A REVIEW OF
SELECTED FEDERAL DECISIONS

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A. SUPREME COURT

1. FOURTEENTH AMENDMENT

a. Armour, et al. v. City of Indianapolis, Indiana, et al., 132 S.Ct. 2073 (2011)

An Indiana statute authorized Indiana's cities to impose upon benefited lot owners the cost of sewer improvement projects. The law also permitted those lot owners to pay either immediately in the form of a lump sum or over time in installments. In 2005, the City of Indianapolis ("City") adopted a new assessment and payment method, the Septic Tank Elimination Project ("STEP") plan, and it forgave any installments that lot owners had not yet paid on other sewer projects.

A group of lot owners who had already paid their entire assessment in a lump sum believed that the City should have provided them with equivalent refunds. The Supreme Court had to decide whether the City's refusal to do so unconstitutionally discriminated against them in violation of the Equal Protection Clause. The Supreme Court held that "the City had a rational basis for distinguishing between those lot owners who had already paid their share of project costs and those who had not." The Supreme Court concluded that there was no violation of equal protection and discussed why this was true.

The City allowed a sanitary sewer project under which 180 property owners could have their homes hooked up to the City's sewer system. That law requires sewer costs to "be primarily apportioned equally among all abutting lands or lots." The cost in the sanitary sewer project came to $9,278 and some of the property owners paid the full amount up front. Others elected the option of paying in installments. Shortly after hookup, the City switched to a new financing system and decided to forgive the hookup debts of those paying on an installment plan. The City refused, however, to refund any portion of the payments made by their

identically situated neighbors who had already paid the full amount due. The result was that, while petitioners each paid the City the full $9,278 for their hookups, more than half of the neighbors paid less than $500 and some paid as little as $300.27.

The City explained that it had three choices: First, it could have continued to collect the installment plan payments of those who had not yet settled their debts under the old system. Second, it could have forgiven all those debts and given equivalent refunds to those who had made lump sum payments up front. Or, third, it could have forgiven the future payments and not refunded payments that had already been made. The first two choices had the benefit of complying with state law, treating all of Indianapolis' citizens equally, in comporting with the Constitution. The City chose the third option. The City's argument that it believed was sufficient to justify a system that would effectively charge petitioners 30 times more than their neighbors for the same service – when state law promised equal treatment – was twofold: The desire to avoid administrative hassle and the "fiscal challenge" of giving back money it wanted to keep.

The majority opinion approved what the City had done by a vote of 6-2.

2. SECTION 1983

a. Filarsky v. Delia, 132 S.Ct. 1657 (2012)

Delia, a firefighter employed by the City of Rialto, California, missed work after becoming ill on the job. Suspicious of Delia's extended absence, the City hired a private investigation firm to conduct surveillance on him. When Delia was seen buying fiberglass insulation and other building supplies, the City initiated an internal affairs investigation and hired Filarsky, a private attorney, to interview Delia. At the interview, which Delia's attorney and two fire department officials also attended, Delia acknowledged buying the supplies but denied having done any work on the house. To verify Delia's claim, Filarsky asked Delia to allow a fire department official to enter his

home and view the unused materials, which Delia refused to do. Filarsky then ordered Delia to bring the material out of his house for the officials to see. This prompted Delia's attorney to threaten a civil rights action against the City and Filarsky, but after the interview concluded, officials followed Delia to his home, where he did produce the materials. No action was taken against Delia after the fire officials reviewed the materials produced by Delia.

Delia then brought an action under 42 U.S.C. §1983 against the City, the Fire Department, Filarsky and other individuals, alleging that the order to produce the building materials violated Delia's Fourth and Fourteenth Amendment rights. The district court granted summary judgment to all the individual defendants on the basis of qualified immunity. The Court of Appeals for the Ninth Circuit affirmed with respect to all individual defendants, except Filarsky, concluding that he was not entitled to seek qualified immunity because he was a private attorney, not a city employee.

The Supreme Court held that a private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from a lawsuit under §1983. In determining whether the Court of Appeals made a valid distinction between city employees and Filarsky for qualified immunity purposes, the Supreme Court looked to the general principles of tort immunity and defenses applicable at common law and the reasons the Court has afforded protection from suit under §1983. In 1871, when Congress enacted §1983, common law did not draw a distinction between full-time public service and private individuals engaged in public service in according protection to those carrying out government responsibilities. Government work was carried out to a significant extent by individuals who did not devote all their time to public duties but instead pursued private callings, as well. Indeed, examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself.

Common law principles of immunity were incorporated into §1983 and should not be abrogated absent clear legislative intent. Immunity under §1983, therefore, should not vary, depending on whether an individual working for the government does so as a permanent or full-time employee or on some other basis. Chief Justice Roberts wrote this opinion for a unanimous Court, with Justice Ginsburg and Justice Sotomayor filing concurring opinions. Chief Justice Roberts stated, "There is no reason Rialto's internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York."

b. Steven Lefemine DBA Columbia Christians for Life v. Dan Wideman, 133 S.Ct. 9 (2012)

Steven Lefemine and other members of the Columbia Christians for Life group protested the availability of abortion in the U.S. by demonstrations in which they carried signs depicting aborted fetuses along busy intersections in Greenwood County, South Carolina. Due to a variety of complaints about the graphic nature of the signs, the police informed Lefemine that he would be ticketed for breach of peace if he did not remove the signs. Although Lefemine objected under his First Amendment rights, he stopped the demonstrations. On several other occasions in letters, the police department affirmed that they would act similarly if confronted with more demonstrations. Out of fear of legal sanctions, the group did not protest for two years.

Lefemine asserted rights under 42 U.S.C. §1983, alleging violations of his First Amendment rights. The district court found that the police officers had infringed on Lefemine's rights and gave an injunction as a remedy, but did not give damages on the basis of immunity. It also did not give attorney fees, finding that they were not warranted under the "totality of the facts." The Fourth Circuit affirmed the denial of attorney fees but changed the theory, stating that Lefemine was not a "prevailing party" under §1988.

The Supreme Court disagreed with the interpretation that Lefemine was not a "prevailing party" for the purposes of §1988. The Court stated that a plaintiff is allowed to recover attorney fees when they prevail. The Court stated that they

have defined prevailing as "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." The Court then stated that they have found an injunction to be one remedy that meets this test. Because he was a "prevailing party" Lefemine should be entitled to attorney fees unless another circumstance would make it unjust; therefore, the case was remanded for further proceeding.

B. CIRCUIT COURT OF APPEALS

1. FIRST AMENDMENT

a. Red River Freethinkers v. City of Fargo, 679 F.3d 1015 (8th Cir. 2012)

Government displays of the Ten Commandments sometimes will violate the Establishment Clause of the First Amendment, see McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844 (2005); other times they will not, see Van Orden v. Perry, 545 U.S. 577 (2005).

The issue in this case is whether a city commission's adoption of an ordinance that in effect countermanded the commission's earlier decision to remove from municipal property a Ten Commandments monument imbued the monument with an impermissible religious symbolism that had earlier been judicially declared not to exist. The district court dismissed the complaint, holding that Red River Freethinkers ("Freethinkers") lacked standing to maintain its First Amendment Establishment Clause action. The Eighth Circuit reversed and remanded for further proceedings.

The Fraternal Order of Eagles – a non-religious civic organization – donated a Ten Commandments monument to the City of Fargo ("City"). In 1961, the monument was installed in its current location on the civic plaza. In 2002, Freethinkers sued the City in federal district court, seeking: (1) a declaration that the City's display of the Ten Commandments monument violated the Establishment Clause and (2) an order that the monument be removed from the mall.

The district court denied the plaintiff's motion for summary judgment, granted the City's motion for summary judgment and dismissed the action. Freethinkers did not appeal from the decision. Freethinkers did offer their own monument to the City with the request that it be placed near the Ten Commandments monument in recognition of the First Amendment right of every American to believe or not believe in any god.

After reviewing several options raised by the city attorney and hearing the view of a number of citizens who expressed various reasons why the monument should be left alone, the commission voted unanimously to reject Freethinkers offer. It further decided to donate the Ten Commandments monument to a private entity, instead of leaving it on public ground. This later action drew a huge public reaction from the citizens who wanted the monument to stay. A group also circulated a petition to change the City's municipal code to provide that "A marker or monument on City of Fargo property for 40 or more years may not be removed from its location on City of Fargo property." The City ultimately voted unanimously for the proposed change in the Code, reversed its earlier decision to donate the monument, and tabled a renewed request by Freethinkers to accept the sister monument. The City then adopted a policy of not accepting additional monuments to be placed on the civic plaza.

Freethinkers filed this lawsuit on behalf of its members, asserting that the City's actions violated the Establishment Clause of the First Amendment.

The City moved to dismiss for lack of jurisdiction, arguing that Freethinkers lacked standing. Based on a recommendation of the magistrate judge, the district court dismissed the Freethinkers action based on lack of standing. The Eighth Circuit assessed Freethinkers standing de novo.

After a lengthy discussion on the issue of standing, the Eighth Circuit reversed the district court, finding that Freethinkers had standing to pursue its claim. However, the Eighth Circuit also held that it was necessary to remand the case for a ruling on Freethinkers claim, and the district court would have to determine what further record development proceedings were appropriate on remand.

One of the panel concurred in the finding that Freethinkers had standing to sue but dissented strongly on the decision to remand the matter to the district court. As it stated, "There is nothing more to be developed pertaining to the motivations of the City Commission in its adoption of the city ordinance, thus, I believe it is proper for us to conclude

this matter by affirming the decision of the district court," (holding that the district court's judgment may be affirmed on any ground supported by the record). This judge believed that the entire record showed that the action of the City Council was not taken for a religious motive and that the evidence was conclusive that the Commission's decision was marked by a willingness to consider all competing views concerning the ordinance, and not to base the decision on any type of religious promotion.

b. Phelps-Roper v. Manchester, Missouri, 697 F.3d 678 (8th Cir. 2012)

Shirley and Megan Phelps-Roper brought this First Amendment facial challenge to an ordinance adopted by the City of Manchester to regulate the time and place of picketing at funerals and burials. Relying in part on Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008), cert. denied, 129 S. Ct. 2865 (2009), the district court ruled that each version of the Manchester ordinance violated the First Amendment, enjoined its enforcement, and awarded nominal damages. After a panel of the Eighth Circuit affirmed, it granted Manchester's petition for rehearing en banc and vacated the panel opinion. Concluding that the final version of the city's ordinance was a legitimate time, place and manner regulation consistent with the First Amendment, the Eighth Circuit reversed, vacated the district court's injunction and remanded for entry of judgment in favor of Manchester.

This is one in a series of cases nationwide in which Phelps-Ropers, members of the Westboro Baptist Church, assert that God punishes America by deaths of its citizens for tolerating homosexuality. The Phelps-Ropers picket and display signs and posters at funerals and other public places to express their beliefs. In Snyder v. Phelps, 131 S.Ct. 1207 (2011), the U.S. Supreme Court held that the father of a deceased soldier could not bring tort claims against the church for protesting near his son's funeral with signs containing messages. In that case, the Court observed that picketers had addressed matters of public import on public property and the speech could not be restricted simply because its message is upsetting or arouses contempt. The Court in Snyder did point out that the church's choice "where and when to

conduct its picketing is not beyond the government's regulatory reach – it is 'subject to reasonable time, place or manner restrictions'."

Manchester's amended ordinance limits picketing and other protest activities within 300 feet of a funeral or burial service, while it is occurring, and for one hour before and after.

The Eighth Circuit ruled that the ordinance did not raise a "content issue", as there is no restriction of any kind as to the content of the message. The Court further held that the Manchester ordinance was a legitimate and limited time, place and manner restriction consistent with the Supreme Court case and with Strickland from Ohio, 539 F.3d at 371.

If your city is considering any action, such as adopting an ordinance establishing some rules of time, place and manner of protesting at a funeral, your city attorney should review the Snyder case and the line of cases coming down in the Eighth Circuit before proceeding with the ordinance.

2. SECTION 1983

a. Hemphill v. Hale, 677 F.3d 799 (8th Cir. 2012)

Hemphill filed a complaint naming five defendants, including Officer Hale, and alleging that on August 19, 2009, while Hemphill was at a gas station, the officers surrounded his car and pointed a gun at him. Hale ordered him to exit the car and put him handcuffed in a patrol car. Officers drove him to his apartment, which they entered and searched without his permission. After finding marijuana and a gun, they took Hemphill into the apartment. Officers seized property that belonged to Hemphill and demanded that he sign a consent form for the search. When Hemphill refused to sign, Officer Hale choked him and hit him in the side rib area with his fist. Hemphill was driven to the police station and held in jail for 24 hours, at which time he was then released, some of his property was returned and he was not charged with any crime. Hemphill asserted various claims, including a Fourth Amendment claim of excessive force by Hale.

Hale moved for summary judgment on the excessive force claim based on qualified immunity. The Court denied the motion, finding that Hale was not entitled to qualified immunity. Hale appealed to the Eighth Circuit.

The two issues involved in this case are: (1) injuries from an incident were de minimis, and (2) it was not clearly established at the time of the incident that the officer could be held liable when the plaintiff suffered only de minimis injury.

The Eighth Circuit held that the treatment of Hemphill established a constitutional violation of his rights and that the use of force in an attempt to consent to a search violated the constitutional rights and was clearly established in August 2009. A reasonable person in Hale's position would have known that his actions were unreasonable.

It is hard to believe that a city would have allowed this case to go to court on the facts and circumstances set out in the case.

b. Montoya v. City of Flandreau, et al., 669 F.3d. 867 (8th Cir. 2012)

Montoya brought an action under Section 1983 against Flandreau police officers, the Chief of Police and the City of Flandreau, alleging that the officers used excessive force against her in violation of the Fourth and Fourteenth Amendments. The district court granted summary judgment in favor of the defendants on all claims, holding that the officers did not violate Montoya's constitutional rights and were entitled to qualified immunity. On appeal, Montoya challenged the district court's grant of summary judgment in favor of Officer Justin Hooper. The Eighth Circuit reversed and remanded.

Montoya ended her relationship with Cournoyer and was in South Dakota to pick up her son. Cournoyer threatened to take him to the Yankton Sioux Reservation, where she would be unable to contact him. Hooper and Gaalswyk responded to a call at 3:17 p.m. Cournoyer stated he wanted

Montoya out of his house by 4:00 p.m. Montoya was "loud and clearly upset" but calmed down after speaking with the officers, who remained at the residence for about fifteen minutes. As they were leaving, the officers told Montoya someone would be arrested if they had to come back. About an hour later, Cournoyer again called the police, and the two officers responded to the call. When the officers arrived, Montoya and Cournoyer were outside the residence. Montoya, Cournoyer, her mother, a friend of hers and the two officers were all standing in a circle. She was standing opposite the officers at a distance of about 10-15 feet. The officers said that she took a step forward and raised her fist. Officer Hooper came and took her left arm, put it behind her back and handcuffed her left wrist. Officer Gaalswyk tried to do the same thing to her right arm, then Hooper came around and kicked her left leg. She fell straight forward to the ground, face first. Hooper fell on top of her, and she screamed and said her leg was broken. The other officer helped Montoya off the ground and assisted her to the patrol car, which took her to the hospital. X-rays of Montoya's leg revealed a tibial plateau fracture on the left knee. Ultimately, she underwent surgery. For four to five months following the surgery, she could only walk with the help of crutches, after which she had to undergo weeks of physical therapy.

Hooper says Montoya raised her right hand in a fist and took a step toward Cournoyer and that he was concerned about Cournoyer's safety. Hooper performed the so-called "leg sweep", causing her to fall to the ground.

After a bench trial, the court found Montoya not guilty of either simple assault or resisting arrest; he found her guilty of disorderly conduct. She filed this lawsuit. The district court concluded the force used by Officer Hooper was objectively reasonable as a matter of law, entitling him to qualified immunity, and granted all of the defendants summary judgment.

Montoya appealed against only Hooper. The Eighth Circuit held that the district court erred in finding no genuine issue of material fact as to whether Hooper violated Montoya's constitutional right to be free from excessive force. The

Court considered the totality of the circumstances, including the severity of the crime, the danger the suspect posed to the officer or others, and whether the suspect was actively resisting arrest or attempting to flee. The degree of injury suffered is also relevant to the excessive force inquiry. The Eighth Circuit stated, "force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." The Eighth Circuit reversed the district court and concluded the force used by Hooper was not objectively reasonable.

A person alleging excessive force must present sufficient facts to show that the officer violated her constitutional right and that the right was clearly established. The district court did err in concluding as a matter of law that Hooper did not violate Montoya's constitutional right. Secondly, the constitutional right Hooper violated was clearly established at the time of the misconduct.

c. Nelson v. County of St. Louis, Missouri, et al., 673 F.3d. 799 (8th Cir. 2012)

This case involves allegations of violations of constitutional rights under the First, Fifth and Fourteenth Amendments added to the original claims of 42 USC §1983 and §1985. The district court dismissed all of the complaints for failure to state a claim. The plaintiffs appealed, and the Eighth Circuit reversed the dismissal of the First Amendment retaliation claim against the defendant Laurie Main, affirmed the dismissal of all other claims and remanded for further proceedings.

For a number of years, deputy sheriffs in St. Louis County had allegedly executed an illegal kickback scheme in which they funneled eviction business to moving companies in exchange for cash payments. The plaintiffs initially participated in this "illegal payment scheme" but began to express reluctance in 2003, withdrew from participation by mid-2004 and have testified repeatedly against the people against whom the allegations were made. Allegedly, the defendants implemented a schedule for the execution of eviction orders which limited the days on which the

plaintiffs could receive eviction notices. The plaintiffs complained repeatedly about the schedule to the Sheriff and to the County's director of judicial administration. After exchanging a number of written and oral communications with the sheriff's office, one of the sheriff's deputies, Laurie Main, announced to most of the other deputy sheriffs that she was going to put the plaintiff out of business. Allegedly, with the cooperation of the entire sheriff's office, this person implemented procedures and practices that were designed to disadvantage the plaintiffs.

Plaintiffs filed a four-count amended complaint: Count I arose under Section 1983 and alleged the deprivation of constitutional rights; Count II averred that retaliation against the plaintiffs for protesting the kickback scheme infringed his rights to freedom of speech and to petition for the redress of grievances under the First and Fourteenth Amendments; Count III was a claim for damages under 42 U.S.C. §1985; and Count IV sought declaratory and injunctive relief in order to effectively redress the plaintiffs' injuries.

The Eighth Circuit reviewed each of the counts and affirmed the district court's dismissal of Counts I and III but not Counts II and IV. The Eighth Circuit concluded that the plaintiffs adequately pleaded a First Amendment claim against Deputy Main. The defendant Main allegedly maintained a deliberately and invidiously discriminatory list of available private moving companies that placed the plaintiffs' company at the bottom of a list. When real property owners with eviction orders asked Main to refer them to a private moving company that could assist with the eviction, she read the names on her referral list from top to bottom, "intending to enable and encourage" the property owner to choose any of the other private movers before they came to the plaintiffs' listing. It was asserted that these procedures "in combination with all other discriminatory and retaliatory practices and procedures" shifted a substantial portion of the plaintiffs' long-time clientele to other movers and inhibited substantially the growth of the plaintiffs' business.

The Eighth Circuit reviewed the essentials of a claim for retaliation under §1983, for violation of the First

Amendment, and determined that the pleadings adequately met those standards so as to survive a motion to dismiss. The Eighth Circuit found that the allegations of certain practices by Main could help to shift a "substantial portion" of the plaintiffs' business to other movers and to "inhibit substantially" the growth of the plaintiffs' business. The Eighth Circuit held that a substantial threat to one's business could be enough to deter a person of ordinary firmness from speaking or petitioning the government. The dismissal of the count seeking declaratory and injunctive relief was also reversed and remanded.

The Eighth Circuit also cautioned that whether the allegations of the petition can be proved is a matter for further proceedings, and remanded.

d. Gallagher v. City of Clayton, et al., 699 F.3d 1013 (8th Cir. 2012)

Arthur Gallagher sued the City of Clayton, Missouri (City), and several city officials in their official capacities under Section 1983, challenging a city ordinance prohibiting outdoor smoking on certain public property. The district court dismissed Gallagher's federal claims as facially implausible, and the Eighth Circuit affirmed that dismissal.

Gallagher was a resident of the City who regularly used the City's parks and enjoyed smoking tobacco products while doing so. The City enacted an ordinance prohibiting the "possession of lighted or heated smoking materials in any form . . . in or on any property or premises owned or leased for use by the City of Clayton, including buildings, grounds, parks, and playgrounds." The ordinance did establish several exceptions, including allowing outdoor smoking on streets, alleys, rights of way and sidewalks other than sidewalks and pedestrian paths in parks, but it also gave the City Manager discretion to prohibit smoking in those areas during "community events, fairs, festivals, neighborhood events and similar public gatherings." The City cited public health and safety, litter reduction and aesthetic rationales for enacting the ordinance.

Gallagher sued the defendants, alleging five grounds under the United States Constitution as to why the ordinance should fail. The City moved for judgment on the pleadings, and the district court granted the defendants' motion, dismissing Gallagher's federal constitutional claims. On appeal, the Eighth Circuit reviewed each of the grounds on which Gallagher had based his assertion that the ordinance was unconstitutional and affirmed that the district court did not err in dismissing these claims.

e. McDonald v. City of St. Paul, et al. 679 F.3d 698 (8th Cir. 2012)

McDonald alleged that his unsuccessful application for appointment as director of the City's Department of Human Rights and Equal Economic Opportunity violated his civil rights. McDonald appealed the district court order granting summary judgment to defendants City of St. Paul and Mayor Christopher Coleman.

McDonald worked for St. Paul as its director of the Office of Affirmative Action and the Coordinator of Minority Business Development and Retention. McDonald was terminated in 2003 and brought a lawsuit against the City, alleging violations of the Minnesota Whistleblower Protection Act, the Civil Rights Act of 1866 and the Civil Rights Act of 1871. In 2004, the parties to the action executed a settlement agreement in which they agreed that the agreement and release did not constitute an admission of liability by any of the parties.

St. Paul adopted an ordinance in 2008 creating the Department of Human Rights and Equal Economic Opportunity, and the council passed a resolution that "the City should engage in a community process in order to select a director for the newly formed Department …." A council member was appointed to chair the thirteen-member committee, consisting of community members and stakeholders, to recommend to the Mayor a list of finalists. The intent was that the new Director of that department be vetted through a community selection process similar to that for the City's police and fire chiefs, and that the initial term be for a period of three years.

McDonald was one of 31 applicants who applied for the position. The selection committee interviewed 8 applicants, including McDonald; it then certified three finalists, one of whom was McDonald. Each of the three finalists appeared at a community interview at which it was stated that one of the three would become the director of the department. Mayor Coleman and Deputy Mayor Ann Mulholland also interviewed each of the finalists. Coleman offered the position to Jensen, who declined to accept it. The Mayor then offered the position to Littlejohn, who also declined, leaving McDonald as the sole remaining finalist. The selection committee then identified three other persons as additional finalists. One withdrew from consideration, leaving two additional finalists certified to the Mayor. One of those finalists withdrew, and the Mayor interviewed the remaining finalist, Frias, and ultimately offered her the director position, which she accepted.

McDonald brought the current action against the City and the Mayor, alleging: (1) violation of his rights to equal protection and procedural and substantive due process under Section 1983 and the Fourteenth Amendment to the United States Constitution, resulting from his engagement in protected activity; (2) conspiracy to deny him an employment opportunity with a public institution because of engagement in protected activity, in violation of Section 1983; (3) violation of Title VII of the Civil Rights Act; (4) violation of Title IX of the Education Amendments Act; and three other claims under Minnesota's state constitution and state law. The district court granted defendants' motion for summary judgment on all claims.

McDonald's contention was that the Mayor and City violated his right to due process by failing to appoint him to the director position after Jensen and Littlejohn, two of the initial list of finalists, had declined the Mayor's offer to take the job. The Mayor and St. Paul argued that McDonald never had a constitutionally protected property interest in a potential position of employment with the City.

The Eighth Circuit held that McDonald must prove (1) violation of a constitutional right, (2) committed by a state

actor, (3) who acted with the requisite culpability and causation to violate the constitutional right. The analysis must begin with an examination of the interest allegedly violated. Where no such interest exists, there can be no due process violation. Further, the Eighth Circuit held that property interests "are not created by the Constitution." They may be created and defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. A person clearly must have more than an abstract need or desire for it and must have more than a unilateral expectation of it. He or she must have, instead, a legitimate claim of entitlement to it.

The Eighth Circuit concluded that McDonald had no protected property interest in the director position. The council resolution urged only that "the City *should* engage in a community process in order to select a director." It further held that the selection committee would "oversee said community process" and "recommend to the Mayor a list of finalists." The City's website indicated that the director "will be vetted through a community selection process *similar* to that for the City's police and fire chiefs." The appointment power of a mayor is stated in the city ordinance as follows: "[the] mayor shall appoint, with the advice and consent of the council, to the positions of city attorney and all heads of executive departments, which appointees shall serve at the mayor's pleasure, except as provided otherwise in this Charter." The Eighth Circuit held that nothing in these statements mandated the Mayor to strictly apply the sections of the City Charter governing the selection of police and fire chiefs; precluded the selection committee from certifying additional finalists; or prohibited the Mayor from considering additional finalists certified by the selection committee. The process left considerable discretion to the selection committee in certifying finalists, to the Mayor in appointing from a list of finalists and to the City Council in approving the Mayor's selection. The fact that an appointment from the initial list of three finalists would have been subject to the approval of the City Council prevented McDonald from possessing a legitimate claim of entitlement to the director position. The Eighth Circuit

affirmed the district court's grant of summary judgment to defendants on McDonald's due process claim.

The Eighth Circuit also reviewed the Title VII and MHRA issues, and held that McDonald could not demonstrate a prima facie case of retaliation under either Title VII or the MHRA.

f. Stahl v. St. Louis, 687 F.3d 1038 (8th Cir. 2012)

St. Louis Ordinance §17.16.270 prohibited conduct, including speech, that had the consequence of impeding pedestrians or vehicular traffic. Stahl was a member of an organization called the "9/11 Questions Group" that espoused conspiracy theories about the events of September 11, 2001. It was the mission of this group to disseminate its message to the largest audience possible through the use of signs, advertisements, leaflets, and the internet. In accordance with this mission, Stahl and two other members of his group took signs to an overpass in St. Louis, which was located over the merger of two busy interstates. They timed this public demonstration to coincide with the morning rush hour.

An hour later, the St. Louis police received a call regarding an "offensive sign" on the highway overpass and responded. The responding officers did not see any noticeable obstruction but, nonetheless, approached Stahl and his group and told them to leave because they were obstructing traffic. When the group refused, they were placed under arrest and forcibly removed. The arresting officer testified that he believed the group's protest activities were particularly dangerous on that overpass because of a nearby highway exit and the interchanging nature of the roadway, and that he believed the signs might have created a driving hazard.

The charges against Stahl were dismissed. Stahl then brought a Section 1983 action against the City of St. Louis, seeking a declaratory judgment that §17.16.270 of the Revised Code was unconstitutional under the First and Fourteenth Amendments. Stahl contended that members of his group had refrained from participating in further

demonstrations within the City for fear of arrest. The district court granted the City's motion for summary judgment, finding the ordinance a content-neutral and a valid time, place and manner restriction. The court also found that the ordinance was not overbroad or vague. Stahl appealed.

The Eighth Circuit reversed, holding the ordinance was unconstitutional on its face because it did not provide fair notice of what conduct was prohibited and it excessively chilled protected speech. The Court noted that the ordinance was not vague in the traditional sense that its language was ambiguous, but rather that the ordinance did not provide people with fair notice of when their actions were likely to become unlawful. Moreover, the Court found the ordinance flawed in that a violation of the ordinance does not hinge on the state of mind of the potential violator but the reaction of third parties.

g. Shekleton v. Eichenberger, et al., 677 F.3d 361 (8th Cir. 2012)

Justin Shekleton is a well-known businessman in New Hampton and suffers from left-side dystonia, a condition that causes his left arm to shake beyond his control. This condition is widely known in the small community of New Hampton. He brought an action pursuant to Section 1983 against Ryan Eichenberger, individually and in his capacity as a Chickasaw County deputy sheriff, alleging Eichenberger violated Shekleton's Fourth Amendment right to be free from excessive force by unnecessarily tasering Shekleton. The district court denied Eichenberger's motion for summary judgment, which Eichenberger claimed was barred by the doctrine of qualified immunity.

The facts, generally, are that Shekleton left a local bar at approximately 11:30 p.m. and stopped outside the bar to talk to four other men and women who were smoking cigarettes outside the bar. Eichenberger drove past the tavern while on patrol and believed, from observing Shekleton and a woman conversing, that they were arguing and that their voices were loud. All of the people at the scene stated under oath that the conversation between Shekleton and the woman was a friendly one.

Eichenberger followed up and, after reporting to the dispatch station what he was going to do, drove back to the bar, parked and walked toward the bar. When Eichenberger arrived, the woman had already gone inside and Shekleton was walking away from the bar. Eichenberger asked Shekleton why he had been arguing with the woman. Shekleton explained that the two had not been arguing. Eichenberger asked Shekleton two or three more times why there was an argument, and Shekleton kept responding that there was no argument. The people at the scene also said that there had been no argument and that they were simply talking. At this time, two other officers arrived on the scene.

Eichenberger believed Shekleton was intoxicated and asked him to move away from the street corner. Eichenberger then asked Shekleton again to explain why he had been arguing with the woman. Shekleton then became agitated, told the deputy that he had not been arguing with the woman and demanded that the officer apologize. Shekleton agreed that he asked for an apology, and this was supported by the witnesses who were still standing outside of the bar.

Shekleton then stopped leaning against the wall, unfolded his arms and turned toward Eichenberger. Eichenberger believed this was threatening, but Shekleton and the other witnesses all agreed that Shekleton did not behave aggressively toward the deputy. Eichenberger twice instructed Shekleton to place his hands behind his back, but both times Shekleton told Eichenberger that he was unable to place his arms behind his back because of left-side dystonia. Eichenberger responded, "I know." When Shekleton did not place his arms behind his back, Eichenberger attempted to handcuff him and, in the process, Eichenberger lost his grip on Shekleton as the two accidentally fell. Eichenberger states that Shekleton broke away from him in an attempt to resist arrest. As the two other officers approached them, one of the officers attempted to restrain Shekleton by grabbing his arm but was unable to do so. At that point, Eichenberger yelled "taser, taser, taser" and discharged his taser at Shekleton with the probes striking Shekleton's upper chest and rib cage. The electric charge from the probes caused Shekleton to fall face

first to the ground. While Shekleton was on the ground, he was double-handcuffed and was arrested for public intoxication and interference with official acts but was taken to the hospital for treatment of his injuries before booking. The charges were dropped.

Qualified immunity protects officers from liability in a Section 1983 case, "unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." In a case similar to this one, Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009), the Eighth Circuit had held that the general law prohibiting excessive force which was in place at the time of the incident was sufficient to inform an officer that use of his taser on a non-fleeing, non-violent suspected misdemeanant was unreasonable.

In reviewing the facts in the light most favorable to Shekleton, the Eighth Circuit held that, on the basis of the facts, a reasonable officer would not have concluded that an argument occurred between Shekleton and the woman, that Shekleton complied with the officer's orders to step away from the street and did not behave aggressively toward the deputy, that Shekleton told the deputy repeatedly that he could not physically place his arms behind his back, and did not resist nor intentionally cause the two to fall.

Under these facts, Shekleton was an unarmed, unsuspected misdemeanant who did not resist arrest, did not threaten the officer, did not attempt to run from him and did not behave aggressively toward him. Shekleton established that a violation of a constitutional right occurred and that a reasonable officer would not have deployed his taser under the circumstances.

As to whether a clearly established constitutional violation occurred, the Eighth Circuit stated, "the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." The Eighth Circuit indicated that it had previously established that a reasonable officer was on notice that tasering under

the circumstances similar to this case was excessive force in violation of the clearly established law.

Each city attorney should either personally or in writing make sure that your police officers understand the significance of this decision. If they are dealing with a situation that involves simply a minor violation and the person does not flee the scene or attempt to resist arrest, the officer should keep the taser in their pocket so that they do not create a similar case.

3. AMERICANS WITH DISABILITIES ACT (ADA)

a. St. Martin v. City of St. Paul, 680 F.3d 1027 (8th Cir. 2012)

Scott St. Martin filed suit alleging that the City of St. Paul engaged in discrimination on three occasions by promoting individuals other than him for a fire district chief position in violation of the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA). The district court granted summary judgment to the City on all counts. St. Martin appealed the district court's judgment. The Eighth Circuit affirmed, with one judge of the panel dissenting.

If you have a case where your city is sued for not hiring or not promoting an individual, this would be a very good case to review for the defense.

This case has some of the aspects of other hiring cases that we have discussed, including Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011). However, it is also important to know that, in this case, there was one judge who dissented quite strongly, arguing that he would have reversed the district court's decision and allowed a jury to decide St. Martin's ADA claims as to the first two job openings and all of his MHRA claims. These claims against the city for not hiring are complicated, and it is good to have as many past precedents as possible to try to sort out the proper decision for your city. This is one case that certainly should be reviewed by your city if a similar situation arises.

b. Otto v. City of Victoria, 685 F.3d 755 (8th Cir. 2012)

Leland Otto worked in the City's Department of Public Works as a Public Works Worker II. His job required the performance of non-supervisory, semi-skilled and skilled operational and maintenance responsibilities, including such activities as patching and repairing curbs and gutters, snow plowing, mowing, tree trimming, trash and hazard removal, sewer cleaning, and maintenance of streets, parks and buildings. Otto twice sustained workplace injuries to his back, first in 1990 and again in 2006. Each time, Otto resumed work and returned to his typical duties.

Otto experienced numbness in his left leg. His doctor ordered him to stop working, and he subsequently underwent surgery. His physician indicated in a workability report that Otto was totally disabled and would remain so for an indeterminate period of time, and then referred Otto to another physician.

Dr. Wei cleared Otto to perform four hours of sedentary work per day, but Otto was not able to do so because the City had no position available that would accommodate Dr. Wei's restrictions. Otto also underwent a functional capacity evaluation, which concluded that he could frequently carry weights of up to five pounds, occasionally lift weights of up to fifteen pounds and seldom lift weights of up to thirty-five pounds. Dr. Wei noted that the work restrictions were permanent. Throughout this period, Otto received workers' compensation benefits, including pay benefits, health insurance, and vacation and sick time accrual.

The City's personnel committee, at a meeting attended by Otto, recommended that the City terminate Otto's employment. Otto asserted that he was able to return to work, but the Council adopted a resolution terminating Otto's employment with the City. The City later replaced him with workers in their twenties. At the date of his termination, Otto was 59 years old.

The Eighth Circuit first reviewed Otto's claim of violation of ADA, which provides that an employer may not "discriminate against the qualified individual on the basis of

disability." Since Otto offered no direct proof of discrimination, the district court examined his ADA claim under the McDonnell Douglas Corp v. Green analysis.

In order to survive summary judgment, Otto must show that he was qualified to perform the essential functions of his position, with or without reasonable accommodation. Limited as Otto was to four hours of sedentary work per day and unable to engage in heavy lifting, the Eighth Circuit said that Otto was physically incapable of fulfilling the essential functions of his job. While Otto told the city council that he could still perform these functions, his assertion was undermined by his own physician's determination that Otto's disability permanently restricted his ability to work. There is no requirement in the ADA that an employer permit an employee to perform a job function that the employee's physician has forbidden.

The Eighth Circuit then reviewed several accommodations that Otto said the City should have provided, but the Eighth Circuit found that there was no evidence introduced by Otto that a position accommodating his disability was available at the time of termination or that he ever applied for such a position.

The Eighth Circuit then reviewed Otto's claim that his termination violated the ADEA. The only evidence that Otto offered to show age discrimination was the fact that workers in their twenties assumed his duties after he was terminated, and this fact alone cannot support a reasonable inference of age discrimination. Also, the ADEA also requires that a plaintiff be qualified for the position from which he was terminated, and Otto's disability prevented him from performing the essential functions of a Public Works Worker II.

The Eighth Circuit further reviewed Otto's contention that the City deprived him of property without due process of law by discharging him without a formal hearing. If state law creates a property right in continued employment, due process requires that the employee receive notice and a pretermination hearing with an opportunity to respond. Otto demonstrated that there was no such property interest

in continued employment under Minnesota law. By contrast, Otto was an at-will employee, and the City's termination of his employment did not deprive him of a property interest protected by the Fourteenth Amendment.

This is a very good case for a city council or a board of supervisors to review in a situation similar to that involving Mr. Otto.

c. Bahl v. County of Ramsey, et al., 695 F.3d 778 (2012)

This case involves an appeal by Bahl from a district court order granting a motion for summary judgment and dismissing his disability discrimination claims under the anti-discrimination provisions of the ADA.

Bahl is deaf and uses American Sign Language as his primary language. He holds a masters degree in American Sign Language and has taught in Minnesota high schools for many years on that subject. Bahl usually communicated with non-ASL speakers in person by using an interpreter and, alternatively, communicating by writing.

Bahl ignored a red light and drove through cross traffic in an intersection and was subsequently arrested by a St. Paul police officer. When the officer arrived next to the car, Bahl shook his head, gestured to his ear and said "no". He further indicated he wanted to communicate in writing, and he pointed to his mouth and said "drivers license" and then made a card shape with his hands.

Bahl claims the officer began pushing him in the car and hurt his shoulder and wrist. When Bahl reached to his right for paper and a pen, and began to write to tell the officer that his joints were sensitive, the officer sprayed Bahl with an aerosol subject restraint, and Bahl started flailing his arms. The officer pulled Bahl from his car, placed Bahl's arms behind his back, and an ambulance transported him to Regions Hospital for treatment.

The officer told the nurses that Bahl was deaf and had asked for an interpreter. Bahl did not understand some of the

words the officer was saying, and repeatedly wrote "ADA Law! must provide Interpreter or I'll file lawsuit."

The next day, a St. Paul police investigator went to the jail where Bahl was kept. He did not bring an interpreter but communicated in writing with Bahl. Bahl asked for a sign language interpreter, indicating it was his primary language, but the officer said "not true", and when Bahl asked him to respect his language, the officer wrote, "Writing is a language." The officer then read Bahl his rights and said he would go and look for an interpreter. After signing his Miranda warning, which was in writing, the officer did not return to speak with Bahl again and indicated, "It would have cost too much money."

The jury convicted Bahl of misdemeanor obstruction of legal process. Bahl began this action in Minnesota state court, claiming disability discrimination against the City of St. Paul and common law negligence. The case was removed to federal court, which granted the City's motion for summary judgment.

The Eighth Circuit has construed the ADA as requiring that qualified persons with disabilities receive effective communication that result in "meaningful access" to a public entity's services. It is a fact question as to whether interpreters are needed for the hearing impaired.

Bahl identified three discrete events during which he asserts the City denied him meaningful access to services: the traffic stop, the statement of the charges, and the post-arrest interview. The Eighth Circuit reviewed the traffic stop facts and the statement of the charges facts, and agreed that neither of these was sufficient to give Bahl any right under the ADA or, alternatively, that the City gave him as many rights as Bahl needed.

In reviewing the facts and allegation of post-arrest interview, the district court ruled that interrogation of persons in custody cannot be characterized as a "service" for purposes of the ADA. The City conceded at oral argument that statutes had been applied to many services and activities that are not constitutionally required.

At a minimum, the Eighth Circuit held that a question of fact exists as to whether the City began to provide the "services" of a post-arrest interview by reading Bahl his Miranda rights and negotiating with Bahl as to when an interpreter would be obtained. Secondly, a question of fact exists as to why the investigator did not continue with Bahl's interview. The officer testified that, after meeting with Bahl, he inquired about an interpreter but believed "it would have cost too much money." The Eighth Circuit stated that the fact that an ASL interpreter would cost the government perhaps more than the benefit received by Bahl was not a sufficient reason to reject the provision of aid. The Court reversed the motion for summary judgment and remanded for further proceedings. It further reversed the district court and held that the City was not entitled to vicarious official immunity.

The result of this case is that every city should review its policy as to whether the city has established any policies on the use of aids for a deaf person and whether any training is provided to the police officers about such policies.

4. FAIR LABOR STANDARDS ACT (FLSA)

a. Montgomery v. Havner, et al., 700 F.3d 1146 (8th Cir. 2012)

This case involves a retaliation claim against the Havners in violation of the Fair Labor Standards Act. In 2011, the Supreme Court held:

> "To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.

This complaint arose out of a situation wherein Montgomery decided to begin closing down for the day at 4:45 p.m. Kathy Havner saw Montgomery, told her she could leave, and Havner would clock her out. Montgomery later learned

that Havner had clocked Montgomery out at 4:45 p.m. Montgomery called Havner that evening to ask why she had been clocked out at 4:45. According to Montgomery, this conversation was civil and "ended nicely" with Havner agreeing to adjust Montgomery's clockout time. Havner then called Montgomery back a short time later to discuss a different office issue involving another employee taking breaks, and this conversation became heated. Soon after this heated conversation, Havner called Montgomery again and terminated her employment with the firm. Montgomery argued that Havner fired her in retaliation for Montgomery making a complaint about being clocked out early.

The district court granted Havner's motion for summary judgment, concluding that Montgomery failed to establish a prima facie case of retaliation under the FLSA because no reasonable jury could find Montgomery's call to Kathy Havner to inquire why she docked Montgomery's pay by 10 minutes could constitute "filing a complaint" about it under the FLSA. Montgomery appealed this district court decision. On appeal, the Eighth Circuit reviewed recent cases involving violations of the anti-retaliation provision of the FLSA and affirmed that the district court was correct in dismissing the case on summary judgment. See Kasten v. Saint-Gobain, a U.S. Supreme Court decision we analyzed at your last year's meeting.

5. TITLE VII

a. Glascock v. Linn County Emergency Medicine, PC, 698 F.3d 695 (2012)

Dr. Glascock, a female physician of Iranian origin, contracted with Linn County Emergency Medicine, PC (LCEM) to provide emergency medical services at Mercy Medical Center in Cedar Rapids. LCEM terminated Glascock, and Glascock brought claims under Title VII and the Iowa Civil Rights Act, alleging discrimination based on sex, pregnancy and national origin. The district court granted summary judgment to LCEM, concluding that Glascock could not assert a claim under either statute because she was an independent contractor, not an

employee. Glascock appealed, and the Eighth Circuit affirmed the ruling of the district court.

This is another in a series of cases analyzing whether an individual is an independent contractor or whether the individual is an employee of the employer.

Glascock entered an "Independent Contractor Physician Service Agreement" with LCEM in May, 2007, to work as an emergency room physician at Mercy Medical Center in Cedar Rapids, Iowa. The agreement was to last one year and renew for an additional year, unless terminated by either party with 90 days notice. It provided that Glascock would be offered an ownership position in LCEM after one year of "satisfactory service" and "upon the approval of a majority of the current owners." Glascock stated that it was her "intent and understanding" that she would become a part owner of LCEM after one year.

The Eighth Circuit reviewed the terms of the agreement, which gave Glascock great freedom in choosing her shifts, her monthly availability and scheduling preferences, and specified that she was free to engage in other professional activities. Glascock did file her own self-employment tax return. In reviewing the factors that determine whether a person is an independent contractor or an employee, the Court affirmed the district court's decision that these factors were in favor of LCEM.

If your city has an issue raised as to whether one of your employees is an independent contractor or an employee, this case would help show how the Eighth Circuit would analyze the facts and the law in the case. Generally speaking, the Eighth Circuit holds that, "To determine whether a hired individual is an employee or an independent contractor, we primarily consider whether the hiring party was able to 'control the manner and means by which a task is accomplished.'" It also listed twelve other factors which the Court should consider in making that determination.

6. ENFORCEMENT OF CITY ORDINANCE

a. Rogers Group, Inc. v. City of Fayetteville, Arkansas, 683 F.3d 903 (8th Cir. 2012)

This case involves an ordinance of the City of Fayetteville, Arkansas, providing "for the licensing and regulation of rock quarries." The ordinance provided that "to operate a rock quarry within the City or one mile beyond the City's corporate limits, a quarry operator must obtain a license from the City after demonstrating its full compliance with all requirements of the Ordinance." Unfortunately, there was no statutory authority in the State of Arkansas for a city to pass an ordinance zoning property located outside of a city's limits.

Rogers Group, Inc., the owners of an operating quarry, brought an action requesting the district court to "declare that the City has no authority to regulate or license the Quarry." The district court concluded that Rogers Group was likely to "prevail on the merits of its claim, based on lack of jurisdiction on the part of the City to legislate as to quarry activity outside its city limits" and entered an order enjoining the City from enforcing the ordinance.

The City of Fayetteville appealed this matter to the Eighth Circuit Court of Appeals which held in the case of Rogers Group, Inc. v. City of Fayetteville, Arkansas, 629 F.3d 784 (8th Cir. 2010), that the district court did not err in finding that Rogers Group was likely to succeed on the merits of its suit.

Following the appeal, the district court held a telephone conference call with the parties to discuss the status of the case – specifically, the pending motions for summary judgment. During this conference, the Court expressed its view that Rogers Group was entitled to partial summary judgment. The City then requested additional time to discuss the matter with the city council and thereafter the City passed an ordinance repealing the part of the ordinance making it applicable to quarries operating within one mile of Fayetteville's city limits.

Rogers Group then filed a motion for attorney fees and costs, seeking to recover $110,419.71 in attorney fees and costs incurred in prosecuting the action. The court granted the motion, finding that Rogers Group was a prevailing party in the case. The City appealed again, arguing that the Rogers Group was not a prevailing party in the case.

The Eighth Circuit held that, under the facts and pleadings of this case, Rogers Group was definitely a prevailing party and was entitled to attorney fees, including fees for this appeal.

There are two main issues in this case. Please note that Arkansas does not have any statute comparable to the Iowa statute (Section 414.23) which gives cities some authority outside of its territorial limits. Secondly, the cost of making an error of the size that Fayetteville made was very expensive, considering that it ended up paying a very substantial amount of attorney fees, as well as paying for its own attorney fees.

Before a city passes a zoning ordinance for land outside of the city's limits, make sure there is authority which allows the city to do so.

7. FAMILY MEDICAL LEAVE ACT (FMLA)

a. Clinkscale v. St. Therese of New Hope, 701 F.3d 825 (8th Cir. 2012)

Clinkscale, an employee of St. Therese long-term care facility, was assigned to work in a unit she did not have specific training for, and she expressed apprehension about this to her supervisor. She was told she had no choice but to work on that unit. She went to see HR Director, Rand Brugger, and began exhibiting the signs of a panic attack. She was crying and shaking severely, even asking for an ambulance. Because of her distress, Brugger told her to go home for the day and return the next day make a plan. Clinkscale saw her physician the next morning, who diagnosed her with situational anxiety attacks. He advised therapy and that she take the rest of the week off. Clinkscale returned to St. Therese with her physician note, and the HR

department gave her FMLA forms to complete. Later that day, however, she was notified by phone that she was being terminated for walking off the job.

Clinkscale filed suit, stating that St. Therese interfered with her right to take reasonable medical leave under FMLA. The district court granted summary judgment in favor of St. Therese, noting that she did not give St. Therese adequate notice of her medical problems prior to her termination.

The Eighth Circuit noted that Clinkscale needed to give notice to St. Therese for an FMLA claim of interference. While the district court stated she did not give notice soon enough, the Eighth Circuit found she did. FMLA requires that notice be given "as soon as practicable" when an unforeseen event occurs. This normally means at least two business days, and Clinkscale gave notice the next morning after the event. The Court found that this is an area where a reasonable jury could conclude that she gave notice "as soon as practicable."

The Court also rejected the argument that she was no longer an employee when she gave notice, as they found she left the premises of St. Therese on the instructions of her supervisor. Further, when she returned the next day, she was given FMLA forms to fill out. Thus, the Eighth Circuit found that whether St. Therese knew of her potentially FMLA qualifying condition before they terminated her was also question of fact. The Court rejected the argument that Clinkscale was terminated for patient abandonment because they found a causal link between her anxiety attack and her refusal to work. Finally, the Court rejected the argument that the FMLA only covers existing medical conditions, finding that argument inconsistent with the language and policy objectives of the legislation.

Therefore, because issues of material fact could be construed by a reasonable jury in favor of Clinkscale, summary judgment was not appropriate.

8. INDEPENDENT CONTRACTOR

a. Fesler v. Whelen Engineering Company, Inc. , 688 F.3d 439 (8th Cir. 2012)

Fesler began working as a sales representative for Whelen in 1980, based on an oral conversation and no signed contract or agreement. Fesler was assigned a territory to cover and was then paid based on commission and percentages of sales in his territory. Whelen issued Fesler a 1099 IRS form annually for his commission payments. Fesler used his commission payments to fund what would eventually become a corporation, David Kimm Fesler, LTD. This corporation hired employees and incurred other expenses to promote and sell Whelen products. Fesler received several policy documents throughout his time with Whelen, all of which stated that sales representatives were "independent contractors, not employees." The same document also gave Whelen some limited control over Fesler, requiring him to contact the plant once a day. In 2004, Whelen termimated Fesler, stating that the company was going in a different direction. Fesler sued, claiming a breach of unilateral contract for employment.

The district court granted summary judgment for Whelen, finding that Fesler was an independent contractor.

The ultimate issue is whether Fesler was an employee or an independent contractor. Iowa law has ten established factors to distinguish between the two employment subtypes; however, the primary focus is on the employer's control over the employee. The Court found that, in this case, the nature of the relationship was an independent contractor because Fesler was paid by his own company, not by Whelen. While Whelen did exercise some control over Fesler's work, the limited degree of direction did not make Fesler an employee. Whelen did not manage the "methods, details, and particulars" of Fesler's work so as to give rise to a relationship of employer and employee. Fesler was an independent contractor and the contract claim cannot stand.