals as a result of the matters alleged in her petition and, if so, to provide details of the treatment. Dean said she had not been treated in relation to her claims. Defendant also asked Dean if she had ever been treated for mental or emotional distress or any other emotional condition and to provide detailed information about the treatment. Dean objected, based in part on the physician-patient privilege and refused to execute the general release provided by Defendant.

Defendant asked Dean to elaborate on the type of damages she was seeking. She responded that she was only seeking "garden variety" emotional distress damages.

Judge Cunningham granted Defendant's motion to compel and ordered Dean to execute the medical records release on the grounds that by pleading emotional distress damages, Dean had placed her mental condition at issue and waived privilege.

The Supreme Court granted a writ of prohibition, holding that Dean had not waived physician-patient privilege by asking for emotional distress damages under the MHRA. The court noted that injuries caused by deprivation of civil rights differ from other tort claims and are not based on physical injury. Citing *Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161 (Mo. App. W.D. 1999), the court noted that such damages may be established by testimony or inferred from the circumstances.

***Bogan v. General Motors Corp.*, 437 F. Supp. 2d 1040 (E.D. Mo 2006)**

Bogan sued General Motors for negligent and intentional infliction of emotional distress after she was fired for selling drugs at work. GM argued in part that summary judgment should be granted in its favor because Bogan had not identified an expert witness to establish diagnosable emotional distress. In a footnote to its discussion of the issue, the court acknowledged *State ex rel. Dean*, but declined to apply it, noting that "extensive case law supports the distinction" between emotional distress damages for intentional torts and for the intentional infliction of emotional distress.

Public School Retirement System of the School District of Kansas City v. Missouri Commission on Human Rights, 188 S.W.3d 35 (Mo. App. W.D. 2006)

Mary Taylor filed a charge of discrimination with both the EEOC and the MCHR against the Kansas City School District (KCSD) and the Public School Retirement System (PSRS). The EEOC initially investigated her complaint and issued right-to-sue letters regarding both entities. Taylor subsequently requested right-to-sue letters from the MCHR and received one that referred to KCSD but not PSRS. The MCHR realized the error after dismissing the complaint. It then vacated the dismissal and issued Taylor a right-to-sue letter referencing both parties.

The PSRS sought a writ of mandamus on the grounds that the MCHR breached its regulatory duty in failing to notify the PSRS of the complaint and breached its statutory duty to promptly investigate. The parties filed cross motions for summary judgment, which was granted in the Commission's favor.

On appeal, the MCHR argued that the PSRS would be unable to offer evidence showing that it had been prejudiced by its failure to provide notice of the complaint and an opportunity to respond. The court agreed, noting that the MHRA permits the issuance of a right-to-sue letter for one of two reasons: (1) to terminate the processing of a complaint without investigation; or (2) the failure of the MCHR to complete an investigation within 180 days. Taylor requested and was issued a right-to-sue letter after 180 had elapsed since the filing of her complaint. To survive summary judgment, the PSRS was required to show that but for the Commission's failure to notify it of the complaint, it would have investigated and issued a no-probable-case statement within that 180 days.

The court also found that the MCHR did not have a ministerial duty to investigate a complaint within 180 days. There was insufficient evidence to support the Commission's contention that it had adopted the EEOC findings as permitted by statute. Even so, the statutory scheme clearly contemplated that investigations could take in excess of 180 days; therefore, the requirement that an investigation be conducted "promptly" did not require completion within that time frame.

McBryde v. Ritenour School District, 2006 WL 2805566 (Mo. App. E.D. 2006)

Plaintiff worked as an assistant basketball coach at Ritenour High School. The district refused to renew his contract based on an incident that occurred while Plaintiff was supervising open gym night. He sued under the MHRA, claiming race discrimination. The jury found in his favor, and the school district appealed.

Plaintiff offered a verdict director based on MAI 31.24, which required a finding that race was a "contributing factor" in the refusal to offer the contract. The school district offered a non-MAI instruction requiring a finding that race was a "motivating factor" in its decision. As the MHRA defines discrimination as "any unfair treatment based on race," the court found Plaintiff's instruction was proper.

Ritenour also contested the trial court's refusal of its business judgment instruction, as used in the 8th Circuit. It argued for application of 8th Circuit case law holding that business judgment instructions are crucial to fair presentation of an employer's case.

Finding no Missouri case law concerning use of the instruction in cases under the MHRA, the court declined to find error and noted that the Missouri Supreme Court was free to adopt an approved business judgment instruction if it chose to do so.

The court also rejected Ritenour's argument that the court erred in refusing to give its "same decision" instruction, because the decision-maker admitted the decision not to renew Plaintiff's contract was based solely on the incidents at open gym night, and Ritenour could not demonstrate that it took consistent actions with white coaches in similar situations. In addition, Ritenour's proposed instruction was an 8th Circuit Title VII instruction, not an MAI approved MHRA instruction.

RETALIATION

Garcetti v. Ceballos, 126 S.Ct. 1951 (2006)

Ceballos was a supervising deputy district attorney for the Los Angeles County District Attorney's Office. He was contacted by opposing counsel regarding inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case. Ceballos believed after investigation that the affidavit contained serious misrepresentations. He reported his findings to his supervisors by memorandum. A subsequent meeting with his supervisors and other staff on the issue became contentious.

Thereafter, Ceballos was reassigned to another position, transferred to another courthouse and denied a promotion. He sued under Section 1983, alleging retaliation in violation of the First and Fourteenth Amendments.

The district court determined that Ceballos was not entitled to First Amendment protection. The Ninth Circuit reversed, concluding that his statements were matters of public concern.

On appeal, the U.S. Supreme Court held that the statements of public employees in connection with their official duties are not entitled to First Amendment protection. While Ceballos may have been speaking on matters of public concern, he did so in his role as deputy district attorney. Public employees are insulated from discipline only when they speak as private citizens.

Justices Stevens, Souter and Ginsburg dissented, primarily noting that public employees should be protected from retaliation when the statements at issue address official wrongdoing or threats to public health and safety.

Garner v. Missouri Dept. of Mental Health, 439 F.3d 958 (8th Cir. 2006)

Garner was a drug counselor for the Department of Mental Health. Two of her coworkers reported that she had received money from a client's Social Security check in violation of the Department's rules. Garner denied the allegation, but admitted to a different violation, buying items from patients. The Department discharged her. She sued both the Department and her supervisor.

The jury found against Garner on her discrimination claim but in her favor on her retaliation claim. She was awarded no damages because the jury also found that she would have been terminated regardless of her opposition to unlawful discrimination.

Over Garner's hearsay objection, the court allowed her supervisor to testify about the coworkers' allegations that she had received money from a client. The 8th Circuit held that the evidence could come in under Federal Rule 801(c) to explain why the supervisor suspended Garner and started an investigation, as it was offered not for the truth of the matter but to prove the supervisor's state of mind.

Garner initially alleged unlawful retaliation under Title VII, not § 1981. The trial court rejected her attempt to amend her complaint at the instructions conference, and the 8th Circuit affirmed. The court noted that Garner had not preserved the issue of whether a "same decision" instruction should be given under § 1981. (While Title VII provides a mixed-motive framework, there is no equivalent under § 1981).

The court denied attorneys' fees based on an interpretation of the mixed-motive provisions of Title VII. Under § 2000e-5(g)(2)(B), attorneys' fees are available in a mixed motive case under § 2000e-2(m). Section 2000e-2(m) refers to mixed-motives involving race, color, religion, sex or national origin; the statute does not mention retaliation. Since the jury decided that the Department's unlawful motive was retaliation and not discrimination, there was no award of attorneys' fees.

***Wallace v. DTG Operations, Inc.*, 442 F.3d 1112 (8th Cir. 2006)**

Wallace appealed the district court's adverse grant of summary judgment on her retaliatory discharge claim. She was a station manager for Dollar Rent-a-Car at the Kansas City airport, with the least seniority of the station managers at this location. In April 2002, she complained to the regional manager about sexual harassment by the company's city manager. Twenty-eight days later, the regional and city managers met with her and terminated her employment. The regional manager admitted he made the decision fifteen days after her complaint. The reasons given for her termination were that there were too many station managers at her location, there was a downturn in business after September 11, 2001, and she was the least senior manager at this location. Wallace conceded these facts were true, but argued they were not the true motivation in her discharge. At the termination meeting, Wallace had asked to be transferred to another location. The regional manager denied the request, stating that because she had a written warning in her file, company policy prohibited transfer. Although this was company policy, Wallace presented evidence that the policy was discretionary and had been applied inconsistently.

Wallace abandoned her sexual harassment claim on appeal. The court found that the fifteen days between her complaint and the decision to terminate her strongly supported an inference of retaliation. Similarly, the fact that she was not fired until eight months after September 11 and the inconsistent application of the transfer policy evidenced retaliation. The court found the employer had provided legitimate, non-discriminatory reasons for its decision, but that Wallace had shown these were pretext.

***Dooley v. St. Louis County*, 187 S.W.3d 882 (Mo. App. E.D. 2006)**

Dooley appealed from the trial court's grant of defendant's motion to dismiss. His petition claimed defendants violated his rights under the First and Fourteenth Amendments by terminating him in retaliation for his opposition to proposed road projects.

To establish he was terminated or demoted in a retaliatory manner, a public employee must show his speech was protected and the speech was a substantial or motivating factor in his demotion or termination. A public employee's speech is protected when it addresses a matter of public concern. The court found the petition alleged Dooley was fired because he made statements of protest to the county executive concerning his opposition to the County's involvement in certain proposed road projects. Assuming all of Dooley's averments were true, the facts alleged met the elements of a retaliatory termination claim: he engaged in speech that appeared to have addressed matters of public concern, which is protected under the First Amendment, and his speech was a substantial or motivating factor in the County's decision to terminate his employment.

***Sivigliano v. Harrah's Casino*, 188 S.W.3d 46 (Mo. App. W.D. 2006)**

Plaintiff appealed the circuit court's dismissal of her petition alleging wrongful discharge in violation of public policy. Plaintiff was a manager. A co-worker told her two of her subordinates were accused of sexual harassment, and ordered her to tell the employees to stop their behavior. Plaintiff protested that under company policy, she was prohibited from speaking directly with the accused employees. Plaintiff's immediate supervisor then ordered her to talk to the employees. After she spoke to the employees as directed, and reported the preceding conversations to HR, she was reprimanded, demoted with a cut in pay, and later fired for violating company policy. She claimed she was fired in violation of public policy.

The court found Plaintiff could not state a claim of wrongful discharge in violation of public policy because she did not plead that she refused to perform an illegal act, or that she reported a violation of law by the employer. The petition alleged she was ordered to violate a provision of the company's policy, not any law or regulation. The court rejected Plaintiff's argument that the company policy was adopted pursuant to state and federal policies against sexual harassment, and therefore invoked the protection of the public policy exceptions to the at-will doctrine.

***Hayes v. Show Me Believers*, 192 S.W.3d 706 (Mo. 2006)**

Plaintiff alleged he was discharged in violation of the workers' compensation retaliation statute, because he was fired after his employer discovered he had filed a workers' compensation claim against his former employer. The circuit court entered summary judgment against Plaintiff, finding that the statute, section 287.780, RSMo, only applied in cases where the discharge stemmed from filing a workers' compensation claim against a current employer. The Supreme Court found that section 287.780 states without limitation that "no employer" can discharge an employee for exercising rights under the workers' compensation law. The court held that at this stage in the litigation, the employer had not demonstrated it was entitled to judgment as a matter of law.

UNIFORM SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

Maxfield v. Cintas Corp. No. 2, 427 F.3d 544 (8th Cir. 2005)

Maxfield was granted leave for military activities 15 times in three years. He was transferred upon return from one period of leave and terminated after another. The district court granted summary judgment for his employer, finding he failed to show that his military status was a motivating factor in those decisions.

The 8th Circuit reversed, noting the differences in the procedural framework between USERRA and discrimination claims. Under USERRA, once the employee makes an initial showing that military status was at least a motivating factor in the adverse action, the burden falls to the employer to show, by preponderance of the evidence, that it would have acted despite the protected status.

Cintas argued that Maxfield's transfer was not a demotion, but employees testified that the position to which he was transferred had been eliminated and reinstated several times. The court found that the change to a less stable position constituted discrimination in a benefit of employment in violation of USERRA. It also found evidence that Maxfield's military status was a motivating factor in the employment actions, based on the proximity in time to his leave and the fact that his supervisor called the military base on more than one occasion to ask if he had reported for duty and if his presence was "imperative."

(NOTE: On remand to the U.S. District Court for the Eastern District of Arkansas, summary judgment was granted in favor of Cintas on the grounds that the undisputed evidence showed the company would have made the same decisions notwithstanding Maxfield's military service. *Maxfield v. Cintas Corp. No. 2*, 2006 WL 1489172 (E.D. Ark. 2006).

FMLA

Chubb v. City of Omaha, 424 F.3d 831 (8th Cir. 2005)

Chubb sued the City when it denied him an annual leave bonus because of his FMLA leave. The City offered police officers who did not take more than 40 hours of sick leave in a given year an additional 2 hours of annual leave for each pay period in which the officer had 1000 hours of accrued sick leave. Chubb had at least 1000 hours of accrued sick leave for all of 2003. However, he took three weeks of FMLA leave. Sick leave ran concurrently with his FMLA leave.

At issue was whether the city unlawfully denied Chubb an employment benefit because of his leave. Chubb argued that the City required him to run his sick leave concurrently, as the form for requesting FMLA leave required him to choose between concurrent sick or annual leave and stated that an employee could not use unpaid leave until all paid leave was exhausted. He selected sick leave. A subsequent letter sent to Chubb stated that the City would not require substitution of paid leave during his period of FMLA leave. While the court elected to assume that the City imposed the substitution requirement, it upheld a grant of summary judgment in favor of the City on the grounds that Chubb selected sick leave and therefore forfeited his right to the bonus.

Additionally, the court declined to penalize the City for permitting Chubb to take paid leave instead of unpaid leave to which he was entitled under the FMLA.

***Rodgers v. City of Des Moines*, 435 F.3d 904 (8th Cir. 2006)**

Rodgers took intermittent leave for a prolonged time period for multiple serious health conditions. Three years after her initial FMLA request and after allowing excessive absenteeism (i.e., she was absent for all or part of 115 work days out of 249), the City eliminated her position and transferred her to a different department with the same pay and benefits as a result of a City-wide reduction in force. Rodgers sued for interference with her FMLA rights and continued working in her new position. A year-and-a-half later, the City issued a written warning to her regarding continued frequent absences from work.

Because she was not discharged, her claim basically involved emotional distress damages for being made to feel she should not use FMLA leave. Overruling a prior decision, the appellate court said that emotional distress damages are not recoverable under the FMLA. The FMLA specifically lists only actual monetary losses of an employee as the type of damages for which an employer may be liable. Additionally, although the statute prohibits employers from interfering with an employee's exercise of FMLA rights, an employee cannot get equitable relief unless he or she has been prejudiced by the employer's violation. In this case, the City took no adverse employment action against Rodgers and granted her FMLA leave requests. Therefore, the 8th Circuit affirmed dismissal of her claims.

***Samuels v. Kansas City, Missouri School District*, 437 F.3d 797 (8th Cir. 2006)**

Samuels claimed violations of both the ADA and FMLA in that she was denied reasonable accommodation and not restored to her prior position after returning from FMLA leave. The court held that she failed to demonstrate she suffered from a "long-term or permanent" disability. At the time of her reasonable accommodation requests and the district's denial of them, Samuels had no medical evaluations that established she was disabled and entitled to protection under the ADA. Subsequent medical evaluations were not relevant to the district's determination of whether she was disabled at the time of her accommodation requests.

Moreover, to the extent that Samuels claimed to be substantially limited with regard to the major life activity of "working," her doctor failed to state that she was unable "to perform either a class of jobs or a broad range of jobs in various classes." Without evidence that her impairment precluded her from a substantial percentage of available jobs, she could not prove she had a disability as defined by the ADA.

Samuels' FMLA claim was filed more than two but less than three years after the alleged unlawful failure to restore her to her job after leave. The court held that the two-year time limit for bringing an FMLA claim applied, not the three-year time limit for when an employer willfully violates the FMLA. The court explained that the term "willful" requires a showing that an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." The mere knowledge of the employer that the FMLA potentially applies to a situation, by itself, fails to demonstrate willfulness. In this case, the district allowed Samuels to perform light duty, work on a

reduced schedule and take intermittent leave. Therefore, her FMLA claim was filed too late, and the 8th Circuit affirmed dismissal.

***Bloom v. Metro Heart Group of St. Louis, Inc.*, 440 F.3d 1025 (8th Cir. 2006)**

Bloom sued Metro Heart Group for workers' compensation retaliation and violation of the FMLA. The court found that a claim for workers' compensation retaliation required proof by an employee that her discharge had an exclusive causal relationship to the exercise of workers' compensation rights. A legitimate reason for discharging an employee will defeat any causal connection between the discharge and an exercise of workers' compensation rights. The fact that Bloom could not perform the essential functions of her job was a legitimate reason for her discharge.

Because she could not perform the essential functions of her job at the expiration of her FMLA leave, the employer was entitled to discharge her. The FMLA allows an employer to require a fitness-for-duty certification from an employee wishing to return to work after such leave. The plain text of the statute and regulations permit an employer to require such certifications only from employees taking FMLA (vs. non-FMLA) leave. Therefore, the group's policy of allowing non-FMLA leave takers to return to work without a fitness-for-duty certification was lawful.

Finally, Bloom argued that her FMLA leave began only after she used her accrued paid leave. The court determined that her FMLA leave began as of the day on which she had a "serious health condition" and qualified for FMLA leave because she was unable to perform the functions of her job. Whether a portion of an employee's FMLA leave is paid is irrelevant to when her 12 weeks of leave started. Therefore, the 8th Circuit affirmed the dismissal of her FMLA claim.

***Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006)**

Stallings was approved on several occasions for intermittent FMLA leave to care for his father. By company policy, employees were to submit requests for vacation time in February of each year in order to resolve conflicting requests on the basis of seniority. In the two years prior, Stallings had requested and was granted vacation during the first three weeks of August. In February 2002, he was only granted the first week. Stallings told his supervisor he intended to take the second and third weeks anyway as FMLA leave to care for his father. His supervisor claims he only stated he intended to help his father move. Stallings reported his absence to the appropriate personnel each day during those two weeks.

When he returned, Stallings was summoned to a meeting to discuss the reasons for his absence. The parties dispute what was said at the meeting, but Stallings admitted he did not help his father move. After the meeting, Stallings was fired for citing FMLA leave for non-FMLA reasons. He subsequently filed a complaint with the U.S. Department of Labor for termination in violation of the FMLA.

At the time Stallings was fired, he was in the midst of a Chapter 13 bankruptcy proceeding. He did not disclose his potential FMLA claims before the case was dismissed on the trustee's motion.

Stallings sued after the Department of Labor found in favor of Hussmann on his claim. The district court granted summary judgment for Hussman and his supervisor on the grounds that Stalling's claims were barred by the doctrine of judicial estoppel because he failed to disclose his claims in the bankruptcy action. The lower court also found that he failed to show pretext for the employer's proffered reason for firing him.

The 8th Circuit found that the district court erred in its application of judicial estoppel. As the court had not previously articulated a standard of review in such cases, it adopted an abuse of discretion standard employed in several other circuits. Examining the three factors that support invocation of the doctrine, the court found two were unmet.

Employing the *McDonnell Douglas* burden-shifting analysis to Stalling's retaliation claim, the court found a genuine issue of fact as to whether Stallings told his employer only that he intended to take FMLA to help his father move. If he indeed told Hussmann he intended to otherwise assist his father during that period, the employer would lack justification for its belief that Stallings lied about his reasons for taking the leave.

***Grosenick v. SmithKline Beecham Corp.*, 454 F.3d 832 (8th Cir. 2006)**

On July 30, 2001, Grosenick notified her supervisor by email that she intended to take leave for knee surgery, effective immediately. Her employer, Glaxo, initially calculated the leave as beginning on August 2. Grosenick's physician completed the requisite FMLA paperwork on August 20, and Glaxo approved a period of leave from August 20 through September 20. At Grosenick's request, her leave was extended to October 10. She returned between October 21 and 24, but Glaxo informed her on October 26 that she could not return to work without clearance from her doctor. Glaxo granted a request to extend her leave through December 10, but now noted that her leave had commenced on August 2. By Glaxo's count, Grosenick's entitlement to FMLA leave expired on October 24. She was informed on October 30 that her position had been filled and that she was in "displaced employee" status. By company policy, Grosenick was given 30 days to find a new position within the company. She did not and was terminated in late January 2002.

Grosenick and Glaxo had been debating about the proper start date for her leave since early October. Grosenick claimed that the failure of Glaxo to provide adequate notice of the start and end dates of her FMLA leave required extension of her leave.

The 8th Circuit, relying on *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), disagreed. Noting that Ragsdale received no notice that her leave counted against her FMLA entitlement, the court found that "proper notice followed by confusion should not create a claim." Grosenick had confirmed the start date of her leave as July 30 and should have known that her twelve-week entitlement commenced on the earlier date.

BREACH OF CONTRACT/NON-COMPETES

***Baum v. Helget Gas Products, Inc.*, 440 F.3d 1019 (8th Cir. 2006)**

HGP recruited Baum, a sales representative, from a competitor. When they met to discuss employment, Baum asserted that he wanted a contract for three years. The parties discussed various terms of employment, on which Baum took detailed notes,

including a salary structure for the next three years. After commencing employment, Baum requested a written agreement, but the parties ultimately signed the meeting notes, at which time the document was amended to designate it as a “contract.”

HGP terminated Baum for poor sales performance. He sued for breach of contract and negligent and fraudulent misrepresentation. The district court granted summary judgment for HGP.

The 8th Circuit found the contract “textually ambiguous,” which created a genuine issue of fact on his contract claim. However, Baum’s own admissions supported summary judgment for HGP on his misrepresentation claims. He argued that HGP knowingly led him to believe he would be employed for three years with no intention of doing so or, alternatively, negligently misrepresented the term of employment. The central issue to both claims was whether HGP made materially false statements about his term of employment. Baum admitted that no one at HGP made any promise that he would be employed for three years, nor did he believe that HGP intended not to abide by the term of the contract at the time it was signed. Because of these admissions, the summary judgment for HGP was affirmed.

Healthcare Services of the Ozarks, Inc., d/b/a Oxford Healthcare v. Copeland, 198 S.W.3d 604 (Mo. 2006)

Two at-will employees signed a non-compete agreement with Oxford, a home health services agency regulated by the Department of Health and Senior Services (DHSS). They agreed not to engage in a competitive business within 100 miles of Joplin, or divert any business or employees of the company for two years after termination.

Both employees had significant contact with DHSS caseworkers and Medicaid clients. After submitting their resignations, they began working with Integrity, a competing home health agency. Shortly thereafter, a number of Oxford employees resigned to work for Integrity. Many of the clients served by former Oxford employees requested transfer to Integrity.

The trial court entered temporary restraining orders against the defendants. At trial, the court found the non-compete agreements enforceable and that the defendants had breached them. However, it denied Oxford damages. It also denied the defendants relief on their counterclaims for tortious interference.

The Southern District reversed, finding defendants lacked sufficiently influential relationships with Oxford’s clients to justify enforcement of the non-compete and that the trial court erred in finding Oxford had a protectable interest in its relationships with Medicaid clients.

The Supreme Court reversed the Court of Appeals, noting that in the healthcare context, patients are analogous to customers and that Oxford had a protectable interest in its patient base. It further held that because Integrity used Copeland’s certificate of provider certification training to satisfy a regulatory requirement for starting its business, Oxford was entitled to damages for the loss of any patient which occurred while

Copeland's certificate was used. The court remanded the case for a determination on damages.

Burrus v. HBE Corp., Case No. ED87786 (Mo. App. E.D. 2006)

Burrus was an at-will salesman in HBE's hospital building division. Pursuant to a written agreement, he was paid a commission for any hospital projects the company completed as a result of his work. The contract stated that a salesperson must be employed by HBE at the time a commission was *earned* to be eligible for the commission.

After he was fired, Burrus claimed he was due commissions for six projects he solicited that ultimately resulted in binding contracts for HBE. He sued for breach of contract, quantum meruit and under the Merchandising Practices Sales Commission Act in chapter 407, RSMo. The trial court granted summary judgment for HBE.

The Court of Appeals reversed and remanded on Burrus' breach of contract claim. HBE argued that a sales commission is "earned" when a final contract is signed and that Burrus was not employed by it at the time the contracts at issue were signed. Burrus argued that he earned the commissions at such time as he completed his portion of work on those transactions. While the court found the term "earned" as used in the contract ambiguous, it declined to adopt Burrus' construction and instructed the trial court to specifically address the issue of whether the contract required a salesman to be employed when a final contract is signed or at the time the salesman completed his portion of the work obtaining a contract in order to be paid commission.

Supermarket Merchandising & Supply v. Marschuetz, 196 S.W.3d 581 (Mo. App. E.D. 2006)

Marschuetz, a salesman, appealed from the court's grant of an injunction to enforce the provisions of a confidentiality and non-compete agreement he signed in 2000. After he signed the agreement, his employer instituted three unilateral changes to the contract, including policies withholding commissions until customer invoices were paid and a policy whereby any salesperson leaving the company would only be paid commissions on invoices paid as of the last day of employment. Following each change, the employer asked Marschuetz to agree to the changes in writing, but he refused. After the third change, Marschuetz resigned and went to work for a competitor.

The court found each change was a material breach of the agreement and barred the employer from enforcing the terms of the non-compete agreement. The changes were material because they altered the manner in which Marschuetz was paid and affected the amount he was paid. The court also found Marschuetz did not ratify the changes by cashing his commission checks and not threatening to quit or file a lawsuit, because he voiced his opposition to the changes, and it was reasonable for him to take time to secure new employment before quitting his job.

PUBLIC EMPLOYEES

State ex rel. McGull v. St. Louis Board of Police Commissioners, 178 S.W.3d 719 (Mo. App. E.D. 2005)

McGull was denied a hearing before the St. Louis Board of Police Commissioners on his termination. The Board did give McGull the opportunity to present his case to a hearing officer, who was not a member of the Board. The hearing officer submits Findings and Conclusions to the Board, which are reviewed with the parties' written exceptions and the hearing transcript. After review, the Board makes the final decision.

McGull sought a writ to compel a hearing before the Board. The circuit court examined the statutes governing the Board and found them sufficiently broad to allow it to delegate hearing authority to a hearing officer. It contrasted those statutes with those establishing the Kansas City Board of Police Commissioners, which have been found to require hearing before the Board. *State ex rel. Rogers v. Board of Police Commissioners of Kansas City, 995 S.W.2d 1 (Mo. App. W.D. 1999)*. Although section 84.150, RSMo vests the Board with "exclusive jurisdiction" in removal matters, the circuit court found this jurisdiction delegable.

The Court of Appeals, reviewing the case de novo, reversed and remanded. It found no significant difference between the statutes governing the St. Louis and Kansas City police boards. Therefore, the board retained exclusive jurisdiction which could not be delegated.

UNEMPLOYMENT

CMR Construction & Roofing, LLC v. Div. of Employment Security, 174 S.W.3d 722 (Mo. App. E.D. 2005)

The Division issued a Notice of Liability to CMR, which CMR appealed. The matter was set for hearing, at which CMR failed to appear. The Division dismissed the appeal. When told the appeal had been dismissed, CMR alleged it faxed a letter to the Division advising of the untimely notice and requesting further relief. CMR argued this constituted a timely notice of appeal. The Division denied receiving the fax and claimed that because it was unsigned it would have been insufficient to trigger an appeal.

Regulation 8 CSR 20-40.010(1) requires that an application for review to the Commission be signed. The Eastern District had previously found this requirement jurisdictional. *Haislar v. Haislar Construction Company, 142 S.W.3d 210, 212 (Mo. App. E.D. 2004)*. However, 8 CSR 10-5.040(3)(C) permits a dismissal to be set aside. The hearing officer can then determine whether a party had good cause for failing to appear and may rule on the merits. 8 CSR 10-5.040(2)(B). There is no requirement that the request to set aside the dismissal be signed. If the request is not granted, it will be treated as an application for review to the Commission.

The court distinguished between a request to set aside and an appeal, finding "valid reasons for ensuring the validity of an appeal and demanding formality." Because there was insufficient evidence to determine if the Division had received the fax, the case was remanded for further proceedings on that issue.

Rector v. Kelly, 183 S.W.3d 256 (Mo. App. W.D. 2005)

The Division of Employment Security found Rector ineligible for unemployment benefits. Her attorney faxed a letter to the Appeals Tribunal that she neglected to sign. Several days later, she faxed an identical letter that was signed.

The Appeals Tribunal found that Rector's appeal was untimely on the grounds that the first, timely-filed letter was unsigned and the second letter was filed too late. The Labor and Industrial Relations Commission affirmed the decision of the Tribunal.

The Division argued that the regulations found 8 CSR 10-5.010 contain the rigid jurisdictional prerequisites to filing an appeal. Regulation 8 CSR 10-5.010(3)(A) does state that an appeal must be signed by the claimant, his or her agent, the employing unit, or a licensed attorney representing the party. However, subsection (3)(B) contains the information the "should" be included in an appeal, including the appellant's signature. The regulation states at subsection (3)(C) that failure to include any of the required information "may" invalidate the appeal.

The court found that the notice of appeal serves several essential functions, which include notifying the respondent of the appeal, triggering a stay and notifying both the lower and superior tribunal of the transfer. The unsigned letter accomplished all those purposes. The court also examined a longstanding body of case law favoring disposal of cases on the merits and found that the procedural requirements should be liberally construed so that good faith appeals may proceed.

Scrivener Oil Co., Inc., v. Div. of Employment Security, 184 S.W.3d 635 (Mo. App. S.D. 2006)

Scrivener sought review of an order by the Labor and Industrial Relations Commission affirming an award of unemployment benefits based on the finding that employee did not commit misconduct. Scrivener discharged the employee after she received a below satisfactory performance evaluation and a 60-day probation, during which she received warnings about the same behavior. She was also cited for refusing to move a display as instructed by her employer.

Scrivener raised two points on appeal: (1) that the Commission erred in finding that the claimant did not disobey an instruction of management and (2) that her failure to follow instructions and declining job performance were misconduct connected with work.

In evaluating the evidence of the claimant's failure to follow instructions, the court held that the Commission may not disregard the undisputed testimony of a witness unless it specifically finds the testimony unbelievable or not credible. Because the Commission had made no such finding, the case was remanded with instructions to make further findings on whether the claimant's failure to follow instructions was willful or intentional so as to constitute misconduct under section 288.050.2, RSMo.

The court also held that while an employee's substandard performance may justify discharge, it does not necessarily provide a basis for denying unemployment benefits.

***Davis v. The School of the Ozarks*, 188 S.W.3d 94 (Mo. App. S.D. 2006)**

Davis was employed as a professor on a one-year non-renewable contract ending on May 31, 2004. In December 2003, Davis was notified that he would not be offered a new contract for the 2004-2005 school year and that he was suspended with pay for the spring semester for conduct in violation of school policies. In March 2004, after Davis filed grievances in accordance with the faculty handbook, the college offered to keep him provided he met certain conditions and offered him a contract for the ensuing school year. Davis did not respond to the letter but filed for unemployment benefits at the expiration of his 2003-2004 contract.

The Division of Employment Security found that Davis was disqualified from benefits because of misconduct connected with work. The Appeals Tribunal agreed that he was disqualified, but on the grounds that he voluntarily quit without good cause. Davis appealed to the Commission, which affirmed the Tribunal.

On appeal, Davis argued that the evidence showed he was discharged. The court rejected this argument and upheld the Commission's determination that his failure to respond to the offer of a new contract was the final act needed to effect separation and therefore constituted voluntary separation from employment.

Davis also argued that the college's offer of a new contract was too vague and ambiguous and that the letter's request for a response within two days was arbitrary. The court found that a reasonable person acting in good faith would have responded to the college's offer and that the two-day timeline was reasonable because it only asked Davis to specify whether he was interested in a new contract as opposed to asking that he sign one within that time. In finding that the offer was not arbitrary, the court relied on the fact that the terms of the proposed contract were virtually identical to Davis' present contract.

***Gaylord v. Wal-Mart Associates, Inc.*, 193 S.W.3d 807 (Mo. App. W.D. 2006)**

Gaylord sustained a minor injury at work. Wal-Mart policy purportedly required employees to submit to a drug test within 24 hours of any accident. Gaylord told his supervisor that he did not want to go to the doctor because he could not pass a drug test. He was told he had to go see a doctor or go home, but that he would be required to submit to a drug test the next day. Gaylord went home but returned to work the next day expecting to take the test. When he returned, he was fired for gross misconduct on the grounds that he admitted to drug use and refused a drug test.

Gaylord was awarded unemployment benefits by the Labor and Industrial Relations Commission. The Division of Employment Security appealed, claiming that that Gaylord had been discharged for misconduct connected with work under section 288.045, RSMo.

Section 288.045.4 requires that an employer's substance abuse policy state that a positive test result constitutes misconduct for which an employee may be disciplined and that an employee be previously notified of that policy in order for the remaining provisions of the statute to be effective. Wal-Mart did not enter its substance abuse policy into evidence, nor did it present any evidence that a positive drug test would be

deemed misconduct for which an employee could be suspended or terminated. Wal-Mart argued that Gaylord's avoidance of a drug test on the day he was injured constituted misconduct, but the court found that the evidence did not show he refused to submit to a test. His supervisor allowed him to go home that day, but advised he would be subjected to testing the next. Gaylord's return to work the next day was indicative of his willingness to take the test in accordance with Wal-Mart's policy.

***Christensen v. American Food & Vending Services*, 191 S.W.3d 88 (Mo. App. E.D. 2006)**

American discharged Christensen after she tested positive for marijuana. The Labor and Industrial Relations Commission reversed the decision of the Division of Employment Security and determined that she was entitled to unemployment benefits because the employer did not present evidence that Christensen's marijuana use affected her ability to perform her duties. The Division appealed.

The Division argued the employer's policy did not need to state verbatim "that a positive test result shall be deemed misconduct," as required by section 288.045.4. However, the court held an employer's policy must include the word "misconduct" for the requirements of the statute to be met. Because the employer's policy did not meet this requirement, Christensen was not disqualified from benefits.

The Commission applied *Baldor Electric Company v. Reasoner*, 66 S.W.3d 130 (Mo. App. E.D. 2001) and found Christensen did not commit misconduct because the employer failed to prove her work performance was impaired by her off-work drug use. The court rejected this finding due to language contained in section 288.045.13(1), RSMo, expressly abrogating previous case law defining misconduct connected with work. On remand, the Division must determine whether Christensen committed misconduct connected with work by deliberately violating the employer's drug policy.

***Div. of Employment Security v. Comer*, 199 S.W.3d 915 (Mo. App. S.D. 2006)**

Comer was discharged after testing positive for marijuana. As in *Christensen*, the Division found him disqualified from benefits because he was discharged for misconduct in connection with work, which decision was reversed by the Commission. In an opinion nearly identical to *Christensen* (above), the court agreed Comer was not disqualified from benefits because the employer failed to include the phrase "misconduct connected with work" in its drug testing policy and thus did not satisfy the requirements of section 288.045.4, RSMo. However, the Commission again erred by relying on *Baldor* to require the employer to show claimant's drug use affected his ability to fulfill his on-the-job responsibilities in order to show misconduct. This portion of the Commission's determination was reversed and remanded.

***Bordon v. Div. of Employment Security*, 199 S.W.3d 206 (Mo. App. W.D. 2006)**

Bordon left her employment when her employer failed to return her to her regular schedule after maternity leave. She filed an application for unemployment benefits, and the Division granted her claim, finding that her separation from employment occurred because no work was available when she returned from leave. The Appeals Tribunal reversed, finding Bordon was offered comparable work, and it was the employer's prerogative to schedule its employees. The Commission affirmed.

Bordon argued on appeal that the evidence showed she was not offered equivalent employment when she returned from maternity leave, and therefore she had good cause attributable to her employer to terminate her employment. Before maternity leave, Bordon was working full-time on the day shift. When she came back from maternity leave, she was offered a part-time position with no set schedule and no set days off. The court held the Commission's finding that she was offered "comparable work" was not supported by the evidence, and the terms of employment offered by her employer constituted a substantial change in her employment. Further, the employment offered was not equivalent employment, to which she was entitled under the FMLA. Because Bordon was not offered equivalent employment, she had good cause to terminate her employment and was entitled to unemployment benefits.

LABOR

St. John's Mercy Health Systems v. NLRB, 436 F.3d 843 (8th Cir. 2006)

Plaintiff hospital and the union entered into a collective bargaining agreement in 2001 that contained a union security provision requiring registered nurses to pay union dues and the hospital to discharge nurses that did not comply with this requirement. The hospital refused to terminate 14 nurses who did not pay their dues. The union filed an unfair labor practices charge with the NLRB, and the administrative law judge ordered the discharge of the registered nurses who had not paid their dues.

The hospital admitted that it failed to comply with the union security provision and collective bargaining agreement, which under normal circumstances would constitute a violation of the NLRA. The hospital argued that complying with the collective bargaining agreement was not an unfair labor practice for three reasons.

First, the hospital argued that it was a violation of Missouri public policy to discharge the nurses. The court assumed that if a public policy existed precluding the discharge of the nurses, the hospital would have a valid defense to the unfair labor practices charge. However, the court found no Missouri statute prohibiting the enforcement of the union security provision or the discharge of nurses.

Second, the hospital argued that Congress intended to treat hospitals differently under the NLRA and, thus, the Board abused its discretion when it ignored that intent and ordered the nurses fired. The court found that Congress did carve out an exception for the healthcare industry requiring special notice before a strike. The court went on to hold that since no similar language exists in the Act regarding enforcement of union security provisions, Congress did not intend to treat hospitals differently with respect to such provisions.

Finally, the hospital argued that because a new collective bargaining agreement did not require termination of the nurses for failure to pay union dues, forcing it to terminate them now was an inappropriate remedy. The court found that the hospital had waived this argument by not making it before the Board and that no extraordinary circumstances existed to justify addressing the issue at this stage of the litigation.

Ruzicka Electric & Sons, Inc. v. International Brotherhood of Electrical Workers, Local 1, ALF-CIO, 427 F.3d 511 (8th Cir. 2005)

Plaintiff sued the defendant labor union pursuant to the Labor Management Relations Act, alleging that the union engaged in illegal picketing and brought state law defamation claims for statements made questioning the quality of the company's work. In addition, the company's president brought an individual state law invasion of privacy claim against the union for surveillance of his home. The district court granted judgment as a matter of law to the union on all claims.

On appeal, the company argued there was sufficient evidence for the court to submit to the jury on all claims. The 8th Circuit reversed and remanded on the company's claim for violations of the Labor Management Relations Act and on the president's privacy claim. It affirmed judgment for the union on the company's defamation claim.

Specifically, the court found evidence from multiple witnesses that the union picketed neutral gates at various job sites that interfered with the company's work. The court went on to find that while precise damages may be difficult to calculate, the issue should be presented to a jury.

On the president's invasion of privacy claim, the court held that a jury could have found that the union invaded his privacy by entering his posted private property.

With regard to the company's defamation claim, the court held that in cases involving federal labor law principles, a plaintiff asserting defamation must satisfy an actual malice standard. The standard was not met here because the alleged statements were opinions and not assertions of objective fact.

PREVAILING WAGE ACT

State ex rel. Griffin v. R.L. Persons Construction, Inc., 193 S.W.3d 424 (Mo. App. S.D. 2006)

A subcontractor's employee brought an action against the general contractor, alleging he was not paid the prevailing wage and requesting double wages under the Prevailing Wage Act. The employee alleged that the ten-year statute of limitations in section 516.110, RSMo applied because he pled an action on bond. The general contractor argued for the three-year statute of limitations in section 516.400 because the employee sought a penalty under the Prevailing Wage Act.

The Court of Appeals initially held that the three-year statute applies to claims under the Prevailing Wage Act because the Act is remedial in nature and offers a "private" penalty rather than a penal reward to be recovered by the government. The Supreme Court ordered transfer, but subsequently entered an order re-transferring the case to the Court of Appeals. The Southern District readopted and reissued its initial decision.