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Polk County Bar Association

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US Supreme Court

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016). Important case coming out of the Northern District of Iowa and through the 8th Circuit. Donning and doffing case in which employees at Tyson Foods plants challenged the company practice of paying a flat rate for time it took them to get ready for work. Employees alleged that the donning and doffing of protective clothing was "integral and indispensable" to the work they performed, even though the work occurred not at their work station. Employees sought Rule 23 class certification which the Employer resisted in part on the basis that the claims were not sufficiently similar to award class relief. The case proceeded to a jury trial on limited claims, both under a Rule 23 class and as a collective action under the FLSA. At trial the jury awarded employees essentially a half-a-loaf ($2.9m vs. $6.7m). Important takeaway: statistical methods of proof may be appropriate where there are at least some common questions of fact. Rule 23 does not require identical issues for each class member.

Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 (2015). A unanimous Supreme Court holds that once the EEOC determines that reasonable cause exists, it must engage a respondent in conciliation efforts prior to filing suit to enforce the statute (in this case Title VII).

EEOC v. Abercrombie & Fitch, 135 S. Ct. 2028 (2015). Employer policy bans wearing "caps" as a manner of protecting its image. Employee denied a job because she wore a head scarf as a form of her religious expression.

District court granted summary judgment holding that there is a failure to accommodate only once the employer is aware of the need for an accommodation. Justice Scalia wrote for the majority holding that there is no requirement under Title VII that the employer have actual knowledge of the protected trait so long as belief of that trait, confirmed or otherwise, is a motivating factor in the decision.

Young v. UPS, 135 S. Ct. 1338 (2015). Young was a part time delivery driver for UPS when she became pregnant. UPS policy requires drivers to be able to lift up to 70 pounds. After she became pregnant, Young's physician imposed on her a limit of 10-20 pounds. UPS told Young she could not work as a driver with those restrictions and she was, therefore, barred from working altogether and lost income and benefits. Young filed suit claiming discrimination because the company accommodated lifting restrictions of other workers. The company countered that it accommodated lifting restrictions only of people injured on the job, those who had lost DOT privileges, and people with "protected disabilities". Young argued that under the Pregnancy Discrimination Act, she was entitled to the same protection as any other employee with similar restrictions. UPS argued that because its policy regarding accommodation was blind to the issue of pregnancy, by definition the policy did not discriminate. The court rejected both arguments holding: that SJ should not have been granted, that the court should have analyzed the claim pursuant to the traditional burden shifting analysis so many courts prefer. Because Young had identified a policy that favored some workers and disfavored pregnant women, she had done enough to satisfy her *prima facie* burden and force UPS to articulate a legitimate non-discriminatory reason to refuse the requested accommodation. Interesting discussion of how similar comparators must be.

IOWA SUPREME COURT

McQuistion v. City of Clinton, 872 N.W.2d 817 (Iowa 2015).

Pregnancy discrimination case brought under the Iowa Civil Rights Act after the District Court granted summary judgment to the City. Much of the Court's analysis tracks the analysis from the United States Supreme Court case Young v. UPS discussed earlier in this outline. Very much like the Young case, the District Court surveyed the landscape of the law as it related to alleged pregnancy discrimination and ultimately remanded the case on the pregnancy discrimination claim to the District Court for findings. Both consistent with the Young case but also taking into account the proper way to analyze

pregnancy discrimination claims requesting accommodations during pregnancy. Parallel and alternative claims alleging equal protection and substantive due process the Iowa Supreme Court affirmed the District Court grant of summary judgment.

Rivera v. Woodward Resource Center, 865 N.W.2d 887 (Iowa 2015).

After losing at trial, the plaintiff appealed claiming error in a jury instruction which states:

> The "determining factor" need not be the main reason motivating the decision to terminate employment. The determining factor need only be the reason which tips the scales decisively one way or the other. If Woodward Resource Center would have made the decision to discharge Rivera even if she had not reported suspected dependent adult abuse, the reports were not the determining factor in the decision to terminate her employment. The reports were not the determinative factor if Woodward Resource Center had an overriding business reason for terminating Rivera's employment.

Rivera claimed on appeal that the fourth sentence of the challenged instruction improperly invited the jury to find that even if the unlawful reason for the termination was the "determinative factor" the jury could still find that the Plaintiff could not succeed because of a business reason that the employer either made up or that was substantively more important than the basis for the discharge. The court held that plaintiff need not prove a lack of overriding business reason as an element of a wrongful discharge claim. More specifically, the court rejected the argument by the plaintiff on appeal holding that the instruction as submitted did not embrace a theme result doctrine, that the subject instruction correctly stated that "the unlawful reason must be a tipping point or determining factor in decision. If it is not – if indeed the termination was based upon other factors and the unlawful conduct did not tip the balance – then the termination was lawful."

Fagen v. Grand View Univ., 861 N.W.2d 825 (Iowa 2015).

The question presented to the court on interlocutory appeal was whether the defendant in a civil case is entitled to a signed patient's waiver from the plaintiff to obtain the plaintiff's mental health records when the plaintiff is alleging a claim for emotional distress. Ultimately the court was unable to resolve the dispute, however, the court did set out a path for litigants to follow.

> When a party refuses upon request to provide a patient's waiver under Section 622.10, the court must make sure the party seeking the waiver is not permitted to go on an unlimited fishing expedition

> into a party's mental health records. Therefore, the person requesting the waiver must make a showing that he or she has a reasonable basis to believe the specific records are likely to contain information relevant to an element or factor of the claim or defense of the claim or of any party claiming through or under the privilege. In doing so, the person seeking the patient's waiver need not establish the records sought actually contain admissible evidence concerning an element or factor to the claim or defense. The person seeking the patient's waiver need only advance some good faith factual basis demonstrating how the records are reasonably calculated to lead to admissible evidence germane to an element or factor of the claim or defense. An important requirement of this showing is the person seeking the patient's waiver must show an axis between the records sought and a specific claim or defense made in the case. If a party can make this showing, the patient-physician privilege is lost as to those records and the party requesting the waiver shall be entitled to the waiver to obtain those records within the scope of discovery.

Hutchison v. Shull, 2016 Iowa Sup. Lexis 35.

When is a meeting a meeting? When is a gathering a gathering? When does a case about the open meetings laws become a case regarding employment law?

Iowa Court of Appeals

Carter v. Lee County, 2015 Iowa App. Lexis 10.

Invoking the Iowa whistleblower protection law, codified at Iowa code section 70A.29, the case addresses what kinds of public complaints are protected (and not protected) by the statute. Plaintiff had made multiple comments to supervisors in Lee County with concerns, among other things, about how his maintenance department budget dollars were being spent. He had also complained at public meetings and individually to supervisors about plans for a new jail. Plaintiff admitted during trial that he did not take his complaints outside the county to other local or state officials. The court held that the whistleblower law requires proof that the subject of the whistleblowing was subjectively believed by the whistleblower to be evidence of wrongdoing that is subjectively sincere. The act must also be shown to be objectively reasonable. Because the court found that revealing matters already known to supervisors,

Carter could not satisfy the objective proof that the disclosure meet the objective criteria. Majority cites language from NJ federal court that the federal whistleblower law does not protect squeaky wheels and "pains in the ass." Dissent by Doyle. Open question: would there be a first amendment violation here?

Gibson v. Buckley, 2015 Iowa App. Lexis 437.

At a trial regarding the termination of a dental assistant alleging violation of Iowa Code section 272C.8(3), the court of appeals held that evidence of Dental Board decisions was properly excluded from evidence. Plaintiff challenged the exclusion on the basis that the Board documents supplied evidence of her good faith. The documents sought to be admitted essentially supported Plaintiff's allegations that her employer engaged in unsanitary dental practices. The court held that because the plaintiff's good faith was not an element of proof of the claim, the evidence was properly excluded.

Wright v. Ross Holdings, LLC (Iowa App. 2015).

Sexual harassment and constructive discharge case spanning several years. The harassment, while inappropriate, was intermittent. The court found after the most recent example of harassment, after which she essentially immediately resigned, that plaintiff had not given the company a reasonable chance to remedy the situation and rejected her constructive discharge claim. Because a hostile environment can on its own be so objectively hostile that there does not have to be a tangible job loss (demotion, reduction in pay, termination, constructive discharge), the court also analyzed the case on the question of the hostile environment claim alone. The court found the behavior of the male co-workers boorish "sexually fueled conversations, minor touching, and requests for a relationship" were not sufficient to meet the burden of proof.

Pharaoh-Carlson v. Hy Vee, Inc., 2015 Iowa App. Lexis 98.

The plaintiff challenged an instruction in a workers' compensation/retaliation case in which the challenged instruction stated:

> "Mr. Carlson was an employee at-will. An employee at-will may be terminated at any time for any reason, except if it is contrary to the public policy of the state. It is against the public policy of the state to discharge any employee for pursuing the rights afforded under the Iowa Workers' Compensation Statute. It is not against the public policy of the state to discharge an injured employee for non-retaliatory reasons, such as absenteeism or job performance. Mr. Carlson has the burden of proving that Hy-Vee's reasons for discharge were retaliatory."

Specifically, the plaintiff argued that the instruction misstated the law and gave him the burden aside from the burden of proving something Hy-Vee should have to prove. The court found that the challenged instruction did not misstate the workers' compensation public policy exception, that it was "a proper statement that absenteeism, attributable to a work-related injury, can be a valid reason to terminate employment." The court held that the challenged instruction properly informed the jury that an employee's termination for pursuing a workers' compensation claim would be a violation of Iowa public policy.

Anderson v. State, 872 N.W2d 410 (Iowa App. 2015).

The question presented in this case is whether a petition should be dismissed for failure to state a claim when the petition fails to allege exhaustion of administrative remedies. In the case the state argued that plaintiff must affirmatively plead their compliance with every procedural requirement in order to avoid pre-answer dismissal because a court could not otherwise presume those requirements had been met. In rejecting the state's argument the court of appeals noted that it found no authority in Iowa statute or jurisprudence to support the argument because the lawsuit gave the state fair notice of the claims asserted and permitted it to adequately respond, according to the court of appeals nothing more was required.

Eighth Circuit

Van Horn v. Martin, 812 F. 3d 1180 (8th Cir. 2015).

On the question of judicial estoppel [which prevents a party from asserting a claim in one proceeding inconsistent with a claim taken by the party in a previous proceeding) the Eighth Circuit held that because the plaintiff failed to amend her Chapter 13 bankruptcy schedules to include her discrimination lawsuit which arose during the pendency of the bankruptcy proceedings, all of the factors of a judicial estoppel claim were met.

Stewart v. Rise, 791 F.3d 849 (8th Cir. 2015).

Judge Malloy affirming summary judgment on the discriminatory termination claim but summary judgment reversed on the hostile work environment claim. Plaintiff was a supervisor in a branch office of a non-profit welfare service program in the Twin Cities. Her supervisors worked from a different office. The plaintiff supervised several Somali case workers who repeatedly made sexist, racial, and other discriminatory comments, including physical violence and intimidation. Plaintiff was regularly called a "bitch," making statements

such as “American women have no value,” quotes referring to “women’s work,” among other distasteful and discriminatory remarks. On the hostile work environment claim, the Circuit held that plaintiff’s evidence by affidavit and deposition testimony may not be discounted at the summary judgment stage. Recognizing that the fact-finder might well accept the employer’s narrative, the court recognizes that summary judgment stage the Court may not adopt the arguments and evidence suggested by the moving party and that the absence of reports or the existence of self-serving affidavits, interrogatory answers, or deposition testimony on their own do not necessarily translate to a good motion for summary judgment. Where there are even alleged inconsistencies in the papers resisting the motion for summary judgment, the court must see the inconsistencies in a manner that favors the non-moving party.

Yousuf v. Fairview Health Services, Inc., 607 Fed. Appx. 604 98th Cir. 2015).

Circuit reversed summary judgment upon her pregnancy discrimination claim and affirmed on the race, national origin, and religious discrimination claims. The court held that:

“Despite [plaintiff’s] assertions that FHS had assumed she was pregnant, the district court relied solely on her failure to present evidence showing that FHS was aware of her pregnancy, and thus deduced that she could not show FHS discriminated against her on the basis of her pregnancy or sex. The district court failed to recognize, however, that Title VII, as amended by the pregnancy discrimination act, also prohibits an employer from discriminating against a woman because of her capacity to become pregnant.

Wagner v. Gallup, Inc., 788 F. 3d 877 (8th Cir. 2015).

Review of summary judgment granted both analyzing the case of the direct and indirect methods of analysis. Plaintiff had alleged the case should be reviewed by the direct method of analysis based upon comments at work, the isolated use of the words “historically” and “old school”. Under the direct method of proof the court found that the comments attributed by plaintiff to being direct evidence of discrimination were merely isolated comments that did not establish an inference of age animus. Analyzing the case under the well worn burden shifting scheme, the court found that plaintiff did not have sufficient evidence to make out a claim of age discrimination and failed to demonstrate comparators were treated more favorably.

Hilde v. City of Eleveth, 777 F. 3d 998 (8th Cir. 2015).

A failure to hire/promote case brought by a 29-year veteran of the City police department who applied for the Chief position at the age of 51. Plaintiff was one of four finalists for the position. The district court had granted summary judgment both on the federal and state law claims finding that plaintiff failed to make a prima facie case based on the fact that the person selected for the position was only 8 years younger than plaintiff. Upon appeal the Eighth Circuit reversed the grant of summary judgment holding that while factors such as retirement eligibility, salary, or seniority have been held to be independent of and not proxies for age discrimination, it is still important to consider what the employer supposes about age. More specifically, the court held that to assume plaintiff was not committed to a position because of his proximity to retirement is specifically age stereotyping that the ADEA prohibits and that using such a criteria to presuppose lowered productivity or dedication would be improper, especially where the City presented no evidence of the plaintiff's lack of commitment and in fact never asked him about his commitment to the position. Those among other factors suggested to the Eighth Circuit that the case should proceed to trial.

Nichols v. Tri-National Logistics, et al, 809 F. 3d 981 (8th Cir. 2016).

The Eighth Circuit again reversing summary judgment (in part and affirming in part) on discrimination claims alleging sex discrimination. Allegations of both unwanted sexual harassment and sex discrimination by an over-the-road truck driver forced to work with and around men who acted inappropriately and in an unwelcome sexual manner, some of which occurred during rest periods on non-working hours. The court of appeals reversed grant of summary judgment based in part on its criticism that the district court improperly failed to analyze sexual harassment that occurred during a 34-hour rest stop and noting that offensive conduct under the statute does not have to occur in the workplace to create a hostile work environment. Additionally, the court found the district court had improperly concluded that it was plaintiff's decision to remain with her truck recognizing that the law does not require an employee to "quit or wanted to quit" when faced with no real choice at all, and that employees should not be forced to choose between employment and their right to file suit. According to the court, the proper test is whether the employee subjectively perceives their situation as offensive. Finally, the court recognized the responsibility of the employer to take prompt remedial action upon receiving actual knowledge of harassment.

Brown v. Diversified Distribution Systems, LLC, 801 F. 3d 901 (8th Cir. 2015).

Plaintiff was terminated five days after complaining about reassignment to a different position after returning from FMLA leave. The district court granted summary judgment and the court of appeals reversed the FMLA entitlement and retaliation claim, but affirmed on the FMLA discrimination claim. An entitlement claim under the FMLA arises when the employer refuses to authorize leave under the statute or takes other action to avoid responsibilities under the statute. When the employee claims denial of a benefit to which she is entitled under the FMLA, she is not required to show that the employer acted with any discriminatory intent. Finally, when the employer knows about the stated reason for taking adverse action against the employee for an extended period of time but then only acts after the employee engages in protected activity, the employers early failure to act supports the inference of pretext. Finally, timing of the event, particularly very close in time, supports an inference of retaliatory intent.

Wages v. Stuart Mgmt. Corp., 798 F.3d 675 (8th Cir 2015).

District court granted summary judgment on an FMLA entitlement claim because there was no evidence that plaintiff was actually qualified for FMLA leave. Because the plaintiff was terminated from her position prior to her one-year anniversary, she was by law not qualified under the FMLA. The interesting takeaway from the Wages case looks to be the fact that the district court granted judgment in plaintiff's favor largely because of the company's sharp lawyer tactics.