SURVEY OF EIGHTH CIRCUIT EMPLOYMENT DECISIONS

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INTRODUCTION

The United States Court of Appeals for the Eighth Circuit's 2000 employment docket was predictably active. The court decided forty-three cases under the Americans with Disabilities Act ("ADA")[1] in 2000, nine of which were notable because the court either (a) applied new standards from the United States Supreme Court in complex factual situations;[2] (b) decided significant issues that the Supreme Court has not yet considered;[3] or (c) provided a consistently pragmatic approach in analyzing the ADA to cases, which on their facts might have as easily been affirmed as reversed.[4]

The United States Courts of Appeals for the Seventh and Eighth Circuit invalidated Department of Labor regulations covering the Family Medical Leave Act ("FMLA")[5] in decisions that have triggered similar results throughout the circuit courts.[6] Meanwhile, Eleventh

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1. 42 U.S.C. §§ 12101-12213 (1994).

2. Otting v. J.C. Penney Co., 223 F.3d 704 (8th Cir. 2000). The Eighth Circuit was the first Court of Appeals to apply the Supreme Court's holding in *Sutton v. United Airlines*, 527 U.S. 471 (1999), to a case involving a plaintiff with epilepsy. Although the plaintiff's medication significantly lessened the symptoms of her epilepsy, she remained "substantially limited in a major life activity," as defined by the ADA. *Otting*, 223 F.3d at 708-11.

3. Cravens v. Blue Cross and Blue Shield, 214 F.3d 1011 (8th Cir. 2000). The Eighth Circuit held that employers must consider reassignment to a vacant position as a reasonable accommodation under the ADA. The Eighth Circuit did so, however, without straying from the rule that the ADA does not require the employer to provide accommodations if it violates a promotional seniority system. *Cravens*, 214 F.3d at 1018. *See generally* Boersig v. Union Electric Co., 219 F.3d 816 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 857 (2001).

4. *See, e.g.*, Kellogg v. Union Pacific Railroad Co., 233 F.3d 1083 (8th Cir. 2000). The Eighth Circuit upheld a district court's finding that a Union Pacific operations manager's inability to perform overtime work did not make him "disabled" under the ADA since he was still able to perform a wide range of jobs despite his depression and anxiety. *Kellogg*, 223 F.3d at 1087-88, 1090.

5. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994).

6. *See* Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579 (7th Cir. 2000). In *Dormeyer*, the Seventh Circuit invalidated an FMLA regulation providing in part, "if the employer fails to advise the employee whether the employee is eligible [for family leave] prior to the date the requested leave is to commence, the employee will be deemed eligible." *Dormeyer*, 223 F.3d at 582 (citation omitted). *See* Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933 (8th Cir. 2000). In *Ragsdale*, the Eighth Circuit invalidated

Amendment immunity issues have engaged the courts at all levels, including the Eighth Circuit, with respect to anti-discrimination legislation other than Title VII.[7]

The court reviewed many cases related to discrimination and harassment under Title VII.[8] In several of those cases the Eighth Circuit applied the affirmative defenses that the United States Supreme Court articulated in *Burlington Industries, Inc. v. Ellerth*[9] and *Faragher v. City of Boca Raton*.[10] The Eighth Circuit, however, has yet to articulate a strategy for applying the issues that the Supreme Court raised in 1999 when the Supreme Court modified the Restatement (Second) of Torts section 909,[11] as it applies in the statutory employment context in *Kolstad v. American Dental Ass'n*.[12] This article reports on several of these cases in detail while limiting its discussion of others to a review of a particular issue or fact situation.[13]

EIGHTH CIRCUIT DECISIONS THAT APPLIED THE SUPREME COURT'S DEFENSES IN *ELLERTH*, *FARAGHER* AND *KOLSTAD*

In 1998 and 1999, the United States Supreme Court defined two defenses for employers in discrimination cases. Both defenses relate to imputing liability for damages to employers for the conduct of employees. *Ellerth* and *Faragher* concerned vicarious liability for supervisory harassment, whereas *Kolstad* considered the circumstances under which the conduct of an employee can be imputed to his em-

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FMLA regulation 29 U.S.C. § 825.700(a) (1994), which prohibited employers from counting leave taken by an employee against the employee's twelve-week FMLA entitlement unless the employer specifically and prospectively designated the leave as FMLA leave. *Ragsdale*, 218 F.3d at 940. The Court noted that (1) the FMLA does not itself require employers to specifically designate leave as FMLA leave; (2) where Congress intended explicit notification provisions with considerable consequences for violations, it so provided in the text of the statute; and (3) nothing in the legislative history of the act indicated an intent to establish explicit notification provisions. *Id.* The court explained that "Congress only intended to mandate a minimum of twelve weeks of leave for employees, it did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave for their employees." *Id.*

7. *See infra* notes 307-46 and accompanying text.

8. *See* Ross v. Douglas County, 234 F.3d 391 (8th Cir. 2000).

9. 524 U.S. 742 (1998).

10. 524 U.S. 775 (1998).

11. RESTATEMENT (SECOND) OF TORTS § 909 (1979). Section 909 governs the conditions for imputing punitive damages to an employer. Restatement (Second) of Agency section 217(C) is the same as section 909. RESTATEMENT (SECOND) OF AGENCY § 217(C) (1957). The *Kolstad* decision uses the two sections interchangeably.

12. 527 U.S. 526 (1999).

13. The Eighth Circuit also decided many state law employment-related issues, such as negligent hiring and retention, wrongful discharge, and workers compensation retaliation.

ployer for liability for punitive damages.[14] In 2000, the Eighth Circuit discussed the *Ellerth/Faragher* affirmative defense ("*Ellerth/Faragher*") in four cases of interest, with two of the discussions involving evidentiary issues.[15] The Eighth Circuit applied various aspects of the *Kolstad* punitive damage analysis in three statutory employment cases.[16]

In *Ellerth* and *Faragher* the Supreme Court announced that employers are vicariously liable when supervisory personnel harass their employees.[17] The Supreme Court made an affirmative defense available to employers in situations of supervisory harassment. The defense ("*Ellerth/Faragher*" defense) has two elements: first, the employer must exercise "reasonable care to prevent and correct promptly any sexually harassing behavior[,]"[18] and second, the plaintiff employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[19] The *Ellerth/Faragher* defense is not available when the supervisor's harassment results in a "tangible employment action."[20] The *Ellerth/Faragher* defense is a three-part analysis, determining whether (1) the plaintiff suffered any adverse employment action, (2) the plaintiff complained about the harassment, and (3) the employer exercised reasonable care (a negligence standard) in preventing harassment in the workplace and correcting harassment which the employer knew or should have known existed.

The issues in *Kolstad*, however, are more complicated, particularly those involving imputing liability for punitive damages. The Supreme Court accepted certiorari in *Kolstad* to resolve a conflict among the courts of appeals on the issue of the quality of conduct required to submit a request for punitive damages to a jury.[21] The Supreme Court decided that a jury may consider punitive damages in cases in

14. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999); Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998)).

15. *See* Williams v. City of Kansas City, 223 F.3d 749 (8th Cir. 2000); Stephens v. Rheem Manufacturing Co., 220 F.3d 882 (8th Cir. 2000); Stuart v. General Motors Corp., 217 F.3d 621 (8th Cir. 2000); Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000).

16. *See* Otting v. J.C. Penney Co., 223 F.3d 704 (8th Cir. 2000); Henderson v. Simmons Foods, Inc., 217 F.3d 612 (8th Cir. 2000); *Ogden*, 214 F.3d 999.

17. *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 764-65.

18. *Ellerth*, 524 U.S. at 765.

19. *Id.*

20. *Id. Ellerth* gave examples of "tangible employment action" to include discharge, demotion, or undesirable reassignment. *Id.*

21. *Kolstad*, 527 U.S. at 526, 533.

which the conduct at issue was malicious or recklessly indifferent and in intentional disregard of the employee's federally protected rights.[22]

The Court also addressed the standards necessary to impute liability for punitive damages to an employer under agency theories,[23] and modified Restatement (Second) of Agency section 217(C) to provide the test.[24] The Restatement provides that punitive damages may be awarded against a principal,

> if, and only if,
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
> (d) the principal or a managerial agent of the principal ratified or approved the act.[25]

The Supreme Court modified section 217(C) because the Court believes that the Restatement's "scope of employment" rule is counterproductive to Title VII's objectives. The Supreme Court correctly analyzed the "perverse incentives" that the "scope of employment" rule creates in the Title VII context,[26] and stated:

> [a]pplying the Restatement of Agency's "scope of employment" rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement

22. *Id.* at 527 U.S. 542-46. The Supreme Court stated that liability for punitive damages would depend in part on whether an employer engaged in conduct with the "knowledge that it may be acting in violation of federal law." *Id.* at 535.

23. *Kolstad*, 527 U.S. at 541-44. The Majority raised the issue of the proper legal standard for imputing liability for punitive damages because it was "intimately bound up" with the issue before the Court on Petition for Certiorari. *Id.* at 540.

24. The Court cited past opinions discussing the significance of agency principles in applying Title VII and noted that Restatement (Second) of Agency section 217 and Restatement (Second) of Torts section 909 are the same. The Court used the two Restatement sections interchangeably in the remainder of the *Kolstad* opinion in the context of the Restatement (Second) of Torts section 909. *See generally Kolstad*, 527 U.S. at 527-42; RESTATEMENT (SECOND) OF TORTS § 909 (1977); RESTATEMENT (SECOND) OF AGENCY § 217 (1957).

25. RESTATEMENT (SECOND) OF TORTS § 909. *See also* RESTATEMENT (SECOND) OF AGENCY § 217. The Restatements clearly limit punitive damages to four specific situations. These situations, on their face and by explanatory comment, apply in both vicarious liability situations (*e.g.*, managerial agent acting in the scope of employment) and situations when direct liability is shown (*e.g.*, principal condoned or ratified acts of agent). In fashioning the "good-faith" defense, *Kolstad* did not draw a distinction between the types of misconduct engaged in by an agent, even when acting within the scope of his employment.

26. *Kolstad* was an Age Discrimination in Employment Act ("ADEA") case. The Supreme Court's use of "Title VII" in its punitive damage defense thus signals the Court's intention that the analysis and defense apply in employment discrimination cases generally.

> antidiscrimination programs. In fact, such a rule would likely exacerbate concerns among employers that § 1981a's "malice" and "reckless indifference" standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions.[27]

The Supreme Court modified the "scope of employment" rule by creating a defense for employers who can demonstrate a "good-faith effort" to comply with Title VII. The *Kolstad* defense has two parts: (1) whether the employee whose actions are at issue is a "managerial agent acting in the scope of employment" for purposes of binding the corporation, and (2) whether the employer can demonstrate that the "managerial agent" acted contrary to the employer's "good-faith efforts" to enforce Title VII.[28] The Supreme Court did not define "good-faith efforts," leaving that to the lower courts.

OGDEN V. WAX WORKS, INC. — *ELLERTH/FARAGHER* DEFENSE; *KOLSTAD'S* "GOOD-FAITH EFFORT"

In *Ogden v. Wax Works, Inc.*,[29] a Title VII sexual harassment case, the Eighth Circuit addressed the *Ellerth / Faragher* defenses and the Supreme Court's holding in *Kolstad*. [30] *Wax Works* reached the Eighth Circuit after a jury returned a verdict for plaintiff Carrie Ogden against her employer Wax Works. Chief Judge Mark Bennett of the United States District Court for the Northern District of Iowa denied Wax Works' motion for judgment as a matter of law or new trial. The Eighth Circuit affirmed.

Facts and Holding

The facts recited in the Eighth Circuit's opinion support the existence of a hostile work environment. Ogden was a store manager for Wax Works. During the last two years of her employment, Ogden's district manager, Hudson, made unwelcome physical advances, propositioned Ogden, mistreated her at work, and finally withheld her annual raise because Ogden would not succumb to his numerous advances.[31] Ogden complained directly to Hudson's immediate supervisor, regional manager Klem, who admitted knowing about Hudson's

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27. *Kolstad*, 527 U.S. 544.

28. The Court held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Id.* at 545 (quoting Kolstad v. American Dental Assoc., 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J. dissenting), *vacated by*, 527 U.S. 526 (1999).

29. 214 F.3d 999 (8th Cir. 2000).

30. Ogden v. Wax Works, Inc., 214 F.3d 999, 1006-07, 1008-10 (8th Cir. 2000).

31. *Ogden*, 214 F.3d at 1003-04.

affairs with other employees and agreed to investigate.[32] A vice president also admitted that he had heard "rumblings" of Hudson's inappropriate relationships with other employees.[33] In the investigation that ensued, Hudson characterized Ogden's complaints as a "personality conflict,"[34] and the investigation focused upon Ogden's performance, which had never been questioned before, rather than Hudson's conduct.[35]

Wax Works' sexual harassment policy encouraged employees to report any alleged violations of the policy to a member of management or directly to the Director of Human Services.[36] The policy promised a "thorough" investigation of "[a]ll such complaints."[37] Wax Works also had signs posted which encouraged employees to call the home office and provided a toll-free number for them to do so.[38]

The district court questioned, however, whether Wax Works was entitled to the affirmative defense from *Ellerth* and *Faragher*. Nevertheless, the district court instructed the jury on the affirmative defense as applied to Ogden's hostile environment claim, but not to her quid pro quo claim. The Eighth Circuit analyzed the *Ellerth/Faragher* defense while acknowledging that the defense is not available in situations in which there has been a tangible employment action.[39] Since the jury found that Wax Works constructively discharged Ogden, the defense did not apply.[40]

In affirming the district court's denial of plaintiff's motion for judgment as a matter of law on the issue of punitive damages, the Eighth Circuit relied on *Kolstad's* clarification of "[t]he precise burden a plaintiff must carry to prove malice or recklessness for purposes of 42 U.S.C. § 1981a(b)(1)."[41] *Kolstad* rejected an interpretation of section 1981a(b)(1) which defined punitive damages to require "egregious" conduct and focused on an employer's state of mind.[42]

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32. *Id.*
33. *Id.* at 1004 n.5.
34. *Id.* at 1004.
35. *Id.* at 1003, 1005.
36. *Id.* at 1005.
37. *Id.*
38. *Id.* This sexual harassment policy provided an avenue of complaint which bypassed a harassing supervisor by authorizing the aggrieved employee to complain to the "home office" and provided a "toll free" number for that purpose. These provisions in a policy would seem to adequately address a situation of supervisory harassment or one where a supervisor who fails to act to enforce a company policy prohibiting harassment.
39. *Ogden*, 214 F.3d at 1007 (citations omitted).
40. *Id.* at 1008.
41. *Id.* (citation omitted).
42. *Id.* "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Id.* (citing *Kolstad*, 527 U.S. at 535).

The Eighth Circuit then found that the jury reasonably rejected the affirmative defense because there was substantial evidence that Wax Works never conducted a "thorough investigation" nor did it take "appropriate action" as promised in Wax Works' sexual harassment policy.[43] The court applied the *Kolstad* analysis regarding imputing liability for punitive damages to an employer, noting "that Hudson served in a managerial capacity and was acting within the scope of his" employment because Hudson supervised several stores, had the authority to schedule and to conduct performance evaluations and accordingly to effect employee raises.[44]

In analyzing *Kolstad's* "good faith efforts to comply with Title VII" criteria, the Eighth Circuit held that there was substantial evidence that Wax Works minimized Ogden's complaints and performed only a cursory investigation which focused on Ogden's performance rather than on Hudson's conduct. These determinations were relevant to whether Wax Works' efforts to comply with Title VII met the "good-faith effort" standard.[45]

Analysis

The Eighth Circuit's analysis of the propriety of the *Ellerth/Faragher* affirmative defense under the facts of *Ogden* was correct. The jury found constructive discharge based on facts that provided substantial evidence that Ogden's working environment was intolerable. That alone would make the defense unavailable to a defendant employer. The facts as recited by the Eighth Circuit also support its analysis that Wax Works' investigation failed "to prevent and correct promptly any sexually harassing behavior," as the affirmative defense requires.[46]

The Court's analysis in *Kolstad*, however is more complicated. The Eighth Circuit correctly interpreted *Kolstad* as creating an affirmative defense that in effect modifies the "scope of employment" prong of Restatement (Second) of Agency section 217.[47]

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43. *Ogden*, 214 F.3d at 1007. Wax Works' sexual harassment policy promised that, "[a]ll such complaints will be held in confidence and will be investigated thoroughly. Appropriate action will be taken." *Id.* at 1005. With respect to Wax Works' efforts at correcting the problem, the Eighth Circuit found that Wax Works minimized Ogden's complaints, performed only a cursory investigation focusing on Ogden's performance rather than Hudson's conduct, and failed to discipline Hudson. *Id.* at 1007 (citation omitted). *See* Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1242-43 (10th Cir. 1999) (noting that the failure to discipline a harassing employee was relevant to an analysis of the employer's response to the plaintiff's complaint).

44. *Ogden*, 214 F.3d at 1010.

45. *Id.*

46. *Id.* at 1007.

47. *Id.* at 1008-09.

The Eighth Circuit found that there was substantial evidence that Hudson served in a "managerial capacity and acted within the scope of his employ."[48] Finally, the Eighth Circuit held that the evidence of Wax Works' written sexual harassment policy and its policy encouraging employees to contact the home office did not as a matter of law establish "good-faith efforts" in the face of "substantial evidence" that Wax Works "'minimized' Ogden's complaints; performed a cursory investigation which focused upon Ogden's performance, rather than Hudson's conduct; and forced Ogden to resign while imposing no discipline upon Hudson."[49] On the facts of *Ogden* it appears that the Eighth Circuit believed that the quality of the investigation and Wax Works' failure to discipline Hudson trumped a written sexual harassment policy that instructed the aggrieved employee to contact the home office. While this approach will not serve the reasons why the Supreme Court established the *Kolstad* defense in every instance, it is probably justified here because Ogden did by-pass her harassing supervisor and report Hudson's conduct to the regional manager.

The result in *Ogden* compares well with the questionable logic of *Deters v. Equifax Credit Information Services, Inc,*[50] a case from the United States Court of Appeals for the Tenth Circuit. In *Deters*, the Tenth Circuit declined to decide whether the manager of one branch office was a "sufficiently highly ranked managerial or policy-making employee such that his knowledge of the harassment" would be imputed to the employer.[51] Instead the court used the employer's policy to obtain a result that is precisely what *Kolstad* termed "perverse," as it would have the effect of discouraging employers from training managers and supervisors.[52] In *Deters*, the court allowed punitive damages to be imputed against the employer because the manager of a branch office failed to follow company policy.[53] The employer had a comprehensive policy prohibiting sexual harassment that identified "your human resource officer" as one of the avenues to bypass a harassing supervisor.[54] Since the employer expected its branch man-

48. *Id.* at 1010.

49. *Id.*

50. 202 F.3d 1262 (10th Cir. 2000). Deters alleged that she reported harassment by one supervisor and three co-workers to the manager of the Company's Lenexa, Kansas Office, where she worked, and that the manager did nothing to stop the harassment. Deters v. Equifax Credit Information Systems, Inc., 202 F.3d 1262, 1264-65 (10th Cir. 2000).

51. *Deters*, 202 F.3d at 1270.

52. *Kolstad*, 527 U.S. at 544-45.

53. *Deters*, 202 F.3d at 1270-71.

54. *Id.* at 1270. The court cited the following portion of the company's policy prohibiting sexual harassment:

> If you feel that you are being harassed in any way by another employee . . . you should talk to your supervisor immediately. The matter will be thoroughly in-

agers to implement the company's human resource policies, the court determined that the direction in the policy to contact "either your human resources officer or Becky Padgett, vice president-Corporate Human Resources" imputed knowledge, and thus liability, to the company as a matter of law — the precise result that *Kolstad* wanted to avoid.

HENDERSON V. SIMMONS FOODS, INC. — *KOLSTAD'S* STANDARD OF RECKLESS INDIFFERENCE

Henderson v. Simmons Foods, Inc.,[55] was a sexual harassment case. Plaintiff Henderson alleged that her employer Simmons Foods, Inc. ("Simmons") constructively discharged her by not responding to her complaints of sexual harassment against two coworkers.[56] The jury awarded Henderson $15,000 for lost wages, $100,000 in punitive damages, and $60,000 for compensatory damages. On appeal, the Eighth Circuit affirmed the district court's entry of judgment on behalf of Henderson.

Facts and Holding

The facts as presented in the court's opinion certainly sound as if Henderson's work environment was hostile. Henderson worked at Simmons' chicken processing plant for thirteen years before a male coworker began to "persistently and continuously harass[ ] her," including several incidents of crude sexual vulgarities and physically touching Henderson sexually and offensively.[57] Henderson reported the male coworker to her supervisors, who waited until the following year to transfer the coworker to a different unit. A little over a year and a half later, however, Simmons placed the same male coworker on the production line four feet from where Henderson worked. Henderson again complained to her supervisor.[58] Within a few months after the male coworker's return to Henderson's shift, he started the verbal harassment again using, as the Eighth Circuit described it, "the crudest of sexual vulgarities."[59] Henderson reported the verbal harass-

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vestigated, and where appropriate, disciplinary action will be taken. If you do not feel that you can discuss the matter with your supervisor or if you are not satisfied with the way your complaint has been handled, *please contact either your human resources officer or* Becky Padgett, vice president-Corporate Human Resources. You will not be penalized in any way for reporting such conduct whether it involves yourself or another person.

Id.

55. 217 F.3d 612 (8th Cir. 2000)
56. Henderson v. Simmons Foods, Inc., 217 F.3d 612, 615 (8th Cir. 2000).
57. *Henderson*, 217 F.3d at 613-14.
58. *Id.* at 614.
59. *Id.*

ment to her supervisor and to the Human Relations Manager, who told Henderson that if Simmons determined that the allegations were baseless the company might terminate her.

Shortly after that, Henderson told the company nurse about the harassment. Henderson also reported that another male coworker had also started harassing her. Henderson said that two female coworkers might have overheard the harassment. When the supervisors questioned the female coworkers, they denied witnessing harassment. One of them said, however, that it was too noisy at the plant to overhear any conversation at a nearby workstation. The other female coworker spoke Laotian and could barely communicate in English, yet the supervisors took no steps to use an interpreter. Both male employees denied harassing Henderson. The Human Relations Manager warned both male employees. After the warning, the men stopped their verbal harassment but one of them continued the hostility by making obscene hand gestures towards Henderson. Henderson again reported his actions, but Simmons did nothing else.[60]

Analysis

The Eighth Circuit's analysis of the punitive damage issue is curious in light of *Kolstad*. Simmons argued that the Eighth Circuit has declined to find that far more egregious conduct would allow punitive damages. Simmons relied on *Varner v. National Super Markets, Inc.*,[61] another case from the Eighth Circuit. In *Varner*, a male employee harassed a seventeen year old female coworker with sexually graphic remarks over several weeks. On two separate occasions, the same male employee sexually assaulted the seventeen year old girl. The seventeen year old did not file any complaints following the assaults. Instead, she told her fiancé who also worked for the employer that she had been assaulted. The supervisor ignored both complaints, stating that company policy did not permit him to act unless the seventeen year old girl personally complained.[62] Indeed, the employer's sexual harassment policy instructed supervisors not to address sexual harassment themselves. Instead the supervisors were to refer aggrieved employees to the company's Human Relations Department.[63] The Eighth Circuit concluded that although the employer was on notice for purposes of liability because of the complaints of Varner's fi-

60. *Id.*

61. 94 F.3d 1209 (8th Cir. 1996).

62. *Henderson*, 217 F.3d at 618 (citing Varner v. National Super Markets, Inc., 94 F.3d 1209, 1211 (8th Cir. 1996)).

63. *Id.* at 619 (citing *Varner*, 94 F.3d at 1213-14).

ancé, there was no deliberate indifference to support punitive damages.[64]

The United States Supreme Court decided *Kolstad* between the time of the Eighth Circuit's opinions in *Varner* and *Henderson*. In *Henderson*, the Court cited *Kolstad* language, noting that "the terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination."[65] The Eighth Circuit referred to this as a "formidable burden on plaintiffs who seek punitive damages in a hostile work environment action premised under Title VII."[66] Henderson probably met this burden because of the way that Simmons responded to her numerous complaints. The Eighth Circuit distinguished *Varner* and *Henderson* in two respects. First, the court noted that Varner's employer's sexual harassment policy told supervisors not to do anything about sexual harassment complaints but to instruct the complaining employee to talk to the human relations department.[67] Second, the court noted that Varner's employer was on notice for liability purposes because of her fiancé's complaints but not for punitive damages because Varner herself had not complained.[68] Implicit in this explanation is that the Eighth Circuit is going to examine sexual harassment policies on the basis of "good-faith," and not on the basis of perfection, which is proper since *Kolstad* focused on reasonable conduct.

STUART V. GENERAL MOTORS CORP. — REASONABLE STEPS TO PREVENT AND CORRECT HARASSMENT

In *Stuart v. General Motors Corp.*,[69] Lora Stuart appealed the United States District Court for the Eastern District of Missouri's grant of summary judgment to her employer, General Motors Corp. ("GMC"), on her claims of sexual harassment and retaliation.[70]

Facts and Holding

Plaintiff Lora Stuart worked for GMC for eleven years. Her last position was a journeyman electrician.[71] The incidents which Stuart alleged to have occurred created a hostile environment occurred during the six years preceding her termination in 1996. Stuart alleged

64. *Id.* (citing *Varner*, 94 F.3d at 1214).
65. *Id.* at 618 (citing *Kolstad*, 527 U.S. at 535).
66. *Id.* at 618.
67. *Id.* at 619 (citing *Varner*, 94 F.3d at 1213-14).
68. *Id.* at 618-19 (citing *Varner*, 94 F.3d 1211).
69. 217 F.3d 621 (8th Cir. 2000).
70. Stuart v. General Motors Corp., 217 F.3d 621, 625 (8th Cir. 2000).
71. *Stuart*, 217 F.3d at 626.

that a pornographic computer program was installed in a computer delivered to her work area in 1990. Stuart never complained about the pornographic computer program until 1996, however.[72] In July 1996, Stuart complained about (1) the pornographic computer program, (2) the conduct of her supervisor and several coworkers, and (3) offensive posters which were placed in her locker.[73]

In granting GMC's motion for summary judgment, the Eighth Circuit found that "no rational jury could find that GMC's response was neither prompt nor adequate."[74] This was based on the several facts. First, within nine days after Stuart complained about the pornographic pictures in her locker, management investigated and considered taking fingerprints, but determined that too many people had touched the pornographic pictures and that fingerprints would be of no use. Second, as soon as GMC learned about the existence of the pornographic computer program, management immediately removed the computer. Third, within days management checked all other computers for pornographic materials. Fourth, management spent a full week interviewing thirty people, regarding what they knew of the pornographic programs, and consulted with Stuart three times during that week. Fifth, even though GMC had posted the sexual harassment policy throughout the plant, it took additional steps to reiterate the policy after Stuart complained.[75] These steps consisted of sending a letter to all plant employees explaining the policy and including a copy of the employee handbook. Finally, GMC offered Stuart a transfer to a different department, which she rejected.[76]

Analysis

The Eighth Circuit decided this case based upon Stuart's failure to demonstrate that her environment was objectively and subjectively hostile. In doing this, the court necessarily considered whether the employer "knew or should have known of the harassment and failed to take proper remedial action."[77] The *Ellerth/Faragher* defense technically did not apply here since GMC terminated Stuart. Nevertheless, the court's analysis is instructive on the issues of an employee's duty to complain about the harassment and on the quality of the employer's response.

72. *Id.* at 626-27.
73. *Id.* at 627-28.
74. *Id.* at 633.
75. *Id.*
76. *Id.*
77. *Id.* at 631 (citation omitted). The Eighth Circuit cited *Faragher*, 524 U.S. at 787, on the issue that a sexually hostile environment must be both "objectively and subjectively offensive." *Id.* (citing *Faragher*, 524 U.S. at 787).

STEPHENS V. RHEEM MANUFACTURING CO. — EVIDENTIARY ISSUES RELATED TO THE *ELLERTH/FARAGHER* DEFENSE

The issues before the Eighth Circuit in *Stephens v. Rheem Manufacturing Co.*[78] were evidentiary in nature. They related, however, to the defendant's reliance on the *Ellerth/Faragher* defense.

Facts and Holding

Stephens sued her employer for hostile environment sexual harassment by her immediate supervisor. The allegations of sexual harassment concerned Stephens' supervisor's infatuation with her, his compliments about Stephens' appearance, and his making sexually suggestive comments in her presence. Stephens did not allege physical contact, although she claimed that her supervisor blew in her ear, shook her chair from behind and tried to lift her skirt with a back scratcher.

A jury returned a verdict in favor of the Stephen's employer. Stephens appealed the district court's failure to grant her motion for new trial, arguing that the verdict was against the weight of the evidence and that significant new evidence was discovered.[79]

Prior to trial, Rheem filed a motion asking the district court to exclude rumors of sexual affairs among members of Rheem management and employees. The district court excluded the evidence under Rule 403 of the Federal Rules of Evidence.[80] The court found that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Stephens argued on appeal that the district court should have admitted the evidence notwithstanding the threat of prejudice because that particular evidence would have effectively rebutted Rheem's *Ellerth/Faragher* defense.[81] The Eighth Circuit did not address Stephens' argument except to say that in the court's opinion, the verdict was based upon plaintiff's failure to establish a sexually hostile work environment, not on Rheem's *Ellerth/Faragher* defense. The Eighth Circuit referred to this evidence as "salacious rumor-based evidence" with limited probative value.[82]

Stephens' second evidentiary argument also involved the *Ellerth/Faragher* defense. Stephens contended that a former Rheem em-

78. 220 F.3d 882 (8th Cir. 2000).
79. Stephens v. Rheem Manufacturing Co., 220 F.3d 882, 884 (8th Cir. 2000).
80. Federal Rule of Evidence Rule 403 provides "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.
81. *Stephens*, 220 F.3d at 882, 885.
82. *Id.* at 885.

ployee came forward after the trial and told Stephens that the supervisor who was harassing her had openly expressed his intention to pursue her at the time she started her employment with Rheem.[83] There was also an anonymous telephone call from an individual implicating the supervisor in a compromising position with another Rheem employee.

Stephens argued that the anonymous telephone call was evidence that would have established that her decision to wait three years before reporting her supervisor's harassment was reasonable. The Eighth Circuit determined that this particular evidentiary argument did bear on Rheem's *Ellerth/Faragher* defense. Nevertheless, the court had already determined that the jury's conclusion that Stephens had failed to establish the existence of a hostile work environment, and thus, her *Ellerth/Faragher* defense was irrelevant.[84]

Analysis

The Eighth Circuit did not discuss one interesting issue in this case. This issue was whether second-hand rumor-based evidence should be allowed in order for a plaintiff to refute a defendant's *Ellerth/Faragher* defense. Stephens was arguing that the rumors of sexual affairs between management and employees and similar conduct would have explained that it was not unreasonable for her to wait to come forward with her charges of harassment for three years. Although not explicit in the Eighth Circuit's opinion, Stephens apparently was arguing that these rumors deterred her from coming forward because she believed that the culture of the company was to harass female employees and that anyone in management who might typically be responsible for helping her would not do so because all management was involved in this conduct. The Eighth Circuit did not take this opportunity to address whether rumors in the workplace can shield a plaintiff from the plaintiff's obligation to make a complaint of harassment. The Eighth Circuit has held that the harassment of a plaintiff's coworkers is relevant to show pervasiveness of a hostile environment.[85] A plaintiff could arguably be upset by witnessing the harassment of others in the workplace. Claiming harassment based upon rumors, however, compromises the rules of evidence by legitimizing lay opinion testimony.[86]

83. *Id.* at 886.

84. *Id.* at 887.

85. *See* Howard v. Burns Bros., Inc., 149 F.3d 835, 838 (8th Cir. 1998).

86. Hester v. BIC Corporation, 225 F.3d 178, 184 (2d Cir. 2000) (lay opinion on the ultimate issue of fact will seldom meet test of being helpful to trier of fact because the jury opinion was as useful as witness).

WILLIAMS V. CITY OF KANSAS CITY — *ELLERTH/FARAGHER* DOES NOT "OPEN DOOR" FOR EVIDENCE OF INCIDENTS OCCURRING AFTER A PLAINTIFF'S COMPLAINT

The City of Kansas City, Missouri ("City") appealed a jury verdict in favor of plaintiff Tracy Williams on her claims that her supervisor had created a hostile work environment and retaliated against her after she complained. In *Williams v. City of Kansas City,*[87] the Eighth Circuit affirmed the jury's finding on her hostile work environment claim but found that the evidence did not support her claim of retaliation.

Facts and Holding

Despite characterizing much of the evidence supporting Williams' hostile environment claim as "generally innocuous," the Eighth Circuit held that "when considered in its totality it supports Williams' interpretation."[88] The court's discussion of the *Ellerth/Faragher* defense came in the context of an evidentiary ruling by the district court.[89] The City raised as a defense evidence that it took steps to prevent and correct sexually harassing conduct and that Williams never used the City's internal sexual harassment complaint process. Williams said that "she did not follow the [C]ity's harassment policy . . . because [sic] she believed the policy was ineffective."[90] Williams presented evidence that after she left employment with the City, her supervisor made a sexually explicit comment to a female coworker. The City then investigated the incident but took no serious action. In response to the City's attempt to keep the evidence of a sexually explicit comment made after Williams left her employment out of evidence, the district court ruled that because the City had raised the *Ellerth/Faragher* defense the City "opened the door" to the evidence of the coworker's "complaint because the City's handling of [the coworker's] complaint was probative of whether its harassment policy was effective."[91]

The Eighth Circuit found the evidence to be irrelevant because the complaint could not have affected Williams' failure to use the City's internal grievance procedure since it happened after Williams left. Furthermore, since the investigation also "took place after Wil-

87. 223 F.3d 749 (8th Cir. 2000).
88. Williams v. City of Kansas City, 223 F.3d 749, 753 (8th Cir. 2000).
89. *Williams*, 223 F.3d at 755.
90. *Id.*
91. *Id.*

liams left" her employment with the City, it too was irrelevant to the issue of the effectiveness of the city's sexual harassment policy.[92]

The City also challenged the district court's admission of evidence of two prior consensual relationships that the supervisor began while working for the City, one of which involved a customer and the other a subordinate. The Eighth Circuit noted that both affairs were removed in time, one of them being nineteen years old by the time of trial. The Eighth Circuit ruled that the supervisor's prior affairs were clearly inadmissible because they were of only minimal relevance "to any issue in the case[,]" they were far removed in time, and they would not be admissible as evidence of prior acts.[93]

Analysis

Based upon the reported opinion, the Eighth Circuit's analysis of the evidentiary ruling involving the *Ellerth/Faragher* defense was correct. The district court's suggestion that a defendant's use of the *Ellerth/Faragher* defense "opens the door" to evidence of complaints and investigations which occurred after the plaintiff left may be relevant in some cases on the issue of punitive damages, but the courts should not graft such an effect on to a defense that the Supreme Court has carefully crafted.

AMERICANS WITH DISABILITIES ACT

As the ADA,[94] approaches its ten-year anniversary, the courts are applying several defining decisions of the United States Supreme Court. In *Sutton v. United Air Lines, Inc.*,[95] for example, the United States Supreme Court rejected the Equal Employment Opportunity Commission's ("EEOC") interpretive guidance regarding mitigating measures, thus allowing courts to consider the impact of mitigating measures on coverage determinations under the ADA.[96] This article

92. *Id.*
93. *Id.* at 755.
94. 42 U.S.C. § 12112 (1994). Congress enacted the ADA on July 26, 1990.
95. 527 U.S. 471 (1999).
96. *See* Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). In *Sutton* the Court held that a person who has a disability under Subsection (2)(A) of 42 U.S.C. § 12102 was disabled if that individual was substantially limited in a major life activity notwithstanding the use of a corrective device. *Sutton,* 527 U.S. at 488. The plaintiffs in *Sutton* were myopic twin sisters who applied for jobs as commercial airline pilots. *Id.* at 475. With corrective lenses, their vision was 20/20. *Id.* United did not hire the plaintiffs, however, because they did not meet United's minimum requirement of uncorrected visual acuity of at least 20/100. *Id.* at 476. The Court held that the sisters were not substantially limited in the major life activity of seeing and, therefore, were not disabled under the ADA. The *Sutton* Court thus held that corrective or mitigating measures should be considered when determining whether an individual is disabled under the ADA, rejecting the EEOC's position. *Id.* at 475, 482. *See also Murphy v. United Parcel*

discusses two of the Eighth Circuit's cases applying *Sutton* to facts involving the effect of mitigating measures on the ADA's definition of "disability."[97] Other decisions focused on the EEOC requirements for the ADA mandated interactive process.[98]

In order to establish a prima facie case of a violation of the ADA, a plaintiff must show: (1) a disability as defined by 42 U.S.C. § 12102;[99] (2) that the plaintiff is qualified to perform the essential functions of the employment position, with or without reasonable accommodation, and (3) an adverse employment action. To be an ADA plaintiff a person must have a statutorily defined disability and be "qualified," or able to perform the essential functions of his or her job with or without "reasonable accommodation."[100]

The district courts in the Eighth Circuit continue to apply the ADA to cases that are often legally complex and typically saturated with complicated factual backgrounds. For the most part, the Eighth Circuit's ADA analyses have reflected a pragmatic approach that furthers the purpose of the ADA.

Service, Inc., 527 U.S. 516 (1999). In *Murphy*, United Parcel Service terminated a mechanic whose job required that he drive commercial motor vehicles because his high blood pressure exceeded the Department of Transportation's ("DOT") qualification standards. *Murphy*, 527 U.S. at 520. With medication, the plaintiff's blood pressure fell within the DOT standards and did not substantially limit plaintiff in any major life activities. *Id.* at 519. The Court concluded that the plaintiff's medication for high blood pressure should be considered when examining whether he was covered under the ADA's definition of disability. *Id.* at 521.

97. *See Otting*, 223 F.3d 704; Taylor v. Nimock's Oil Co., 214 F.3d 957, 960-61 (8th Cir. 2000).

98. The EEOC revised its Guidelines on mitigating measures to reflect the holding in *Sutton*. The revisions consisted, in part, of the removal of "'without regard to mitigating measures such as medicines, or assistive or prosthetic devices' from the first sentence of the eighth paragraph" of section 1630.2(j). 65 FR 36327 (2000).

99. The ADA defines "disability" as: "A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; B) a record of such an impairment; or C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (1994). *See* 29 C.F.R. § 1630.2 (1999) for the EEOC regulations defining those three elements of disability.

100. Ten years after Congress enacted the ADA the courts are still defining "reasonable accommodation." Reasonable accommodation includes:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or device, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (1994).

OTTING V. J.C. PENNEY CO. — MITIGATING MEASURES, REASONABLE ACCOMMODATION; THE INTERACTIVE PROCESS

The Eighth Circuit addressed the post–*Sutton* mitigating measures standards in *Otting v. J.C. Penney Co.*[101]

Facts and Holding

Rhonda Otting developed epilepsy at the age of seventeen, after she was hit on the right side of her head by a softball.[102] At trial, Otting was thirty-three years old and had been a part-time sales associate in J.C. Penney's ("Penney's") Fine Jewelry Department, working approximately twenty-five hours per week.[103] Otting also worked in Penney's Home Furnishings, Children's and Women's Departments.[104]

Although taking anti-seizure medication, Otting continued to have seizures two or three times each month.[105] In October, 1995, Otting took a two-week medical leave of absence so that her doctor could determine whether Otting might benefit from brain surgery.[106] Otting returned to Penney's and worked for approximately one month in the Housewares Department before taking a two-month medical disability leave to undergo brain surgery related to her seizure disorder.[107] When Otting returned to work, Penney's assigned her to work in the Shoe Department.[108] Otting's duties in the Shoe Department were the same as in the other departments where she had worked except for the requirement that she use a ladder to retrieve stock.[109] Otting worked in Penney's Shoe Department for the next four months with no apparent difficulty, but the seizures continued.[110]

During the summer of 1996, Otting took a short-term disability leave to try to work with her doctor to adjust her medications in another attempt to control her seizures.[111] When Otting returned to work, her doctor placed her on one restriction, "that [she] not climb ladders until she had been seizure free for six months."[112] Since it

101. 223 F.3d 704 (8th Cir. 2000).
102. Otting v. J.C. Penney Co., 223 F.3d 704, 706 n.1 (8th Cir. 2000).
103. *Otting*, 223 F.3d at 706-07. This qualified Otting for J.C. Penney's benefits, including health insurance, short-term disability and long-term disability. *Id.* at 707.
104. *Otting*, 223 F.3d at 707.
105. *Id.* at 706.
106. *Id.* at 707.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* In spite of the seizures, Otting received a customer service award and a satisfactory rating in a performance review for her work in the Shoe Department. *Id.*
111. *Otting*, 223 F.3d at 707.
112. *Id.* at 707.

was Penney's company policy that employees with any restrictions could not return to work,[113] Penney's terminated Otting's employment, even though Otting specifically asked about the availability of work in other departments.[114]

Otting sued Penney's and a jury returned a verdict for Otting, awarding her compensatory damages of $28,390.40 and punitive damages of $100,000.00.[115] The district court denied Penney's motion for judgment as a matter of law on the issue of liability for compensatory damages, but granted Penney's motion concerning liability for punitive damages.[116]

Penney's defended its actions by arguing that Otting was not disabled under the ADA because climbing a ladder is not "a major life activity" as required by the ADA.[117] The Eighth Circuit agreed with Penney's that climbing ladders is not "a major life activity."[118] Nevertheless, the Eighth Circuit found that Otting met the definition of disability under 42 U.S.C. § 12102(2)(A) because during her seizures Otting "could not speak, walk, see, work, or control the left side of her body."[119] The court held that the major life activities of speaking, walking, seeing, working, and being able to control one's body were "major life activities" to be properly considered when evaluating Otting's disability.[120]

The Eighth Circuit reinstated Otting's punitive damage award.[121] Relying on the Supreme Court's holding in *Kolstad*, the Eighth Circuit found that Penney's evidenced "malice or reckless indifference" because it was "company policy not to allow employees with any restrictions to return to work."[122] The Penney's store where Otting worked made no effort to explore any way she could return to work with her

113. *Id.* at 711.

114. *Id.* at 707-08.

115. *Id.* at 708.

116. *Id.*

117. *Id.* at 710. Penney's defense was specious under these facts. Otting was obviously qualified to perform the essential functions of a salesperson's job unless she had to climb a ladder as she had already worked successfully in three other departments at Penney's that did not require climbing a ladder.

118. *Otting*, 223 F.3d at 710 (citation omitted).

119. *Id.* at 710, 711. In addition, Otting was prohibited from driving and could not bathe herself because of a risk of drowning if she should have a seizure. *Id.* at 710.

120. *Otting*, 223 F.3d at 710.

121. *Id.* at 712. Penney's refusal to enter into an interactive process with Otting to try to accommodate her disability were most certainly reflected in the punitive damage award.

122. *Otting*, 223 F.3d at 711. In *Kolstad*, the United States Supreme Court discarded "egregious" or "outrageous" conduct as qualities necessarily present before punitive damages could be awarded. *Id.* at 711.

restriction involving ladder climbing.[123] Furthermore, in the two months following Otting's termination, Penney's "hired two full-time sales associates in the Men's and the Children's Departments[,]" neither of whom was disabled.[124] Based on the testimony of the store manager and the personnel manager that Penney's policy did not allow employees to return to work if they had restrictions, the Eighth Circuit concluded that Penney's knew that it "may be acting in violation of federal law[,]" and that such conduct can constitute "malice and reckless indifference."[125]

The Eighth Circuit did not address the Supreme Court's significant holding in *Kolstad*, which makes the Restatement (Second) of Torts section 909 the starting point for any analysis to determine the liability of a corporate employer for punitive damages, provided the requisite malice is first established.[126] The phrase "company policy," which the store manager and the personnel manager used to explain why they did not consider working with Otting to accommodate the difficulty she had with only one of Penney's jobs, quite possibly provided the nexus between (a) the conduct of branch store managers in failing to work with Otting to accommodate her disability, as the ADA requires, and (b) corporate-level policy and decision makers to bind Penney's for punitive damages under Restatement (Second) of Torts section 909.[127]

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123. *Otting*, 223 F.3d at 712. Although not specifically mentioning the EEOC's "interactive process" or the EEOC guidance on that subject, the Eighth Circuit acknowledged the Supreme Court's statement in *Sutton* that "whether a person has a disability under the ADA is an individualized inquiry." *Id.* at 710 (citing *Sutton*, 527 U.S. at 483). *See* Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the American's with Disabilities Act, 1999 WL 33103142 (E.E.O.C. Guid.) (March 1, 1999).

124. *Otting*, 223 F.3d at 708. After finding malice and reckless indifference, however, the court did not continue the *Kolstad* analysis on the issue of whether the malicious and reckless conduct of the store management could be properly imputed to Penney's. *See infra* notes 21-27 and accompanying text.

125. *Otting*, 223 F.3d at 711-12.

126. *Kolstad*, 527 U.S. at 526, 529-554.

127. Restatement (Second) of Torts section 909 provides:

> Punitive damages can properly be awarded against a Master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (1979).

Analysis

Otting makes it clear that an employee who is "disabled" under the ADA can take steps that significantly lessen the severity of her disability, yet remain disabled. Despite her ongoing efforts, Otting could not completely control her seizures. Her disability, the corrective measures needed, and the success of the corrective measures, were quite different from requiring glasses to correct poor eyesight, as was the case in *Sutton*.[128] The Eighth Circuit analyzed Otting's disability according to the major life activities she lost during a seizure. The Eighth Circuit's "temporal" analysis seems appropriate in this mitigating measure situation where the disability reappears unpredictably, albeit infrequently. Indeed, the mitigating measure issue seems almost legally irrelevant in this situation. This analysis obviously does not apply in every situation where medication will mitigate disability, for example to lower blood pressure to a level acceptable to the Department of Transportation, as discussed in *Murphy v. United Parcel Service*.[129]

It is difficult to understand how an employer could seriously argue that a person who asks not to be required to climb a ladder at work until she has been free of seizures for six months is being unreasonable. The facts in *Otting* make that argument particularly shallow, since (1) Otting worked in other departments of the store before Penney's assigned her to sell shoes, and (2) those same sorts of positions became available after Penney's refused to accommodate.[130] Penney's failure to reasonably accommodate Otting's request and refusal to work with Otting created a dangerous set of facts for a jury to consider.

The EEOC's "interactive process"[131] is one way an employer determines whether a reasonable accommodation is possible given all of the facts involved in any consideration of a disabled employee's ability to work. The employee must take the first step to engage the employer in this process. Otting did that when she asked to be reassigned to another department. Penney's blanket response allowing no

128. *See Otting*, 223 F.3d at 704-13; *Sutton*, 527 U.S. at 471-515.

129. 527 U.S. 516 (1999).

130. The Eighth Circuit's opinion did not focus on reasonable accommodation or on the interactive process, perhaps because of the complexity of the mitigating measures issues which needed to be resolved or perhaps because the reasonable approach seemed so clear and the defendant's failure to proceed so blatant.

131. After a request for reasonable accommodation is made, the employee and employer should enter into an informal dialogue designed to clarify the needs of the employee and what would be a reasonable accommodation. This informational dialogue has been coined the "interactive process." Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the American's with Disabilities Act, 1999 WL 33103142, at *5 (E.E.O.C. Guid.) (March 1, 1999).

accommodation of any restriction was inconsistent with this process. Like the facts relating to reasonable accommodation, those relating to the concept of the interactive process needed little analysis. *Otting* certainly demonstrates, however, that in the Eighth Circuit the failure to interact in order to determine a reasonable accommodation can be conduct sufficient evidence supporting a jury's finding of malice and reckless indifference for punitive damages.

ANDERSON V. NORTH DAKOTA STATE HOSPITAL — TEMPORARY IMPAIRMENT AND "REGARDED AS" DISABLED

Anderson v. North Dakota State Hospital,[132] presented the Eighth Circuit with a unique fact situation involving a claim of disability based upon the fear of snakes.

Facts and Holding

Anderson was a switchboard operator at the North Dakota State Hospital ("Hospital"). When Anderson learned that a co-worker had seen a snake in her work area, Anderson refused to return to her job.[133] Anderson was so stressed over the reported sighting of the snake that she took a leave of absence, lasting several months. When Anderson returned to work, she was transferred to a different location and given a lower paying position as a nursing assistant.[134]

Anderson appealed the district court's grant of summary judgment on her ADA claim.[135] Even though the Eighth Circuit found the Hospital immune under the Eleventh Amendment, the court went on to decide the merits of Anderson's ADA claim. Anderson maintained that her fear of snakes prevented her from working anywhere where snakes may be. Anderson stated that any encounters with snakes rendered her "completely hysterical," making her unable to work or drive.[136] The Eighth Circuit assumed, without deciding, that "driving and working are major life activities" and held that Anderson's inability to drive was a "temporary response," which did not "rise to the level of a substantial limitation."[137] In analyzing Anderson's claim that her ability to work was significantly impaired, the court held that

132. 232 F.3d 634 (8th Cir. 2000).

133. Anderson v. North Dakota State Hospital, 232 F.3d 634, 635 (8th Cir. 2000).

134. *Anderson*, 232 F.3d at 635. The Eighth Circuit found that the Eleventh Amendment protected the Hospital from Anderson's ADA claim. *Id.* (citation omitted).

135. *Anderson,* 232 F.3d at 635. The district court ruled that the Hospital was not entitled to Eleventh Amendment immunity and granted the Hospital's motion on the merits of Anderson's claim. *Id.*

136. *Anderson*, 232 F.3d at 636.

137. *Id.* (citing Heintzelman v. Runyon, 120 F.3d 143, 145 (8th Cir. 1997) (per curiam) (noting that "[s]tatutory disability requires permanent or long-term limitations"); 29 C.F.R. § 1630.2(j)(2)). The opinion implies that had Anderson alleged that a

Anderson failed to show that a fear of snakes prevented her from working in "a broad class of jobs."[138] Finally, the court rejected Anderson's claim that the Hospital regarded her as disabled because it (1) knew about her fear of snakes, and (2) required Anderson to use her sick leave while she was off of work after learning about the snake. The court explained that the "mere fact" that an employer knows about a condition is not sufficient proof that the employer "regards" the employee as disabled, and requiring an employee to use sick leave does not, by itself, demonstrate that the employer regards the employee as disabled.[139]

Analysis

The Eighth Circuit decided *Otting* several months before deciding *Anderson*, yet did not distinguish the two cases on the "temporary response" issue. Otting's seizures left her temporarily incapable of performing several major life activities,[140] while Anderson's hysteria over snakes left her temporarily incapable of performing two major life activities.[141] Although the Eighth Circuit did not distinguish the cases, the difference between *Otting* and *Anderson* would appear to be that Otting's epilepsy was a condition that was, by all accounts, permanent. The possibility of seizures from her condition was with her all of the time, not just in the presence of a triggering event. Anderson, however, alleged a temporary disability triggered by the appearance of a snake (and apparently also by the knowledge that a snake had been sighted on the premises in the past). It follows, then, that Anderson's disability disappeared in snake-free environments, whereas Otting always suffered from epilepsy. Otting had no way to control the epileptic seizures which caused her to lose major life functions.[142]

KELLOGG V. UNION PACIFIC RAILROAD CO. — REASONABLE ACCOMMODATION AND REGARDING AN EMPLOYEE AS DISABLED

In *Kellogg v. Union Pacific Railroad Co.*,[143] the Eighth Circuit upheld the district court's grant of summary judgment to defendant Union Pacific on plaintiff Clyde Kellogg's claims that (1) Union Pacific

temporary attack of hysteria permanently impaired her ability to drive, she may have created a fact issue as to a disability. *Id.* at 636.

138. *Anderson*, 232 F.3d at 636.

139. *Id.* at 637. The ADA prohibits discrimination of an individual considered to be disabled, even if the individual is not. 42 U.S.C. § 12102(2)(C) (1994).

140. *See supra* notes 116-19 and accompanying text.

141. *See supra* note 135 and accompanying text.

142. *See supra* note 104 and accompanying text.

143. 233 F.3d 1083 (8th Cir. 2000).

discriminated against him in violation of the ADA,[144] and (2) considered him as disabled, also in violation of the ADA.[145] The district court had granted Union Pacific Railroad Co.'s ("Union Pacific") motion for summary judgment on the grounds that Kellogg had not shown that he was disabled.

Facts and Holding

Kellogg worked for Union Pacific for twenty-six years. He was a "third generation" Union Pacific employee who started work as a switchman/brakeman and progressed through the ranks into management.[146] Kellogg was promoted to senior manager of Intermodal Stack Train Operations, which required him to work sixty to eighty hours per week and to be on call twenty-four hours per day.[147] Kellogg experienced symptoms of a heart attack at work, which were later diagnosed as a severe panic attack with major depression and anxiety. The doctors prescribed counseling, medication and a leave of absence. When Kellogg attempted to return to work with his doctors' restriction of a forty-hour, daylight only work week, Union Pacific told him that they could not accommodate his working restrictions.[148] As a result, Kellogg went on long term disability status. Union Pacific terminated Kellogg's employment when those benefits expired.

It was apparently uncontroverted that Kellogg told Union Pacific that he wanted to return to work repeatedly and that Union Pacific did not respond. Kellogg applied for eight jobs within Union Pacific.[149] Kellogg specifically alleged that Union Pacific violated the ADA because Union Pacific failed to (1) allow him to return to his job as senior manager of Intermodal Stock Train Operations, and (2) hire him to work in the other positions for which he had applied.

The Eighth Circuit once again assumed without deciding that "working is a major life activity under the ADA."[150] The Eighth Circuit defined the issue as "whether the particular impairment constitutes for the particular person a significant barrier to

144. 42 U.S.C. §§ 12101-12117 (1994).

145. 42 U.S.C. § 12102(2)(C). Kellogg also claimed that a Release and Settlement Agreement between Union Pacific and Kellogg after a 1991 on-the-job injury established an employment relationship which in effect guaranteed Kellogg a permanent position. Kellogg v. Union Pacific R.R. Co., 233 F.3d 1083, 1089 (8th Cir. 2000). The district court had granted summary judgment on that claim and the Eighth Circuit affirmed. *Kellogg*, 233 F.3d at 1090.

146. *Kellogg*, 233 F.3d at 1085.

147. *Id.* at 1088.

148. *Id.*

149. *Id.*

150. *Id.* at 1087 (citing *Sutton*, 527 U.S. at 492, where the United States Supreme Court had also assumed without deciding that working was a major life activity).

employment."[151] The Eighth Circuit had already decided that "being limited to a forty-hour work week" does not substantially limit an employee in the "major life activity of working."[152] Since overtime hours were normal in Kellogg's former job, a forty-hour work week restriction precluded him from fulfilling the essential functions of that job. Kellogg's use of the word "guidelines" to describe his restrictions, coupled with his application for several other jobs for which he believed he was qualified caused the court to conclude that he was not disabled since there were other jobs Kellogg could perform.[153]

Kellogg argued that he did not receive the other jobs because Union Pacific "regarded him" as disabled, but did not convince the court that Union Pacific had perceived or "regarded" him as disabled.[154] Kellogg apparently had no evidence to support his "regarded as" claim other than Union Pacific's knowledge of his disability. Knowledge, without more, is not sufficient in the Eighth Circuit to establish a "regarded as" claim.[155]

Analysis

Given the court's description of Kellogg's pre-disability job responsibilities, it would seem to have been impossible to accommodate Kellogg in his prior management position.[156] Since the Eighth Circuit requires that job reassignment be considered as a reasonable accommodation,[157] it is curious that reasonable accommodation and the interactive process were not at issue.[158]

The opinion also does not develop the facts regarding the court's finding that Kellogg was not disabled. Kellogg testified that his re-

151. *Kellogg*, 233 F.3d at 1087 (citing Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 949 (8th Cir. 1999)).

152. *Id.* (citing *Taylor*, 214 F.3d at 960-61).

153. *Id.* at 1088.

154. *Id.* Union Pacific said that the jobs for which Kellogg had applied were "promotions" and other candidates were more qualified. *Id.* at 1088-89.

155. *Kellogg*, 233 F.3d at 1089 (citing *Taylor*, 214 F.3d at 961).

156. Kellogg's job required a sixty to eighty hour work week. Kellogg's disability precluded overtime. Overtime is a legitimate requirement of a job, and the inability to work overtime, without more, did not make an employee "disabled" under the ADA. *Kellogg*, 233 F.3d at 1088-89.

157. The Eighth Circuit had already decided *Cravens v. Blue Cross and Blue Shield*, 214 F.3d 1011 (8th Cir. 2000), requiring the consideration of reassignment as a reasonable accommodation.

158. Both the district court and the Eighth Circuit obviously wondered about this as well:

> Like the District Court, we cannot help but wonder why Union Pacific did not assist Kellogg, an experienced, commended and loyal employee, in finding a position with the company that would satisfy the interests of both parties. But our observation does not change the conclusion that the District Court did not err in granting summary judgment for Union Pacific.

Kellogg, 233 F.3d at 1090.

strictions were "guidelines,"[159] a description his doctors might not have agreed was accurate. That description, however, and Kellogg's apparent belief that he was qualified to perform other jobs at Union Pacific were the basis for the court's "not disabled" determination — a seemingly harsh, yet legally sound result.

CRAVENS V. BLUE CROSS AND BLUE SHIELD — INTERACTIVE PROCESS AND REASSIGNMENT AS A REASONABLE ACCOMMODATION

In *Cravens v. Blue Cross and Blue Shield*,[160] the Eighth Circuit considered whether plaintiff Rebecca Cravens was a qualified individual with a disability under the ADA and also whether her employer, Blue Cross and Blue Shield of Kansas City ("BCBS") had complied with its duty under the ADA to engage in an interactive process with Cravens in an attempt to reasonably accommodate her disability. The United States District Court for the Western District of Missouri had granted summary judgment in favor of BCBS and Cravens appealed.[161]

Facts and Holding

Cravens, an eighteen year BCBS employee, sought medical treatment because of wrist pain.[162] Her doctors restricted Cravens from repetitive motion and specifically from "keying," or typing claim information into BCBS's computer system. In the year prior to seeing her doctor, Cravens was spending a substantial part of her time using a keyboard.[163] For two months, BCBS gave Cravens temporary assignments that did not require keying. After that, her doctors diagnosed Cravens with bilateral carpal tunnel syndrome and permanently restricted her keyboard activities.[164] BCBS told Cravens that she had "ten to twelve weeks to find another BCBS position" (that did not require using a keyboard).[165] BCBS Human Resources told Cravens to use the internal application process and agreed to let Cravens continue working in a limited duty position until she found another job. If Cravens could not find another job with the company, she would be terminated.[166] Cravens sent a memorandum to a BCBS Human Resource Department representative requesting "as much assistance as

159. *Kellogg*, 233 F.3d at 1088.
160. 214 F.3d 1011 (8th Cir. 2000).
161. Cravens v. Blue Cross and Blue Shield, 214 F.3d 1011, 1014 (8th Cir. 2000).
162. *Cravens*, 214 F.3d at 1014.
163. *Id.*
164. *Id.*
165. *Id.* at 1014-1015.
166. *Id.* at 1015.

possible" to find another job within BCBS.[167] Cravens could not find another job within the company, and BCBS terminated her employment.[168]

Under the ADA, discrimination includes:

> [n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . .[169]

Section 12111(8) of the ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual hold or desires."[170] BCBS argued that Cravens was not a "qualified individual with a disability" because she could not "perform, with or without reasonable accommodation, the essential functions of the job she" held (using the keyboard).[171] BCBS further argued that the phrase "or desires" only applies to job applicants and not to individuals who are seeking reassignment.[172] The Eighth Circuit took a different view and held that section 12111(8) includes "*current employees* with a disability who seek or *desire* transfer to another position within the company."[173] Specifically, the Eighth Circuit concluded:

> the definition of "qualified individual with a disability" includes a disabled employee who cannot do his or her current job, but who desires and can perform, with or without reasonable accommodation, the essential functions of a vacant job within the company to which he or she could be reassigned.[174]

The Eighth Circuit further determined that since section 12111(9) used the word "reassignment" a disabled individual by implication must have an existing job (or "assignment"), and thus would be currently employed.[175]

The Eighth Circuit provided guidance on the responsibility and limitations of an employer to reassign under certain circumstances.[176]

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167. *Id.*
168. *Id.*
169. *Id.* at 1016 (citing 42 U.S.C. § 12112(b)(5)(A) (1994)).
170. *Id.* (citing 42 U.S.C. § 12111(8) (1994)).
171. *Id.* at 1017.
172. *Id.*
173. *Id.*
174. *Id.* at 1018 (footnote omitted).
175. *Id.* at 1017.
176. *Id.* at 1019.

First, reassignment does not arise as an option unless "accommodation within the individual's current position would pose an undue hardship."[177] Second, an employer is not "required to create a new position as an accommodation."[178] The ADA's terms require that the existing position be vacant.[179] Accordingly an employer does not have to remove or transfer one employee in order to make room for a disabled employee.[180]

Cravens apparently filed an affidavit in opposition to her employer's motion for summary judgment which raised, in the view of the Eighth Circuit, questions of fact regarding whether there were other positions available at the time for which she could have qualified had BCBS allowed reassignment.[181] The Eighth Circuit determined that a jury could have determined that BCBS's efforts did not constitute good faith efforts to participate in an interactive process.[182]

Analysis

As the Eighth Circuit pointed out, "there is no per se liability under the ADA if an employer fails to engage in an interactive process."[183] Nevertheless, in a prior ruling, the Eighth Circuit noted that "the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith."[184] The facts in the Eighth Circuit's opinion suggest that BCBS abandoned Cravens to the company's generic internal application process. The opinion strongly suggests that simply pointing an employee who has requested reasonable accommodation to a possible resource is not enough. The employer does need to "engage" in the process until the employer makes a determination whether the employer can accommodate the disability.

177. *Id.* (quoting 29 C.F.R. § 1630.2(o) (2000) (referring to reassignment in this sense as an "accommodation of last resort")). *Id.* at 1019.

178. *Cravens,* 214 F.3d at 1019 (citation omitted).

179. *Id.*; 42 U.S.C. § 12111(9).

180. *Cravens*, 214 F.3d at 1019 (citations omitted).

181. *Id.* at 1020.

182. *Id.* at 1021.

183. *Id.*

184. *Id.* at 1021 (quoting *Fjellestad,* 188 F.3d at 952).

LLOYD V. HARDIN COUNTY — JOB RESTRUCTURING AS A REASONABLE ACCOMMODATION, THE EFFECT OF APPLYING FOR SOCIAL SECURITY DISABILITY BENEFITS AND THE "DIRECT THREAT" DEFENSE

In *Lloyd v. Hardin County*,[185] plaintiff Kenneth Lloyd fell from a second story porch in a non-work-related accident, injuring his spinal cord. The United States District Court for the Northern District of Iowa granted his employer's motion for summary judgment. Lloyd appealed, claiming that his employer had violated the ADA by failing to reasonably accommodate his disability.[186]

Facts and Holding

As a result of the accident, Lloyd had no feeling below the knees and only partial feeling in his upper legs.[187] Before Lloyd was released to return to work to operate heavy equipment called a "road maintainer," his employer met with Lloyd to see if modifications could be made to the road maintainer so that Lloyd could climb in and drive.[188] A month following the meeting, Lloyd was visiting the job site when one of his leg braces collapsed, causing him to fall. One of Lloyd's supervisors saw the fall and became concerned that Lloyd might fall while climbing on or off the road maintainer. Two weeks later the employer terminated Lloyd.[189] The district court acknowledged that job restructuring is a potential accommodation under the ADA.[190] Nevertheless, the district court did not believe that Hardin County ("County") could reasonably be required to take actions that Lloyd was requesting, such as hiring a new employee or reassigning existing employees to perform some of the essential functions of Lloyd's job.[191]

The County argued that Lloyd was not a qualified individual as a matter of law because his disability posed a "direct threat" to the health or safety of himself or others. The district court denied the County's motion for summary judgment on that issue because the County presented no medical or other objective evidence to support a "direct threat" defense, as required by the ADA.[192]

185. 207 F.3d 1080 (8th Cir. 2000).
186. Lloyd v. Hardin County, 207 F.3d 1080, 1082 (8th Cir. 2000).
187. *Lloyd*, 207 F.3d at 1082.
188. *Id.*
189. *Id.*
190. *Id.* at 1083.
191. *Id.*
192. The district court noted that determinations of whether an individual poses a "direct threat," under 42 U.S.C. § 12113(b), "shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the

Lloyd was receiving Social Security disability benefits. Since Lloyd had claimed total disability, the County argued that Lloyd was estopped from asserting that he was a "qualified individual with a disability," who could perform his job with a reasonable accommodation.[193] The Eighth Circuit had already rejected a "per se judicial estoppel approach" and allowed a plaintiff resisting a motion for summary judgment on an ADA claim despite a prior representation of disability to present "strong countervailing evidence" that the plaintiff was actually qualified to perform the essential functions of his or her job. The prior allegation of total disability instead creates a presumption that a plaintiff is not qualified under the ADA because no reasonable accommodation will override his "total disability."[194]

The restructured job that Lloyd proposed would have necessarily involved assigning one or more of the essential functions of Lloyd's job to someone else.[195] Because of (1) Lloyd's request for job restructuring, and (2) the assertions made in his Social Security application, Lloyd failed to overcome the presumption that was created by his prior allegation of total disability.[196]

The district court acknowledged that "some job restructuring is a potential accommodation under the ADA."[197] Nevertheless, the district court did not believe that the County could reasonably be required to take the actions that Lloyd was requesting, such as hiring a new employee or reassigning existing employees to perform some of the essential functions of Lloyd's job. The restructured job that Lloyd proposed would have necessarily involved allocating one or more of the essential functions of his job to someone else.[198]

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most current medical knowledge and/or the best available objective evidence." *Id.* at 1083.

193. *Lloyd*, 207 F.3d at 1083.

194. *Id.* (quoting Downs v. Hawkeye Health Services, Inc., 148 F.3d 948, 951 (8th Cir. 1998)).

195. *Id.* at 1084-85.

196. *Id.* at 1085. In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), the Supreme Court stated:

> When faced with a plaintiff's previous sworn statement asserting 'total disability' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of [his or] her job, with or without 'reasonable accommodation.'

Cleveland, 526 U.S. at 807.

197. *Lloyd*, 207 F.3d at 1083.

198. *Id.* at 1084.

Analysis

The Eighth Circuit's opinion suggests that Lloyd's employer certainly made reasonable efforts to accommodate Lloyd's disability, such as considering modifications to heavy equipment to allow Lloyd to continue to work. Considering the extent of the job restructuring necessary for Lloyd, however, the Eighth Circuit could have affirmed the district court's grant of summary judgment without relying on the presumption of total disability caused by Lloyd's application for Social Security disability benefits.

BOERSIG V. UNION ELECTRIC CO. — NO CONTINUING VIOLATION FOR DISCRETE ACTS, BONA FIDE SENIORITY SYSTEM NOT A "SELECTION CRITERIA" UNDER THE ADA AND DOES NOT DISPARATELY IMPACT DISABLED

In *Boersig v. Union Electric Co.*[199] Randall Boersig argued to the district court that his employer Union Electric's seniority system was in effect an improper selection criteria prohibited by the ADA.[200] Union Electric denied Boersig a promotion in 1994 based upon a disability and then filled similar positions with less senior workers.

Facts and Holding

Boersig was a forty-three year old white male who began working for Union Electric in 1986. After starting work for Union Electric, Boersig was involved in several automobile and workplace accidents which left him with physical impairments affecting both of his knees, both of his wrists, his right hip and his left shoulder. Boersig had permanent medical restrictions forbidding kneeling, squatting and lifting over twenty-five pounds. He also had difficulty climbing ladders and handling tools.

During the first half of 1994, Boersig told Union Electric that he was interested in a promotion to the position of installer. Boersig had just returned from wrist surgery at the time. His supervisor was concerned that Boersig would not be able to handle the physical requirements of the job. Union Electric denied the promotion on the recommendation of a physician who reviewed the job description and consulted with Boersig's physicians. After that, Union Electric filled installer position vacancies with employees classified as "helpers," who had less seniority than Boersig. Boersig never grieved any of the promotions that were given to less senior workers, however, nor did he

199. 219 F.3d 816 (8th Cir. 2000).

200. Boersig v. Union Electric Co., 219 F.3d 816, 820-21 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 857 (2001).

file any charges alleging discrimination. Boersig also did not request reasonable accommodations to allow him to successfully perform any of the installer positions.

In 1996, Union Electric opened a meter repairman position and provided notice to its employees, as required by the Collective Bargaining Agreement ("CBA"). Union Electric gave the job to a woman who had been promoted to an installer position in February 1995. Boersig filed a grievance for his failure to get this promotion. In his grievance, he noted "the denial of promotion dates to July 1994."[201] Two weeks later Boersig filed a Charge of Discrimination based upon the same allegations. The district court granted summary judgment in favor of Union Electric on Boersig's claim for failure to promote him to installer in 1994 and 1995 on the basis that those promotions were time-barred because Boersig filed his EEOC charge more than three-hundred days after the effective date of Union Electric's action.[202]

In affirming the district court's grant of summary judgment to Union Electric, the Eighth Circuit relied upon *Benson v. Northwest Airlines, Inc.*, a 1995 holding.[203] In *Benson*, the Eighth Circuit held that the ADA does not require an employer to accommodate a disabled employee by circumventing a "bona fide" seniority system. This seniority system was defined as "one that was created for legitimate purposes, rather than for the purpose of discrimination."[204] Boersig, however, attempted to circumvent *Benson* by arguing that the CBA's seniority promotional system fell within the ADA's definition of "discrimination," which prohibits the use of "selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" unless the criteria are job related.[205] With this argument, Boersig transformed his reasonable accommodation case into a theory of ADA liability based upon disparate impact. Boersig had no authority to support his argument that a bona fide

201. *Boersig*, 219 F.3d at 821.

202. *Compare Boersig*, 219 F.3d at 821, *with* High v. University of Minnesota, No. 00-1381, 2000 WL 1858959 (8th Cir. Dec. 20, 2000). In *High*, the Eighth Circuit clarified that it has never applied the continuing violations doctrine to a discrete act, giving as an example a failure to promote. *High*, No. 00-1381, 2000 WL 1858959, at *1. *Compare* Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1311 (10th Cir. 1999) (noting that no continuing violation theory to avoid the statutory time bar for a failure to hire claim under Title VII and ADEA, despite subsequent alleged acts of the same type occurring within the limitations period; plaintiff on inquiry notice of alleged discrimination when it first occurred, and that she had duty to assert rights at that time), *with* Evans v. Dean Foods Co., No. 99-4148, 2000 WL 1260493, at *2-3 (10th Cir. 2000) (noting that plaintiffs in sexual discrimination cases have duty to assert their rights once they are on inquiry notice that there may have been an offense).

203. 62 F.3d 1108 (8th Cir. 1995).

204. Eckles v. Consolidated Rail, 94 F.3d 1041, 1046 n.7 (7th Cir. 1996).

205. 42 U.S.C. § 12112(b)(6) (1994).

seniority system fits within the ADA's definition of "selection criteria." The Eighth Circuit reasoned that including seniority systems within the definition of "selection criteria" would undermine many negotiated CBA's because "virtually all seniority systems contain prerequisites for movement between jobs." Many of those prerequisites necessarily screen out disabled employees. The Eighth Circuit believed that Boersig's "disparate impact" argument would require his employer to accommodate by violating the express terms of the CBA.

Analysis

Boersig filed a Petition for Rehearing en banc with the Eighth Circuit, challenging the Eighth Circuit's holding on the validity of Union Electric's promotional series seniority system.[206] The Rehearing was denied and Boersig filed a petition for Certiorari to the United States Supreme Court. The Supreme Court declined to review *Boersig* on January 16, 2001.[207] While it is possible that a seniority system governing promotions in a CBA might screen out individuals with a disability, the Eighth Circuit's opinion offers no analysis of when such a promotional system might cross the line as an improper selection criteria. Rather, this opinion rests on the contractual rights of other bargaining-unit employees. The strength of the Eighth Circuit's articulation of the need to protect seniority systems in CBAs means that this issue is established, at least in the absence of a unique factual situation.

TAYLOR V. NIMOCK'S OIL COMPANY — FAILURE TO REHIRE AFTER DISABILITY CONTROLLED WITH MEDICINE

In *Taylor v. Nimock's Oil Co.*,[208] the Eighth Circuit granted defendant Nimock's Oil Company's ("Nimock's") motion for summary judgment on the grounds that plaintiff Wanda Taylor failed to establish that she suffered from a disability within the meaning of the ADA.

Facts and Holding

Taylor was the head cashier in one of defendant Nimock's convenience stores for seven years.[209] After suffering a heart attack and spending time off work, Taylor's doctor gave her a release to work with certain restrictions including that Taylor's duties were limited to oper-

206. *Boersig*, 219 F.3d at 816.
207. Boersig v. Union Elec. Co., 121 S. Ct. 857 (2001).
208. 214 F.3d 957 (8th Cir. 2000).
209. Taylor v. Nimock's Oil Co., 214 F.3d 957, 958 (8th Cir. 2000). The "head cashier" essentially ran the store. *Id.*

ating a cash register, a restriction which in effect meant that Taylor could be a cashier but not the head cashier.[210] Her employer had no cashier positions available at that time.

Two months later, Taylor's doctor gave her a full release to return to work without restriction. Taylor was taking medication to control the effects of her heart disease.[211] No cashier or head cashier positions were available at that time. During the next six months, Nimock's did not offer Taylor any position at the convenience store even though Nimock's hired several new cashiers during that time. During that same time Nimock's had terminated Taylor's employment, but apparently did not tell Taylor.[212] After learning of her termination, Taylor started work as a "front end manager" at Hays Food Center.[213]

Analysis

Taylor was one of three ADA cases decided in June 2000.[214] *Taylor* and *Allen v. Interior Construction Services, Ltd.*,[215] concerned failures to rehire after plaintiff employees became ill or were injured. The Eighth Circuit did not discuss whether Nimock's had a duty to contact Taylor about the open cashier positions despite telling Taylor that Nimock's would offer her another cashier position "when one became available."[216] Taylor did not dispute that, as of March 1996, she could work without restriction as long as she continued on her medication. Accordingly, she could not be considered "disabled" under the ADA. At the time of the appeal, Taylor was working full-time.[217]

Taylor also failed to persuade the Eighth Circuit that her employer had regarded her as disabled.[218] The Eighth Circuit concluded that her employer's (1) knowledge of Taylor's medical difficulties, (2) expressing concerns by offering her medical leave, and (3) sending her a get well card did not amount to treating Taylor as if she had a permanent disability that substantially limited her life activities.[219]

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210. *Taylor*, 214 F.3d at 959. The restriction specifically limited Taylor to "run the register only." *Id.*

211. *Taylor*, 214 F.3d at 959.

212. *Id.*

213. *Id.*

214. *See also Cravens*, 214 F.3d 1011; Allen v. Interior Construction Services, Inc., 214 F.3d 978 (8th Cir. 2000).

215. 214 F.3d 978 (8th Cir. 2000).

216. *Taylor*, 214 F.3d at 958-62.

217. *Id.* at 960.

218. *Id.* at 961.

219. *Id.* (citing Cody v. Cigna Healthcare of St. Louis, Inc., 139 F.3d 595, 598-99 (8th Cir. 1998)).

ALLEN V. INTERIOR CONSTRUCTION SERVICES, LTD. — NO DUTY TO CONTACT DISABLED "AS NEEDED" EMPLOYEE

Allen v. Interior Construction Services, Ltd.,[220] was a failure to rehire case. Allen worked for Interior Construction Services Ltd. ("Interior") on an as-needed basis between December 1994 and November 1995.[221]

Facts and Holding

In November 1995, Allen injured his back while working for Interior.[222] Allen was then under medical orders not to work until March 1996. Between March and May of 1996, when Allen was fully released, Allen contacted Interior four or five times about work. Interior told Allen that they did not need his services.[223] After learning that Interior had hired other carpenters after his release to work, Allen sued Interior for discrimination under the ADA.[224] The district court entered summary judgment in favor of Interior. The Eighth Circuit affirmed on the basis that Allen failed to make a prima facie case of discrimination.[225]

Analysis

Although Interior hired twenty-three carpenters who were not disabled between December 1995 through early July 1996, the Eighth Circuit found that hiring those twenty-three nondisabled carpenters did not support an inference of discrimination against Allen.[226] The Eighth Circuit said that Allen's inferred discrimination was based on the assumption that Interior had an "affirmative duty to contact him whenever it had work available[,]" a duty which the Eighth Circuit found not to exist.[227]

The court also dismissed Allen's similar argument about the seven carpenters that Interior hired between May 13, 1996 and July 1996 because Allen presented no evidence that those carpenters were hired on days on which Allen contacted Interior for work.[228] Allen was not a permanent employee so, although this result seems harsh, it is certainly easier to understand than the result in *Taylor*. Taylor had

220. 214 F.3d 978 (8th Cir. 2000).
221. Allen v. Interior Construction Services, Ltd., 214 F.3d 978, 980 (8th Cir. 2000).
222. *Allen*, 214 F.3d at 980.
223. *Id.*
224. *Id.* at 981-82.
225. *Id.*
226. *Id.* at 982.
227. *Id.*
228. *Compare Allen*, 214 F.3d at 982-83, *with Taylor*, 214 F.3d at 957. *See supra* note 215 and accompanying text.

been a permanent employee and Nimock's told her that they would call her if a position became available. The Eighth Circuit did not comment on Nimock's failure to do so.

KAMPOURIS V. THE ST. LOUIS SYMPHONY SOCIETY — CORRECTED DISPOSITION NOT PRETEXT

In *Kampouris v. St. Louis Symphony Soc'y*,[229] Louis Kampouris claimed that the St. Louis Symphony Society (the "Symphony") refused to let him continue to work with the Symphony because the Symphony perceived Kampouris to be disabled in violation of the ADA.[230] Kampouris also alleged discrimination due to his age.[231]

Facts and Holding

The Symphony hired Louis Kampouris as a violinist in 1949. When Kampouris reported to rehearse for the 1997 season, the Symphony's director told Kampouris that he could no longer rehearse or perform with the orchestra and discontinued his salary and benefits.[232] Since the Eighth Circuit affirmed the district court without a comprehensive opinion pursuant to Eighth Circuit Rule 47B, these facts were omitted both from the *per curiam* decision and the dissent.[233] In affirming the district court's grant of summary judgment to the Symphony, the Eighth Circuit stated that Kampouris failed to prove his case and agreed with the district court's conclusion that the Symphony's decision was based on a legitimate discriminatory reason. The *per curiam* opinion provided no facts with respect to these issues.[234]

The dissent concluded that the district court had "improvidently granted summary judgment, depriving Kampouris of his right to trial by jury."[235] The dissent's discussion focused upon the deposition testimony of the Symphony's Director of Orchestra Personnel, Neville. Neville initially testified that he believed that Kampouris was "disabled from any occupation[.]"[236] Neville then corrected his deposition testimony to "indicate that he merely understood that the disability insurer" had designated Kampouris as disabled.[237] The dissent be-

229. 210 F.3d 845 (8th Cir. 2000).
230. Kampouris v. St. Louis Symphony Soc'y, 210 F.3d 845 (8th Cir. 2000).
231. *Kampouris*, 210 F.3d at 848.
232. *See* American Fed'n of Musicians Local 2-197, AFL-CIO v. St. Louis Symphony Soc'y, 203 F.3d 1079, 1080 (8th Cir. 2000). This companion case considered an issue related to the grievance Kampouris filed related to his dismissal from the Symphony.
233. *Kampouris*, 210 F.3d at 846-50.
234. *Id.* at 846.
235. *Id.* at 847 (Bennett, J., dissenting).
236. *Id.* at 848 (Bennett, J., dissenting).
237. *Id.* (Bennett, J., dissenting).

lieved that Neville's corrections raised genuine issues of material fact as to how he perceived Kampouris' impairments. In support of its decision that Neville's deposition changes raised factual issues not only with respect to Kampouris' prima facie case, but also with respect to whether the corrections also generated a material issue on the validity of the Symphony's articulated legitimate business reasons for letting Kampouris go.[238]

Analysis

The Eighth Circuit filed this opinion on April 28, 2000, two months before the United States Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*[239] Although *Reeves* specifically rejected the pretext-plus theory in the context of an employer's Federal Rule of Civil Procedure Rule 50 motion in an the Age Discrimination in Employment Act ("ADEA") case, *Reeves* discussed pretext at length and the Eighth Circuit has cited *Reeves* in analyzing pretext issues.[240] Had *Kampouris* reached the Eighth Circuit after *Reeves*, the Circuit may not have reached a different result, but might have viewed this as an opportunity to further its analysis of issues related to demonstrating pretext.

EIGHTH CIRCUIT DECISIONS APPLYING *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*

In *Reeves* the United States Supreme Court agreed to consider the proper legal standard for overturning a jury verdict and granting judgment as a matter of law. Although *Reeves* was an ADEA case, it has reached all other types of employment discrimination claims.[241] *Reeves* addressed the allocation of the burden of proof and the burden of persuasion in applying the *McDonnell Douglas Corp. v. Green*,[242] burden shifting analysis ("*McDonnell Douglas*" analysis).

The issue in *Reeves* concerned whether a plaintiff alleging discrimination under the *McDonnell Douglas* analysis must not only (1) make a prima facie case of discrimination, plus (2) present sufficient

238. *Id.* at 848-49 (Bennett, J., dissenting) (citing Thorn v. Sunstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000) (noting that alterations in deposition testimony pursuant to Federal Rule of Civil Procedure Rule 30(e) can raise a question of fact for the jury as to the "accuracy and reasonableness of the changes").

239. 120 S. Ct. 2097 (2000). *See infra* notes 241-307 and accompanying text regarding the Eighth Circuit decisions applying *Reeves*.

240. The Supreme Court in *Reeves* wrote: "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purposes." Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2108 (2000).

241. *See infra* notes 242-307 and accompanying text.

242. 411 U.S. 792 (1973).

evidence that the defendant's legitimate business reason was false, but also (3) present evidence that the defendant's real reason for acting was discrimination.[243] The Eighth Circuit did not require this pretext-plus standard in order for a plaintiff to avoid summary judgment,[244] or to withstand a Rule 50 motion, which was the situation in *Reeves*.

Facts and Holding

Reeves was fifty-seven years old and a supervisor at Sanderson Plumbing. Sanderson accused Reeves, his immediate supervisor, Caldwell, who was forty-five years old, and another supervisor, who was in his middle thirties, of failing to maintain accurate time records. When Sanderson's management reviewed the time records, they determined that Reeves and Caldwell were responsible for timekeeping problems and for failure to discipline employees. Even though a jury found for Reeves, the United States District Court for the Northern District of Mississippi determined on a Rule 50 motion that Reeves failed to meet his burden of demonstrating pretext because he had failed to offer independent evidence of discrimination. The United States Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court noted that Reeves had made a "substantial showing" that the management's proffered explanation was false.[245] Reeves produced written records going back a number of years demonstrating the consistency and accuracy of the timekeeping, proof that the timeclock had malfunctioned (which was the probable explanation for the few situations that were not correct) and, finally, that he was out of town on two days when a particular employee was clocked-in although she was not at work. The Supreme Court emphasized that proof that a defendant's explanation is not believable is simply one form of circumstantial evidence that can be probative of discrimination.[246]

243. *Reeves*, 120 S. Ct. at 2104-05.

244. *See* Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1114 (8th Cir. 1994).

245. *Reeves*, 120 S. Ct. at 2107.

246. *Id.* at 2108; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 517 (1993), *aff'd*, Hicks v. St. Mary's Honor Center, 90 F.3d 285 (8th Cir. 1996). One of Reeves' supervisors told him "just months" before his termination that Reeves "was too damn old to do [his] job," and that "he was so old [he] must have come over on the Mayflower." *Reeves*, 120 S. Ct. at 2110. The Supreme Court noted that, while the Fifth Circuit acknowledged the "potentially damning nature" of the comments by ruling that the comments were not made in the context of Reeves' termination and that the supervisor making the comments was only one of three who recommended that Reeves be fired, the Fifth Circuit "impermissibly substituted its judgement . . . for the jury's." *Id.* at 2111.

Analysis

Prior to *Reeves*, the Eighth Circuit did not require a plaintiff to present sufficient evidence of "pretext-plus" discrimination in order to avoid summary judgment on an ADEA claim.[247] Nevertheless, the Eighth Circuit relied on *Reeves* in several cases to examine the *McDonnell Douglas* analysis and to review evidence in several situations where pretext was an issue.

BOGREN V. STATE — COMPARABLES MUST BE "SIMILARLY SITUATED IN ALL RESPECTS"

In *Bogren v. State*,[248] plaintiff Anne Bogren, who had been a trooper with the Minnesota State Patrol, sued the State of Minnesota alleging race and gender discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964.[249] The district court had granted summary judgment on Bogren's federal law claims and the Eighth Circuit affirmed.

Facts and Holding

Bogren was still on probation at the time of her termination. Although Bogren had performed satisfactorily during her training, there were documented disputes about her driving skills going back to her training. On at least one occasion when Bogren had an accident, she was less than candid in admitting the accident and had to be pressured to submit a report, even though a report was standard procedure.[250] Also during her probationary period, Bogren was involved in an altercation with a former boyfriend, which involved Bogren's breaking some dishes in his home. Bogren's former boyfriend called the local police to complain about Bogren's conduct. The local police gave Bogren a criminal citation.[251] Following the investigation of the incident in her former boyfriend's home, the Chief of Patrol decided to terminate Bogren, who was still in her probationary period.[252]

247. Floyd v. Missouri Dep't of Social Services, 188 F.3d 932, 936-37 (8th Cir. 1999) (citing *Hicks*, 509 U.S. at 515; Hill v. St. Louis Univ., 123 F.3d 1114, 1119-20 (8th Cir. 2000)).

248. No. 99-3516, 2000 U.S. App. LEXIS (8th Cir. Dec. 22, 2000).

249. Bogren v. State, No. 99-3516, 2000 U.S. App. LEXIS, at *1 (8th Cir. Dec. 22, 2000).

250. *Bogren*, No. 99-3516, 2000 U.S. App. LEXIS, at *1. Bogren also alleged claims under 42 U.S.C. §§ 1981, 1983 and 1985 against three individual State Patrol employees. *Id.* at *1.

251. No. 99-3516, 2000 U.S. App. LEXIS, at *5.

252. *Id.* at *6.

Analysis

It appears from the opinion that Bogren relied heavily on *Reeves* in her attempt to overturn the district court's finding of summary judgment. Bogren made several claims of pretext.[253] She first argued that white male troopers were not treated as harshly for disciplinary or performance issues.[254] In response, the Eighth Circuit acknowledged that such instances of disparate treatment might be sufficient to present a jury question regarding pretext provided that Bogren had shown that the other troopers were "similarly situated [to her] in all relevant respects."[255] All but one of the white male troopers whom Bogren claimed were treated better in disciplinary situations were out of their probationary periods and thus covered by a Collective Bargaining Agreement ("CBA"). Accordingly, the grievance procedures defined by the CBA controlled the termination of those officers.[256]

Bogren next identified several probationary troopers who, Bogren said, were not disciplined even though citizens lodged complaints against them.[257] The Eighth Circuit found this insufficient to establish pretext because the misconduct of persons who were more leniently disciplined had to be of "comparable seriousness" to Bogren's misconduct.[258] The court noted that Bogren had failed to present any evidence that any of the other officers who happened to be on probation "ever received a comparable criminal citation" or that there were any concerns "over their accountability, driving performance or tendency to "prevaricate" during their probationary period."[259]

Finally, Bogren argued that being the only black female trooper ever employed by the Minnesota State Patrol was circumstantial proof of pretext.[260] The Eighth Circuit termed this evidence "simplistic" while recognizing that statistical evidence "may support a finding of pretext, particularly where there are independent, direct grounds for disbelieving the employer's explanation for discharge."[261]

Thus, while the Eighth Circuit did not engage in a discussion of pretext involving *Reeves*, the analysis in *Bogren* is certainly consistent with *Reeves*.

253. *Id.* at *10.
254. *Id.*
255. *Id.* (citation omitted).
256. *Id.* at *11-12.
257. *Id.*
258. *Id.* at *12 (citation omitted).
259. *Id.*
260. *Id.* at *14.
261. *Id* at *14-15 (citation omitted).

TATOM V. GEORGIA-PACIFIC CORP. — SUBSTANTIAL EVIDENCE OF DISCRIMINATION STILL NECESSARY

In *Tatom v. Georgia-Pacific Corp.*,[262] a jury awarded Charles Tatom $670,000.[263] This amount was later doubled to $1,340,000 due to a finding that defendant Georgia-Pacific Corporation willfully violated the ADEA and Georgia-Pacific appealed.[264]

Facts and Holding

Prior to the problems that led to Georgia-Pacific's suspending Tatom without pay for one-hundred-twenty days, Tatom's history was considered an asset to the company. Three months prior to the incident leading to his suspension, Georgia-Pacific gave Tatom a rating of "commendable" on his annual review, a raise, and also asked Tatom to be the superintendent of "one of the largest papermaking machines in the world."[265] Georgia-Pacific suspended Tatom because he failed to follow proper safety measures to lock-out a section of that machine as required by Georgia-Pacific's safety rules.[266] Tatom had directed an employee to go into the area of the paper press that Tatom had failed to lock-out. The employee filed a grievance. After an investigation, Georgia-Pacific's labor relations manager recommended that Georgia-Pacific fire Tatom. Instead, Georgia-Pacific reprimanded Tatom in writing, suspended him without pay for one-hundred-twenty days, and directed that he would not receive a merit increase for that year.[267] Tatom, who was fifty-nine years old at the time, told Georgia-Pacific that he would quit rather than accept the suspension. Georgia-Pacific promoted a fifty-six year old man to replace Tatom. Tatom's theory under the ADEA was that the suspension constituted a constructive discharge motivated by age.[268]

Tatom presented no direct evidence of discrimination. Accordingly, the Court applied the *McDonnell Douglas* burden-shifting analysis.[269] The Eighth Circuit found that the evidence was insufficient to support a finding that Georgia-Pacific constructively discharged Tatom by giving Tatom the one-hundred-twenty day suspension.[270] The Eighth Circuit considered Tatom's suspension as a reason for con-

262. 228 F.3d 926 (8th Cir. 2000).
263. Tatom v. Georgia-Pacific Corp., 228 F.3d 926, 930 (8th Cir. 2000).
264. *Tatom*, 228 F.3d at 930.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 930.
269. *Id.* at 931 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-06 (1973), *aff'd*, Green v. McDonnell Douglas Corp., 528 F.2d 1102 (1976)).
270. *Id.* at 932.

structive discharge to be Tatom's "subjective feeling," not the objective standard used under Missouri law to determine whether working conditions are intolerable.[271] Furthermore, the Eighth Circuit noted that all of the evidence, including his promotion, salary increase and commendable performance rating indicated that Georgia-Pacific valued Tatom as an employee.

The Eighth Circuit assumed for purpose of its review that Tatom had established a prima facie case of age discrimination and presented sufficient evidence for the jury to reject Georgia-Pacific's reason for suspending Tatom for one-hundred-twenty days. Even with those assumptions, the Circuit concluded that no rational jury could find that Tatom's suspension was the result of intentional discrimination based on age.[272]

Analysis

The Eighth Circuit supported its decision by a careful application of *Reeves*. This language in *Reeves* controlled the Eighth Circuit analysis in *Tatom* in that the court noted that "in an ADEA case it may not be enough for a jury to disbelieve the employer; the fact finder must have evidence on which to base a reasonable belief that age was a determining factor."[273] Finding no evidence of any age bias by Georgia-Pacific contemporaneous with Tatom's suspension, the Eighth Circuit determined that there was no reasonable basis for a finding of age based intentional discrimination.[274]

FISHER V. PHARMACIA & UPJOHN — PLAINTIFF DEMONSTRATED PRETEXT-PLUS

The Eighth Circuit's opinion in *Fisher v. Pharmacia & Upjohn*,[275] reversed the district court's grant of summary judgment in favor of the defendant employer through an analysis that relied in part on *Reeves*.

Facts and Holding

Fisher was a sales representative for the Upjohn company for twenty-nine years, selling animal health products. Fisher consistently received average to above-average performance evaluations and received Upjohn's National Sales Award seven times.[276] When Upjohn merged with Pharmacia, Inc., ("Pharmacia"), Pharmacia as-

271. *Id.*
272. *Id.*
273. *Id.* (citing *Reeves*, 120 S. Ct. at 2109).
274. *Id.*
275. 225 F.3d 915 (8th Cir. 2000).
276. Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 918 (8th Cir. 2000).

signed Fisher to the corporate sales unit, which sold to large corporate swine operations. This unit was designed to be the company's top sales unit.[277] After nearly one year in the Corporate Sales Unit, Pharmacia transferred Fisher, who was then sixty years old, to the Pork Sales Unit, where Fisher had less responsibility and was selling to small veterinary operations. Pharmacia's reasons for the transfer were Fisher's alleged lack of product knowledge, grammatical errors in both written and spoken correspondence, and unprofessional conduct during sales calls, which Pharmacia defined as talking more about social issues than Pharmacia's products.[278] The district court assumed without deciding that Fisher had established a prima facie case of age discrimination, but held that Fisher failed to make a sufficient showing of pretext.[279]

On appeal, the Eighth Circuit examined Fisher's evidence of pretext. Fisher produced customer affidavits to demonstrate that Pharmacia's proffered reasons for demoting Fisher were not true.[280] The customer affidavits said that Fisher "always presented his company's products in a way that demonstrated the benefit of their use to Heartland Pork [the customer]" and refuted other Pharmacia allegations.[281]

Analysis

The Eighth Circuit acknowledged that under *Reeves,* additional independent evidence of some type of discriminatory animus is not always required to support any inference of discrimination.[282] The court concluded that it did not need to decide whether Fisher's prima facie case and the potential falsity of Pharmacia's explanation, without more, supported an inference of discrimination because Fisher presented additional evidence of disparaging age-related comments to support an inference of discrimination. Members of Pharmacia's management made comments, such as "we need to get rid of the old guys;" the company "wanted to bring some of the younger people along faster;" and Fisher's supervisor referred to him as "the old guy."[283] Pharmacia argued that the statements were stray remarks, which were made by nondecisionmakers and not causally-related to Fisher's adverse employment action. The Eighth Circuit acknowledged that

277. *Fisher,* 225 F.3d at 918.
278. *Id.*
279. *Id.* at 919.
280. *Id.* at 920-21.
281. *Id.* at 921. Heartland Pork was one of the defendant's largest corporate clients. *Id.* at 920.
282. *Fisher,* 225 F.3d at 922.
283. *Id.*

stray remarks standing alone may not present an inference of discrimination, but nevertheless held that these comments are "surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury."[284] The Eighth Circuit noted that "[s]tray remarks therefore constitute circumstantial evidence which, when considered together with other evidence, may give rise to reasonable inference of age discrimination."[285] The court obviously considered these particular stray remarks in the context of a compelling presentation of facts supporting both a prima facie case and pretext sufficient to support Fisher's right to have a jury determine his case.

Scroggins v. University of Minnesota — Interventing Unprotected Conduct Defeats Interference

In *Scroggins v. University of Minnesota*,[286] the Eighth Circuit affirmed the University of Minnesota's ("University") three-day suspension and subsequent termination of James Scroggins, an African-American, who was a custodian at the University.[287] The Eighth Circuit decided *Scroggins* on August 2, 2000, shortly after the United States Supreme Court filed its decision in *Reeves*. The Eighth Circuit discussed the holding in *Reeves*, stating, "the Supreme Court held that a prima facie case of discrimination combined with sufficient evidence of pretext may support a finding of intentional discrimination. The Court, however, emphasized such a showing will not always be adequate to support a finding of liability."[288]

Facts and Holding

Scroggins had chronic performance and conduct problems on the job.[289] The University finally terminated him after his supervisor found him asleep fifteen minutes after the end of his official break.[290] Scroggins' termination occurred thirteen days after he filed a complaint with the EEOC based upon an earlier suspension.[291] The Eighth Circuit found that Scroggins failed to produce evidence of pre-

284. *Id* at 922-923 (quoting Bevan v. Honeywell, Inc., 118 F.3d 603, 610 (8th Cir. 1997)).

285. *Id.* at 923 (citing Madel v. FCI Marketing, Inc., 116 F.3d 1247, 1253 (8th Cir. 1997)). The Eighth Circuit did not expand the significance of stray remarks in this analysis.

286. 221 F.3d 1042 (8th Cir. 2000).

287. Scroggins v. University of Minnesota, 221 F.3d 1042, 1043 (8th Cir. 2000).

288. *Scroggins*, 221 F.3d at 1044 (citing *Reeves*, 120 S. Ct. 2109).

289. *Id.*

290. *Id.* The Eighth Circuit noted that while Scroggins argued that his transfer was discriminatory, he did not show that it was an adverse employment action. *Id.*

291. *Scroggins*, 221 F.3d at 1045.

text and that his failure to do so defeated both his Title VII claim of racial discrimination and of retaliation.

In dealing with the temporal connection between Scroggins' protected conduct of filing a charge with the EEOC and his termination, the Eighth Circuit relied on *Kiel v. Select Artificials, Inc.*,[292] and determined that Scroggins' "intervening unprotected conduct eroded any causal connection that was suggested by the temporal proximity of his protected conduct in his termination."[293] In other words, being fired for sleeping on the job, a bona fide work rule, trumped any causal connection that could have been suggested by the brief thirteen-day time period between Scroggins' filing his charge and his termination.

Analysis

The Eighth Circuit was technically correct in not reaching the issue in *Reeves* relating to independent evidence of discriminatory intent, since it found that Scroggins had failed to produce evidence of pretext or to establish a prima facie case of retaliation. The Eighth Circuit's discussion of the pretext evidence in *Scroggins* was useful in light of *Reeves*. Scroggins alleged that there were inconsistencies between his supervisors' deposition testimony and their testimony at the unemployment hearings.[294] The alleged inconsistencies involved the time when the two supervisors who were involved in Scroggins' termination learned of the filing of his EEOC charge. The supervisor who was primarily responsible for the termination testified in her deposition that during the termination Scroggins said "something" about the "EEOC" but that Scroggins did not mention filing a charge. At the hearing, the supervisor testified that she had learned that Scroggins filed a charge on the day of the unemployment compensation hearing.[295] It is apparent from the decision that the Eighth Circuit looked at the testimony carefully and rightly determined that this inconsistency did not raise "a suspicion of mendacity."[296]

CALVIN V. YELLOW FREIGHT SYSTEMS, INC. — SUBJECTIVE CRITERIA AS PRETEXT

In *Calvin v. Yellow Freight Systems, Inc.*,[297] the Eighth Circuit affirmed the United States District Court for the Western District of Missouri in granting summary judgment to her employer Yellow

292. 169 F.3d 1131, 1136 (8th Cir. 1999).
293. *Scroggins*, 221 F.3d at 1045 (citing Kiel v. Select Artificials, Inc. 169 F.3d 1131, 1136 (8th Cir.), *cert. denied,* 528 U.S. 818 (1999)).
294. *Id.* at 1044-45.
295. *Id.* at 1045.
296. *Id.* at 1045 (citing *Reeves*, 120 S. Ct. at 2108).
297. 218 F.3d 904 (8th Cir. 2000).

Freight Systems, Inc. ("Yellow Freight") on plaintiff Janine Calvin's claims that her employer discriminated against her on the basis of race in violation of section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) and in violation of 42 U.S.C. § 1981.

Facts and Holding

Calvin, a part-time employee, was black. Yellow Freight offered a full-time position to a part-time white male employee with less seniority than Calvin. Although the Eighth Circuit summarily affirmed the district court's opinion, District Judge Joseph F. Bataillon, sitting by designation, dissented. In his dissent, Judge Bataillon argued that an application of the Supreme Court's holding in *Reeves* required consideration of substantial conflicting evidence which warranted submitting the case to a jury.[298] The dissent focused on two facts that could be considered pretext, the decisionmaker's inability to rank in order of importance the criteria he used to make the hiring decision, and some language from a Position Paper which Yellow Freight's lawyers had sent to the EEOC and later incorporated into Yellow Freight's answers to interrogatories.[299] During the decisionmaker's deposition Calvin's counsel asked specific questions relating to the language in the Position Paper, which the decisionmaker was unable to answer. The dissent believed that these inconsistencies were, the kind of subjective criteria for promotions which allow an employer to sabotage a plaintiff's case and "mask" intentional discrimination.[300]

Analysis

The dissent illustrates how *Reeves* requires a more diligent analysis of the pretext prong of the *McDonnell-Douglas* analysis. *Reeves* determined that it was sufficient for a plaintiff to rebut his employer's reason for the alleged discriminatory conduct, and that the employee need not then offer additional evidence that the motivation was illegal discrimination.[301] The dissent reviewed each of Yellow Freight's reasons for its decision in hiring a white man to fill the full time position instead of hiring Calvin, comparing qualifications, overall hours worked, training on the job, and education. The dissent demonstrates

298. Calvin v. Yellow Freight System, Inc., 218 F.3d 904, 905 (8th Cir. 2000) (Bataillon, J., dissenting).

299. *Calvin*, 218 F.3d at 908-09 (Bataillon, J., dissenting). Paragraph three on page five of the paper stated "[b]ased upon job knowledge, productivity, quality of work, availability, work habits, and last, length of service as a casual, Ladd considered Cindy Charmley the best candidate at that time. . . ." *Id.* at 908 (Bataillon, J., dissenting).

300. *Calvin*, 218 F.3d at 909 (Bataillon, J., dissenting) (citing McCullough v. Real Foods, Inc., 140 F.3d 1123, 1129 (8th Cir. 1998)).

301. *Id.* at 908 (Bataillon, J., dissenting) (citation omitted).

the value of looking closely at all of the evidence and in particular, the significance of position papers in supporting a plaintiff's later attempts to demonstrate pretext.

GRIFFIN V. SUPER VALU — SPECULATION NOT SUFFICIENT TO SUPPORT PRETEXT

In *Griffin v. Super Valu*,[302] the Eighth Circuit affirmed the United States District Court for the Eastern District of Missouri's grant of summary judgment to plaintiff Keith Griffin's employer on his claim of race discrimination under Title VII.

Facts and Holding

Griffin alleged that Super Valu denied him two promotions because he was black.[303] Super Valu passed over Griffin for a promotion from a casual warehouse employee to a permanent employee. At the time of the promotions, Griffin had "five unexpunged disciplinary actions in his personnel file,"[304] which Super Valu argued were legitimate business reasons for not promoting Griffin. The disciplinary actions were based upon Griffin's failure to meet production standards and insubordination.

Analysis

The Eighth Circuit did not discuss the holding or significance of *Reeves*.[305] Nevertheless, the Eighth Circuit carefully considered the quality of Griffin's evidence of pretext, rejecting Griffin's allegations of disparate treatment. Griffin was unable at his deposition to state specifically the time period when Super Valu treated him less favorably than similarly-situated white employees or even to identify white employees who were more favorably by any particular supervisors.

Some plaintiffs have a sense that they are being treated unfairly and rely on rumors or inaccurate workplace lore to believe the disparate treatment to be true. The *McDonnell Douglas* analysis requires sufficient admissible evidence of pretext; however, reliance on speculation and rumor does not meet that burden.[306] *Griffin* provides a val-

302. 218 F.3d 869 (8th Cir. 2000).

303. Griffin v. Super Valu, 218 F.3d 869, 870 (8th Cir. 2000).

304. *Griffin*, 218 F.3d at 871. Super Valu's policy was only to advance those employees who "had at least six month's seniority and had no more than one unexpunged disciplinary action . . . ." *Id.*

305. *Griffin*, 218 F.3d at 869-72. The court, however, cited *Reeves* on the issues of a plaintiff's obligation to offer evidence of pretext. *Id.* at 871 (citing *Reeves*, 120 S. Ct. at 2106).

306. *Griffin*, 218 F.3d at 871-72.

uable analysis of the quality of evidence necessary to support a plaintiff's claim of pretext.[307]

ELEVENTH AMENDMENT IMMUNITY

The United States Supreme Court modified the analysis for Eleventh Amendment immunity in *Seminole Tribe of Florida v. Florida,*[308] and *City of Boerne v. Flores.*[309] Following those decisions, states began to challenge the constitutionality of federal legislation as it applies to state employers. In *Kimel v. Florida Board of Regents,*[310] the United States Supreme Court held that Age Discrimination in Employment Act ("ADEA")[311] does not abrogate the States' sovereign immunity under the Eleventh Amendment.[312] Shortly thereafter, the Supreme Court heard oral argument in *Board of Trustees of University of Alabama v. Garrett.*[313] The question presented in *Garrett* was "whether a state is immune from suits by state employees asserting rights under" the Americans with Disabilities Act ("ADA").[314] The Eighth Circuit has considered Eleventh Amendment immunity in the ADA context on several occasions.[315]

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307. *Id.* at 870-72. *See also* Allen v. Interior Construction Service, Ltd., 214 F.3d 978, 982-83 (8th Cir. 2000) for a helpful analysis of ADA discrimination under the *McDonnell Douglas* analysis.

308. 517 U.S. 44 (1996). The Supreme Court established a two-part test to determine whether Congress properly abrogated Eleventh Amendment immunity. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55-56 (1996). *See infra* notes 320-21 and accompanying text.

309. 521 U.S. 507 (1997).

310. 528 U.S. 62 (2000).

311. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994).

312. Kimel v. Florida Board of Regents, 528 U.S. 62, 72-73, 91, *cert. granted,* Florida Dept of Corrections v. Dickson, 528 U.S. 1132, *cert. dismissed,* 528 U.S. 1184 (2000). At the time the Supreme Court accepted certiorari in *Kimel* the Eighth Circuit was the only Circuit Court other than the Eleventh Circuit holding that the States were immune from suit under the ADEA. *See* Humenansky v. Regents of the Univ. of Minnesota, 152 F.3d 822, 824 (8th Cir. 1998). Six Circuits had held that the ADEA was a valid abrogation of the States' Eleventh Amendment immunity. *See generally* Cooper v. New York Office of Mental Health, 162 F.3d 770, 772 (2d Cir. 1998), *cert. granted, vacated by,* Board of Trustees of Univ. of Connecticut v. Davis, 528 U.S. 1110 (2000); Migneault v. Peck, 158 F.3d 1131, 1136 (10th Cir. 1998), *cert. granted, vacated by,* Board of Regents of Univ. of New Mexico v. Migneault, 528 U.S. 1110 (2000); Coger v. Board of Regents, 154 F.3d 296, 304 (6th Cir. 1998), *vacated by,* 209 F.3d 485 (2000); Keeton v. University of Nevada Sys., 150 F.3d 1055, 1057 (9th Cir. 1998); Scott v. University of Mississippi, 148 F.3d 493, 500 (5th Cir. 1998); Goshtasby v. Board of Trustees of the Univ. of Illinois, 141 F.3d 761, 766 (7th Cir. 1998).

313. 120 S. Ct. 1669 (2000).

314. Garrett v. University of Alabama at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 2000).

315. Walker v. Missouri Dept. of Corrections, 213 F.3d 1035, 1036 (8th Cir. 2000) (noting the ADA claim failed); DeBose v. Nebraska, 186 F.3d 1087, 1088 (8th Cir. 1999) (holding the principals established in Alsbrook apply to the case at hand); Alsbrook v. City of Maumelle, 184 F.3d 999, 1010 (8th Cir. 1999) (holding Congress lacked the

Prior to the Supreme Court's decision in *Kimel* the Eighth Circuit was one of only two circuits to hold that the ADEA did not abrogate the States' Eleventh Amendment immunity.[316] The Eleventh Amendment to the United States Constitution provides "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[317] The Eleventh Amendment provides that no plaintiff other than the United States or another state may sue a state in federal court absent a constitutional provision that grants Congress the power to abrogate the states' Eleventh Amendment immunity.[318] The Fourteenth Amendment confers such power to Congress under certain circumstances.[319] A state can expressly waive its immunity to suit or Congress can abrogate a state's Eleventh Amendment immunity.[320] If a state does not waive its immunity to sue then a court must determine whether Congress has properly abrogated the state's Eleventh Amendment immunity.

The analysis of whether or not Congress has abrogated Eleventh Amendment immunity is twofold. First, Congress must make its intent to abrogate Eleventh Amendment immunity "unmistakably clear."[321] Second, Congress must identify conduct that "transgresses" the substantive provisions of the Fourteenth Amendment and then Congress must tailor its legislative action to prevent such conduct.[322]

Congress can "validly abrogate the States' Eleventh Amendment immunity" only pursuant to section 5 of the Fourteenth Amend-

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power to abrogate a state's Eleventh Amendment immunity); Gorman v. Bartch, 152 F.3d 907, 909, 911 (8th Cir. 1998) (analyzing whether injuries received when transporting a paraplegic arrestee were cognizable under the ADA). *See infra* notes 336-45 and accompanying text.

316. *See Humenansky*, 152 F.3d at 824.

317. U.S. CONST. amend. XI.

318. *Kimel*, 528 U.S. at 72-73. Under the Eleventh Amendment, a state is not subject to suit in federal court by its own citizens. Edelman v. Jordan, 415 U.S. 651, 662-63 (1974).

319. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). The Fourteenth Amendment provides, in relevant part:

> Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce by appropriate legislation the provisions of this Article.

U.S. CONST. amend XIV, § 1, 5.

320. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985).

321. *Kimel*, 528 U.S. at 73.

322. *Id.* at 78. This was the dispositive issue in *Kimel* since the Supreme Court held the language in the ADEA to have been unequivocal in its intention to make the ADEA apply to the States. *Id.*

ment.[323] In *City of Boerne,* the Supreme Court articulated the current test for determining whether Congress has effectively abrogated the State's immunity under section 5 of the Fourteenth Amendment.[324] The test in *City of Boerne* turned on an analysis of the "congruence and proportionality" of the Congressional action relative to the problem to be addressed. The court noted that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[325]

THE UNITED STATES SUPREME COURT'S HOLDING IN *KIMEL V. FLORIDA BOARD OF REGENTS*

On January 11, 2000, the United States Supreme Court decided *Kimel* holding that the ADEA,[326] as amended, does not abrogate the States' sovereign immunity under the Eleventh Amendment.[327] The Supreme Court had granted certiorari,[328] to resolve a conflict among the circuits on the question of whether the ADEA validly abrogates the states' Eleventh Amendment immunity.[329]

The Court determined that the language in the ADEA was "unmistakably clear" that Congress intended the ADEA to apply to the States.[330] The ADEA failed the second step of the analysis, however, because:[331]

> States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and legitimate interests they serve with razor like precision . . . . In contrast, when a State discriminates on the basis of race or gen-

323. Cisneros v. Wilson, 226 F.3d 1113, 1119 (10th Cir. 2000).

324. City of Boerne v. Flores, 521 U.S. 507, 516-20 (1997). This case involved a constitutional challenge to the Religious Freedom Restoration Act ("RFRA"). *Id.*

325. *City of Boerne*, 521 U.S. at 520.

326. 29 U.S.C. §§ 621-634 (1994).

327. *Kimel*, 528 U.S. at 67.

328. 525 U.S. 1121 (1999)

329. *Kimel*, 528 U.S. at 66-67. At the time the Supreme Court granted certiorari in *Kimel*, there was a 6-2 split in the Circuits on the issue of whether the ADEA validly abrogated the States' Eleventh Amendment immunity. *See supra* note 314 and accompanying text.

330. *Kimel*, 528 U.S. at 73. The Court stated, "[t]o determine whether a federal statute properly subjects states to suits by individuals, we apply a simple but stringent test: 'Congress my abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Id.* (citations omitted).

331. The Court noted that it had previously held that age discrimination claims do not establish violations of the Equal Protection Clause. *Kimel*, 528 U.S. at 86. Furthermore, victims of age discrimination are not a discrete class and therefore claims of age discrimination are subject only to a rational basis review. *Id.* at 83 (citations omitted).

> der, we require a tighter fit between the discriminatory means and the legitimate ends they serve. Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations.[332]

In *Kimel*, the Supreme Court applied *City of Boerne's* "congruence and proportionality" test[333] to determine whether Congress' actions in addressing a wrong fits with the overall purpose of the statute at issue, thus preventing Congress from stepping farther into the states' Eleventh Amendment protection than necessary. The Supreme Court held that the ADEA was "so out of proportion to a supposed remedial or preventive object that [it] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[334] Since the ADEA makes all discriminatory conduct in the employment context against any individual because of that individual's age unlawful, it overreaches, prohibiting far more in the area of state employment decisions than would ever be held unconstitutional using a rational basis standard.[335] The *Kimel* Court concluded that "the ADEA prohibits very little conduct likely to be held unconstitutional[.]"[336]

THE EIGHTH CIRCUIT'S ELEVENTH AMENDMENT ANALYSIS OF THE AMERICANS WITH DISABILITIES ACT

Three titles in the ADA[337] address discrimination against the disabled.[338] Title I prohibits employment discrimination against the dis-

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332. *Kimel*, 528 U.S. at 83-84 (citations omitted).

333. *Id.* at 81. The Supreme Court relied on the same test in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). The Supreme Court held, in *Fitzpatrick*, that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of [section] 5 of the Fourteenth Amendment." *Fitzpatrick*, 427 U.S. at 456.

334. *College Savings Bank*, 528 U.S. at 646 (quoting *City of Boerne*, 521 U.S. at 532).

335. *Kimel*, 528 U.S. at 86. Even with the ADEA's bona fide occupational qualification defense, section 623(f)(1) does not remedy the ADEA's overbreadth. *Id.*

336. *Kimel*, 528 U.S. at 88. The Supreme Court noted in its opinion that age is not a suspect classification under the equal protection clause. *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 470 (1991)). Consistent with this view, the Eighth Circuit held, in *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000), that the FMLA does not validly abrogate Eleventh Amendment immunity for actions brought against the state. The Eighth Circuit held that the legislative scheme of the Family and Medical Leave Act is not congruent or proportional to any identified constitutional harm. *Townsel*, 233 F.3d at 1096.

337. 42 U.S.C. §§ 12101-12213 (1994).

338. In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the United States Supreme Court held that the Equal Protection Clause prohibits arbitrary discrimination against the disabled. Accordingly, the Fourteenth Amendment protects the disabled. Congress is entitled to enforce this protection against the States. Martin v. Kansas, 190 F.3d 1120, 1127-28 (10th Cir. 1999).

abled.[339] Title II prohibits disability discrimination in the services of public entities.[340] Title III prohibits discrimination by public accommodations involved in interstate commerce, such as hotels or restaurants.[341] The Eighth Circuit considered the Eleventh Amendment immunity issue in an ADA Title I case in *Walker v. Missouri Department of Corrections.*[342]

Plaintiff Margaret Walker suffered from polio and post-polio syndrome. When her disability began to limit her ability to work, Walker requested reasonable accommodation from her employer the Missouri Department of Corrections ("MDOC"). Walker eventually became totally unable to work. She sued the MDOC for failing to grant her reasonable accommodations that would have enabled her to work longer.

The Eighth Circuit held that the Eleventh Amendment barred Walker's claims against the MDOC under ADA Title I, absent any contention that MDOC, a state agency, had consented to suit or waived its Eleventh Amendment immunity. The Court's opinion was abbreviated and did not provide an analysis of its holding.

In *Anderson* the Eighth Circuit held that Anderson could not sue a state hospital for a violation of Title I of the ADA because of the state's Eleventh Amendment immunity protection in spite of her having gone into hysterics after learning that someone had seen a snake in her work area.[343]

The Eighth Circuit held in *Gorman v. Bartch,*[344] that Title II of the ADA applies to state prisons and prison services. In *Gorman,* the Kansas City, Missouri police arrested Gorman, a paraplegic who used a wheelchair, and placed Gorman in a patrol wagon that was not equipped with a wheelchair lift or wheelchair restraints. During the drive to the Police Station, belts which the police had used to tie Gorman to hold him upright on the bench in the police van loosened and Gorman fell to the floor, injuring his shoulders and his back severely enough to require surgery.[345] The Eighth Circuit held that the

339. 42 U.S.C. § 12112 (1994).

340. 42 U.S.C. § 12132 (1994). A public entity is defined as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B) (1994).

341. 42 U.S.C. § 12182 (1994).

342. 213 F.3d 1035 (8th Cir. 2000).

343. *Anderson,* 232 F.3d at 635. *See supra* notes 132-42 and accompanying text. In *Alsbrook v. City of Maumelle,* the Eighth Circuit held that Congress had no power to abrogate the States' Eleventh Amendment immunity from suit in federal court under Title II of the ADA. Alsbrook v. City of Maumelle, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc).

344. 152 F.3d 907 (8th Cir. 1998).

345. Gorman v. Bartch, 152 F.3d 907, 910 (8th Cir. 2000).

local Police Department falls "squarely within the statutory definition of 'public entity[.]'"[346]

The Eighth Circuit correctly determined the issue of Eleventh Amendment immunity under the ADEA in circuit decisions prior to the Supreme Court's decision in *Kimel*. Determining the Eleventh Amendment immunity under Title I of the ADA will not be as simple an analysis as the Eighth Circuit presented in *Walker*, however.

CONCLUSION

During its 2000 Docket, the United States Court of Appeals for the Eighth Circuit decided hundreds of issues involving employment law. This article has surveyed the Eighth Circuit's decisions in several cases alleging violations of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act and the Family and Medical Leave Act. The Eighth Circuit had several opportunities to examine lower courts' applications of the affirmative defenses defined by the Supreme Court in *Ellerth, Faragher,* and *Kolstad.* The Circuit's analysis in each of those cases is particularly significant for employment lawyers who counsel clients on policy development and implementation.

Employment lawyers also benefited from the Circuit's pragmatic application of the ADA. The ADA statutory framework is conceptually difficult. The various EEOC guidelines provide an additional layer to the analysis. Given the typically difficult factual situations involved in these cases, the Eighth Circuit is to be commended for taking a consistently pragmatic approach in its analyses.

In the last six months of the year, the Eighth Circuit responded to the United States Supreme Court's holding in *Reeves.* Even though the Eighth Circuit had not required plaintiffs to demonstrate pretext plus additional evidence of discrimination in order to avoid summary judgment, the Circuit used the opportunity of the *Reeves* decision to provide guidance on the pretext prong of the *McDonnell Douglas* analysis.

The Eighth Circuit has held that the neither the ADEA or Title I of the ADA abrogates the States' Eleventh Amendment immunity. The United States Supreme Court took the same view in *Kimel* on the ADEA. The Supreme Court will decide the Eleventh Amendment issue in the ADA context in *Board of Trustees of University of Alabama, et al. v. Garrett* this Term.[347]

346. *Gorman*, 152 F.3d at 912 (citation omitted).
347. 120 S. Ct. 1669 (2000).