defense UPDATE

The Iowa Defense Counsel Association Newsletter Spring 2012 Vol. XIV, No. 2

POWADA: A GROSS OVERREACTION

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Iowa's two senators, Chuck Grassley and Tom Harkin, have sponsored legislation that seeks to overhaul federal employment practice statutes—and to revamp them in a decidedly plaintiff-friendly manner. In mid-March 2012, Harkin, Grassley, and Patrick Leahy introduced Senate File 2189, dubbed the Protecting Older Workers Against Discrimination Act ("POWADA"). In short, POWADA reflects a sweeping proposal to benefit plaintiffs and the plaintiff's bar—with a concomitant effort to burden employers. POWADA seeks to change the default civil litigation rule by setting a standard that shifts the burden of persuasion to the employer. This article will review the status of the law surrounding the burden of proof in employment cases, describe POWADA's text, and support the conclusion that the legislation is nothing more than a gift to the plaintiff's employment bar.

Harkin and Grassley's bill is an attack on the Supreme Court's analysis in *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009). The Senators contend in part that in *Gross*, the Supreme Court "departed from . . . well-established precedents." The bill's "findings and purposes" section outlines at length the basis for Harkin and Grassley's belief that the *Gross* decision was a departure from precedent—and as discussed, these "findings" are plainly erroneous. The press release surrounding the introduction of the legislation suggests that neither POWADA's authors nor their staff have analyzed the state of the law. Ironically, although Senator Grassley has no apparent reservations in attacking the Supreme Court because he deems the *Gross* decision not sufficiently plaintiff-friendly, Grassley recently criticized statements by the President as an "attack" on the Supreme Court. Jason Clayworth, *Branstad sides with Grassley's 'stupid' comment*, Des Moines Register 1B (Apr. 10, 2012). Grassley and Harkin have taken on legislation that has an extraordinary purpose—to benefit plaintiffs and the plaintiff's bar.

Background

Several federal statutes regulating employment practices authorize a but-for causation standard, including Title VII, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA"). *See e.g*. 42 U.S.C. § 2000e-2(a) (Title VII—prohibits discriminatory employment practices based on race, color, religion, sex, or national origin);[1] 42 U.S.C. § 2000e-3(a) (Title VII—prohibiting retaliation);[2] 29 U.S.C. § 623(a)(1) (ADEA—prohibiting discriminatory employment practices based

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1. Title VII makes it unlawful for an employer to take an adverse employment action against an individual "*because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added).

2. Title VII's anti-retaliation provision prohibits taking an adverse employment action against an individual "*because* he has opposed any practice made an unlawful employment practice . . . or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added).

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on age);[3] 29 U.S.C. § 623(d) (ADEA—prohibiting retaliation);[4] 42 U.S.C. § 12112(a) (ADA—prohibiting discriminatory employment practices based on disability);[5] 42 U.S.C. § 12203(a) (ADA—prohibiting retaliation).[6] The Supreme Court has interpreted statutory text containing a "because of" standard to require an employee to prove that consideration of an unlawful factor was outcome determinative in the adverse action at issue. *See e.g. Gross*, 129 S. Ct. at 2351; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). That interpretation is consistent with the conventional practice in civil litigation: when the "statutory text is silent on the allocation of the burden of persuasion," the "ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims." *Gross*, 129 S. Ct. at 2351 (citing *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)).

At times, Congress has made deliberate policy choices to set a lesser standard. In 1991, for example, Congress amended Title VII to create an alternative basis for imposing liability, stating:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Pub. L. No. 102-166, § 107. The 1991 Act established by express statutory text the rules of production and persuasion governing cases arising under Title VII. *See* 42 U.S.C. § 2000e-2(m). The 1991 Act went on to state that for purposes of Title VII, "[t]he term 'demonstrates' means meets the burdens of production and persuasion." Pub. L. No. 102-166, § 104; *see also* 42 U.S.C. § 2000e-2 (m). Additionally, the 1991 Act made the "same decision" defense an affirmative one, at least as to remedy. Pub. L. No. 102-166, § 107. An employer found liable under 42 U.S.C. § 2000e-2(m) may limit remedies, but may not avoid liability, if it "demonstrates" it would have made the same decision absent the impermissible factor. 42 U.S.C. § 2000e-5(g)(2)(B)(i)–(ii).

Similarly, Congress made a deliberate policy choice to use the less demanding "motivating factor" language in another federal statute: the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Like the 1991 Act's Title VII amendments, a plaintiff may prevail under USERRA by proving that military service was a "motivating factor" in an employer's adverse employment action. 38 U.S.C. § 4311(c)(1). The employer then may avoid liability by proving that it would have taken the same action absent the protected conduct. *Id*. In contrast to the anti-retaliation provisions under Title VII, the ADEA, and the ADA, USERRA's anti-retaliation provision specifies that the plaintiff has the burden to prove protected conduct was a motivating factor in the challenged employment decision, then the burden shifts to the employer to prove the same decision defense. 38 U.S.C. § 4311(c)(2).

In practice, under these federal "motivating factor" statutes, a plaintiff merely has to prove membership in a protected class, an adverse employment action, and the protected group status was a "motivating factor" in the adverse employment decision. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100–02 (2003). The plaintiff does not have to establish but-for causation. The "same decision" defense is a corollary to the motivating factor standard, whereby an employer demonstrates another neutral motivating factor drove a decision and would have led to the same outcome. The same decision affirmative defense places the burden of persuasion on the defendant in most race and sex discrimination cases.

For an employer, prevailing on the "same decision" defense can be a pyrrhic victory. Even if an employer prevails on the defense, the consequence is denying the plaintiff compensatory damages. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i)–(ii). Attorney's fees are still available to plaintiff's lawyers. As most experienced employment defense litigators know, plaintiff's attorney's fees are often the largest element of damage in many employment cases—especially failure-to-promote or equal-pay claims. Thus, a plaintiff's lawyer who fails to obtain monetary relief for the plaintiff may still "cash in" under the "mixed-motives" theory. It is not entirely clear, however, whether the relative lack of success in such a case should impact a plaintiff's lawyer's monetary recovery. Among the federal courts that have decided whether a fee claim should be denied or reduced after an employer establishes the "same decision" defense, most agree that the award of attorney's fees is a matter left to the discretion of the district court. *See Sheppard vs. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1335 (4th Cir. 1996). *See also Garcia vs. City of Houston*, 201 F.3d 672, 677–78 (5th Cir. 2000).

In contrast to Title VII (as amended in 1991) and USERRA, the ADEA, the ADA, and the retaliation prohibitions in Title VII, the ADEA, and the ADA, do not authorize shifting the burden of per-

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3. The ADEA makes it unlawful to take an adverse employment action "*because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

4. The ADEA's anti-retaliation provision prohibits taking an adverse employment action against an individual "*because* such individual, member or applicant for membership has opposed any practice made unlawful by this section, or *because* such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d) (emphasis added).

5. The ADA prohibits discrimination in employment "against a qualified individual *on the basis of* disability." 42 U.S.C. § 12112(a) (emphasis added).

6. The ADA's anti-retaliation provision prohibits taking an adverse employment action against an individual "*because* such individual has opposed any act or practice made unlawful . . . or *because* such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a) (emphasis added).

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suasion on causation to the employer. Although some circuit splits exist, generally, under these statutes, a plaintiff bears the burden of proving that protected class status must have "actually played a role in [the employer's decisionmaking] process and had a *determinative influence* on the outcome." *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 143 (2000) (emphasis added); *see also Hazen Paper Co*., 507 U.S. at 610 (the employee must prove that age actually motivated the employer's decision). The Eighth Circuit Court of Appeals has repeatedly held that retaliation claims are subject to the "determinative—not merely motivating-factor" standard. *Van Horn v. Best Buy, Stores, L.P.*, 526 F.3d 1144, 1148 (8th Cir. 2008); *see also Alvarez v. Des Moines Bolt Supply, Inc*., 626 F.3d 410, 416 (8th Cir. 2010).

In 2009, the Supreme Court recognized in the *Gross* decision that "Title VII is materially different with respect to the relevant burden of persuasion." 129 S. Ct. at 2348. *Gross* held that because the ADEA's statutory language does not authorize mixed-motive liability, a mixed-motive theory is not available to a plaintiff. The Supreme Court clarified that to establish a disparate-treatment claim under the ADEA, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id* at 2350. Moreover, "ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims." *Id*. at 2351. Consequently, a mixed-motive jury instruction "*is never proper* in an ADEA case." *Id*. at 2346 (emphasis added). The Supreme Court based the *Gross* decision on the ADEA's statutory text and the typical understanding of but-for causation in civil litigation. *Id*. at 2350 ("[t]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."). The Supreme Court also referenced several authorities recounting the typical understanding of but-for causation. *Id*.

Response to *Gross*: POWADA

POWADA would amend several federal statutes regulating employment rights, including discrimination and retaliation under the ADEA, the ADA, the Rehabilitation Act of 1973, and Title VII's retaliation provisions, by inserting the mixed-motives proof concept dreamed up by the plaintiff's bar in the 70s and 80s and codified in the Civil Rights Act of 1991 with regard to Title VII cases. If enacted, the POWADA legislation would essentially convert most age discrimination, and disability discrimination, and retaliation cases into "mixed-motives" cases.

POWADA explicitly rejects the Supreme Court's ruling in *Gross*. The proposed legislation seeks to shift the burden of proof to the employer in all age discrimination cases, requiring a defendant in an age case to bear the burden of proving that it did not take the plaintiff's age into account in taking an employment action. In his press release, Senator Harkin noted that the legislation was intended to overturn *Gross* and to "restore the law to what it was for decades…." Harkin's release ignores the fact that prior to *Gross* there was no clarity concerning the burden of proof in an age discrimination case except for the fact that most courts presented with the problem concluded that the plaintiff, not the defendant, should bear the burden of proof.

The authors of POWADA claim that *Gross* has somehow had a chilling effect on age discrimination claims. They also allege that *Gross* has resulted in some sort of unfairness in the litigation process. There is absolutely no statistical or empirical evidence to support either of these claims.

Moreover, the bill's "findings and purposes" rely on demonstrably inaccurate statements. For example, the bill includes a statement that "Congress intended that courts would interpret Federal statutes, such as the ADEA, that are similar in their text or purpose to title VII of the Civil Rights Act of 1964, in the ways that were consistent with the ways in which courts had interpreted similar provisions in that title VII." S. 2189, 112th Cong. § 2(a)(3) (2012). As discussed, the statutory text in the ADEA and the relevant provision of Title VII are not similar. The ADEA's statutory text reflects a congressional purpose to authorize a different standard for Title VII and the ADEA. In *Gross*, the Supreme Court directly addressed this point, explaining that unlike Title VII, the ADEA's text "does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross*, 129 S. Ct. at 2349. The Supreme Court observed that in 1991, when Congress amended Title VII to add the "motivating-factor" standard, Congress neglected to add such a provision to the ADEA, even though it contemporaneously amended the ADEA in several ways. *Id*. (citing Civil Rights Act of 1991, § 115, 105 Stat. 1079; *Id*., § 302, at 1088). Consequently, the Supreme Court concluded that "[w]e cannot ignore Congress's decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." 129 S. Ct. at 2349.

POWADA rejects these clear textual differences as a basis for the Supreme Court's decision in *Gross*. Incredibly, POWADA is critical of the Supreme Court for interpreting Congress's "failure to amend any statute other than title VII" as evidence that Congress did not intend to allow mixed-motives claims under other statutes. S. 2189 § 2(a)(4)(A). Senators Harkin and Grassley appear to suggest that the Supreme Court should have encroached on Congress's legislative function. Although POWADA as a whole contends that the Supreme Court's decision in *Gross* departed from congressional intent, in fact, the *Gross* decision reflects a careful effort to avoid encroaching on the separation of powers by rewriting a statute to give it a meaning that Congress did not capture in the statutory text.

This is the second attempt by Harkin to overturn *Gross*. An earlier

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version of POWADA was introduced in both the House and Senate. S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009). The 2012 version has been described by some civil rights advocates as being more palatable than the earlier version because it does not contain a retroactivity provision. *See* Ilyse Schuman, *Bill Would Change Burden of Proof, Causation Standards in ADEA, ADA Cases*, Washington DC Employment Law Update (Mar. 19, 2012), http://www.dcemploymentlawupdate.com/2012/03/articles/discrimination-in-the-workplac/bill-would-change-burden-of-proof-causation-standards-in-adea-ada-cases/. This is simply wrong. The final provision of the bill makes it applicable to all claims "pending" on or after the enactment of the legislation. This language is inherently ambiguous, but, because the *Gross* litigation is still active, if the bill is enacted, Gross's lawyers will presumably claim that the POWADA amendment applies. Moreover, what Grassley and Harkin and others ignore is the fact that no jury has ever held that Jack Gross was treated differently "because of" his age as is required by the plain language of the ADEA.

Application of the *Gross* decision by lower courts

Courts have applied the *Gross* decision since its announcement. It has not only been applied to age discrimination cases, but also to claims brought under the ADA and the Family and Medical Leave Act. *See Serwatka v. Rockwell Automation, Inc*., 591 F.3d 957, 959 (7th Cir. 2010) (applying *Gross* to disability discrimination claims). But see *Zimmerman v. AHS Tulsa Regl Med. Ctr., LLC*., 2011 WL 6122629 at *7 (N.D. Okla. Dec. 8, 2011). Some courts have applied the *Gross* but-for standard to ADEA retaliation cases. *See Barton vs. Zimmer, Inc*., 662 F.3d 448, 457 (7th Cir. 2011); *See also Pantoja vs. Monterey Mushrooms, Inc*., 2011 WL 4737407 at *6 (C.D. Ill. Oct. 6, 2011) (FMLA, observing that *Gross* but-for standard applies in all employment cases unless the statutory language indicates otherwise). On the other hand, other courts have held that *Gross* should not be applied beyond the context of an ADEA case.

Iowa's Morass

In *DeBoom v. Raining Rose, Inc*., the Iowa Supreme Court expressed its intention to follow, rather than deviate from, the companion federal analytical framework when analyzing the Iowa Civil Rights Act ("ICRA"). 772 N.W.2d 1, 13–14 (Iowa 2009). Rather than distinguishing the ICRA from federal law, in *DeBoom*, the Iowa Supreme Court adopted the Eighth Circuit Court of Appeals Model Jury Instructions for a Title VII claim. Yet in *DeBoom*, the Iowa Supreme Court adopted a Title VII model jury instruction that was based on Title VII's "motivating factor" standard (i.e., the 1991 Act) rather than the ICRA's "because of" causation standard. Although the Iowa Supreme Court has recognized distinctions between the ICRA and federal law when clear textual differences in the statutory language exist, the ICRA does not mirror Title VII's 1991 amendments. The ICRA, like the ADEA, establishes liability if an employer discharges an employee "because of" a protected characteristic. *See* Iowa Code § 216.6. The Eighth Circuit Court of Appeals has noted the inconsistency between the ICRA's statutory text and the standard outlined in *DeBoom*. *See Newberry v. Burlington Basket Co*., 622 F.3d 979, 982 (8th Cir. 2010). The Iowa Supreme Court has not yet had the opportunity to follow up on the *DeBoom* decision and resolve lingering questions.

The appellate briefing in *DeBoom* reveals that neither litigant addressed the textual difference in Title VII (the "motivating factor"–"same decision" framework) and the ICRA's "because of" causation standard. Neither party notified the Iowa Supreme Court about the Supreme Court's *Gross* decision or its possible impact on the ICRA's interpretation. The Iowa Supreme Court's decision makes no reference to *Gross*. Ironically, it appears that even the appellant ignored the U.S. Supreme Court decision interpreting identical statutory language. The *DeBoom* decision has been cited as committing Iowa to a "motivating factor" analysis in all discrimination claims. This is simply not true. In *DeBoom*, the court was faced with the choice between a common law tort proof standard and an Eighth Circuit model instruction. Faced with that difficult choice, the Supreme Court of Iowa opted for one of the choices. Were it to have been made aware of the simple logic of the *Gross* analysis, there is every reason to believe that the Iowa Supreme Court would have applied *Gross* to the ICRA. Hopefully the Iowa Supreme Court will be presented with an opportunity to do so in the near future.

Conclusion

POWADA is a solution in search of a problem that does not exist. If enacted, it will certainly breathe new life into the plaintiff's employment bar. It probably will not have any impact on the number of age discrimination claims that are pursued before state and federal nondiscrimination agencies. It will, however, undoubtedly increase the number of state and federal lawsuits alleging age discrimination. Faced with the prospect of recovering attorney's fees even if they fail to recover monetary damages for a client, if POWADA is enacted, plaintiff's lawyers will not be able to resist asserting mixed-motives discrimination and retaliation claims under ADEA, the ADA, and Title VII's retaliation standard. POWADA might more appropriately be dubbed a "lawyer's full employment bill." As members of the Iowa defense bar understand that every plaintiff's claim must be defended, perhaps the IDCA should stand mute in the POWADA argument. This cynical approach, however, overlooks the fact that encouraging litigation where only the lawyers are the winners is ultimately self-destructive. ■

IOWA DEFENSE COUNSEL INTERIM LEGISLATIVE REPORT APRIL 13, 2012

By Scott Sundstrom, Nyemaster Goode, P.C., IDCA Lobbyist

Scott Sundstrom

The 2012 Iowa legislative session is nearing its end. While most of the policy issues have been resolved, a number of significant issues – most notably the state budget – are still being negotiated and likely won't be resolved until the final hours of the legislative session. What follows is a short report about the status of issues of interest to Iowa Defense Counsel Association (IDCA) members. A full legislative report will follow after the completion of the legislative session.

General Issues

As of the writing of this report, the major outstanding issues at the legislature include the state budget, commercial property tax reform, education reform, and mental health services redesign.

The budget is determined in a number of bills broken down by specific state agencies or funding sources. Virtually all of these budget bills have been sent to conference committees to resolve significant differences between the Republican-controlled House and the Democratic-controlled Senate. Conference committee reports are not amendable and can only be voted up or down on the House and Senate floors. This simplifies the process of putting together compromises and keeps politically difficult issues from derailing budget deals.

Property tax reform, education reform, and mental health redesign are all considered "must-do" bills by some combination of the House, Senate, and Governor. They are also all high-profile and potentially very expensive. Whether these issues get tackled, and in what form, is yet to be determined.

Judicial Branch Budget

This year, IDCA is working in conjunction with other lawyer groups (the Iowa State Bar Association, the Iowa Association for Justice, and local bar associations), judges, court reporters, and others to seek full funding for Iowa's judicial branch. Simply funding the court system at the same level as last year (a "staus quo budget") is not adequate. With only a status quo budget, built-in costs, such as mandated salary increases, will result in further service cuts by an already overburdened court system. A significant part of the joint effort for full court funding, known informally as "Full Court Press," involves lawyers, judges, and clients meeting with their local legislators to educate lawmakers about the importance of adequate funding of Iowa's court system.

The judicial branch appropriations bill is House File 2338. The House version of the bill appropriates $156.4 million to the judicial branch. The Senate version of the bill appropriates $162.9 million. The Governor originally requested $166.4 million. The bill is now in conference committee. The members of the conference committee are: Sen. Rob Hogg (D-Cedar Rapids), Sen. Tom Hancock (D-Epworth), Sen. Gene Fraise (D-Ft. Madison), Sen. Steve Kettering (R-Lake View), Sen. Roby Smith (R-Davenport), Rep. Gary Worthan (R-Storm Lake), Rep. Lance Horbach (R-Tama), Rep. Rich Arnold (R-Russell), Rep. Todd Taylor (D-Cedar Rapids), and Rep. Mary Wolfe (D-Clinton). Sen. Hogg and Rep. Wolfe are attorneys. The fate of the judicial branch budget is in the hands of these conference committee members. IDCA members are urged to contact their legislators – particularly if they are conference committee members – and ask for the Senate budget number to be adopted. Especially helpful with House Republicans would be information from clients indicating the increased cost to businesses resulting from delayed trials, hearings, and rulings when courts are underfunded. Legislators need to understand that court funding is important to all Iowans, not just lawyers.

Policy Issues

Not surprisingly given the split control of the House (Republican) and Senate (Democratic), very little tort-reform legislation was enacted this session. Here are a few bills of note this session:

Seat Belts: The IDCA had one affirmative legislative proposal this year. House Study Bill Seat 575 would have removed the arbitrary 5% limit on mitigating damages when a plaintiff fails to wear a seatbelt. The bill received a subcommittee hearing in the House, but faced strong opposition from both the Iowa Association for Justice and the Iowa State Bar Association. It did not advance. Attempts to amend that bill onto other bills were not successful either.

Trespassing: House File 2367 would have made the duties a landowner owes to a trespasser part of the Iowa Code. Although the bill generally codified the current common law duties, it deviated in some significant ways that could favor plaintiffs, particularly in "attractive nuisance" cases involving minors. Consequently, the IDCA opposed the bill after it was amended on the House floor. The bill was not taken up in the Senate.

Statute of Repose for Building Defect Claims: The Master Builders of Iowa and the Iowa Chapter of the American Institute of Architects sought legislation this session to shorten the statute of

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repose for building defect claims. Iowa currently has fifteen year statute of repose, which is among the longest in the nation. House File 2307 proposed to change the statute of repose to ten years (an earlier version of the bill had eight years). The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association. It was approved by the House Commerce Committee, but was not debated on the House floor.

Civil Procedure: Both the House and Senate Judiciary Committees approved bills that made several changes to procedure in civil cases (House File 2425 and Senate File 2305, respectively). The bills included a hodge-podge of changes, some of which were defense-friendly, others of which were plaintiff-friendly. There was not great enthusiasm for either bill by any interested party. Neither bill was taken up for debate on the floor of either chamber. One concept discussed in the House bill, a simplified procedure for small-dollar civil cases, is of interest to the IDCA and is a recommendation of the recently released Iowa Civil Justice Reform Task Force appointed by the Iowa Supreme Court (the report is available at http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf). This issue may receive significant discussion during the 2013 legislative session.

Statute of Limitations for Claims Alleging Sexual Abuse of Minors: Senate File 2295 modifies the statute of limitations for civil and criminal actions relating to the sexual abuse of minors. The bill would extend the time to file a claim that occurred when the injured person was a minor from one year after the attainment of majority to ten years after the attainment of majority. The bill also provides that a civil action for damages relating to sexual abuse that occurred when the injured party was a child under fourteen years of age, shall be brought within ten years from the time of the discovery of both the injury and the causal relationship between the injury and the sexual abuse. Current law specifies such an action shall be brought within four years of the time of discovery of both the injury and the causal relationship between the injury and the sexual abuse. The bill passed the Senate and has been approved by the House Judiciary Committee. It has not been brought up for debate in the House. Although it is still technically eligible for debate in the House, the bill's prospects for passage appear dim. ■

IDCA SCHEDULE OF EVENTS

May 3, 2013
IDCA Webinar - Digging Deeper: Cross-Examination Techniques
See inside this issue to register!

September 13 – 14, 2012
48th Annual Meeting & Seminar
West Des Moines Mariott, West Des Moines, IA
Watch for details in Summer 2012.

September 19 – 20, 2013
49th Annual Meeting & Seminar
West Des Moines Mariott, West Des Moines, IA

September 18 – 19, 2014
50th Annual Meeting & Seminar
West Des Moines Mariott, West Des Moines, IA

IDCA WELCOMES NEW MEMBERS

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MESSAGE FROM THE PRESIDENT

Gregory G. Barntsen

Since my last report to the IDCA membership IDCA has been moving forward on several fronts in order to become a more viable and effective organization. We have accomplished the following during the last quarter:

1. The Board adopted a five-year strategic plan with a new mission: **To be the trusted professional voice for the defense of civil litigants.** It is IDCA's vision to protect and promote a balanced civil justice system through advocacy, membership growth, education and increasing member engagement.

2. In order to accomplish these goals, IDCA reviewed its committee structure and solidified eight functional committees with specific responsibilities directly related to IDCA's strategic plan. The following are IDCA's committees:

Annual Meeting & Seminar Committee
Assists in organizing annual meeting events and CLE programs.

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Commercial Litigation and Products Liability Committee
Monitor current developments in the area of commercial litigation and act as resource for the Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on commercial litigation issues. Monitor current development in the area of product liability; act as resource for Board of Directors and membership on product liability issues. Advise and assist in amicus curiae participation on product liability issues.

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Employment Law and Professional Liability Committee
Monitor current developments in the area of employment law; act as a resource for the Board of Directors and membership on employment law issues. Advise and assist in newsletter and in amicus curiae participation on employment law issues. Monitor legislative activities in the area of professional liability; act as a resource for the Board of Directors and membership on professional liability issues. Advise and assist in newsletter and amicus curiae participation.

Co-Chairs: Frank B. Harty
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Legislative Committee
Monitor legislative activities affecting judicial system; advise Board of Directors on legislative positions concerning issues affecting members and constituent client groups.

Chair: Gregory A. Witke
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Membership and Marketing Committee
Review and process membership applications and communications with new Association members. Responsible for membership roster. Provide assistance with public relation efforts for the organization including media information. Involvement with the website planning and with the jury verdict reporting service. Monitoring the District Representative reporting of jury verdicts in Iowa.

Co-Chairs: Gale E. Juhl, JD
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Tort and Insurance Law and Workers Compensation Committee
Monitor current developments in the area of tort and insurance law; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on tort and insurance law issues. Monitor current developments in the area of Worker's Compensation; act as a resource for Board of Directors and Membership on comp issues. Advise and assist in newsletter and amicus curiae issues.

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PRESIDENT'S MESSAGE CONTINUED ... *CONTINUED FROM PAGE 8*

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Young Lawyers and Social Medial Committee
(35 yrs old & younger or 10 yrs & under in practice)
Liaison with law school and young lawyer trial advocacy programs. Planning of Young Lawyer Annual Meeting reception and assisting in newsletter and other programming. Liaison with law school trial advocacy programs and young lawyer training programs.

Co-Chairs: Benjamin M. Weston
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3. IDCA solicited member involvement on these committees through email. We received a great response and, as of the writing of this email, committees are beginning to have their initial meetings. It isn't too late to join a committee! Just send an email to Heather Tamminga at staff@iowadefensecounsel.org and identify the committee in which you would like to participate.

4. The Membership and Marketing Committee established goals to develop and identify key contacts with insurance companies and large self-insurers for potential new members; conduct a survey of potential insurance representatives to discern how they can become engaged and be members of our association; and to review, research and make contact with other organizations used by insurance organizations to determine ways the IDCA can provide reading materials, seminars and determine the nature of the membership benefits of the organizations that are the most effective voices on insurance and defense-related issues in Iowa and the nation.

5. The Legislative Committee has been active with the assistance of the IDCA's lobbyists and has gone on record opposing legislation to change the liability of an owner, lessee or occupant of land for injury to a trespasser on the land. This bill was opposed as it expanded that liability and there was no need for the proposed legislation based on the current common law in Iowa. The Committee has been active monitoring the proposed judicial budget and providing input to legislators through the committee and IDCA members in an attempt to have the budget increased to the judiciary so that services can be improved.

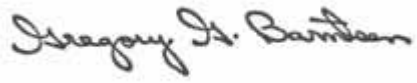
6. The IDCA Articles of Incorporation and Bylaws have been reviewed by Andrew Van Der Maaten and Richard Whitty and revisions have been proposed to make each of these documents reflect the current vision and goals of the organization. The proposed revisions were reviewed by the Board of Directors at its April 13, 2012, meeting and a resolution will be adopted to approve both documents at the IDCA Annual Meeting in September.

7. Heather Tamminga, Executive Director, created an IDCA Volunteer Manual for all Committee chairs and members to use in performing their duties.

8. With the new committee structure and strategic plan in place, IDCA hopes to increase its membership and the benefits, along with greater membership participation.

9. The Annual Meeting & Seminar Committee is recruiting speakers and sponsors for the IDCA Annual Meeting & Seminar, September 13 - 14, 2012..

I would like to personally thank each of you who has volunteered to speak at the Annual Meeting or serve on an IDCA committees. I encourage each of you to become involved with IDCA as committee members or as individuals making suggestions to help our organization be more effective in providing its members with benefits and promoting the vision of our organization. I also like to give my thanks to Heather Tamminga, Executive Director; Bruce Walker, President-Elect; Jim Craig, Secretary; and Noel McKibbin, Treasurer, for all the hard work they have put in assisting me in my position as President.



ELIMINATING "MULLIGANS":

THE IOWA SUPREME COURT CLARIFIES THE "FAILURE OF ACTION" STATUTE

By Jason M. Casini, Whitfield & Eddy, PLC, Des Moines, IA

Jason M. Casini

True story: Trial was less than two weeks away. The settlement conference had been a complete disaster for Plaintiff's counsel. After being chastised for late pre-trial filings and lectured extensively by the District Court that "slip and fall" cases involving relatively minor personal injuries were faring worse than "coin flips" in that venue, Plaintiff's counsel still insisted on presenting a "bottom line" settlement demand that was exponentially higher than his client's questionable "specials." In the process, it also became clear that he was scrambling to obtain perpetuation depositions for two of her three treating physicians, thereby putting several elements of damage in serious jeopardy. As the settlement conference rapidly fell apart, defense counsel struggled to contain their delight at the opportunity to actually try such a weak case.

Several days later, however, the stack of incoming mail contained a surprise - a service copy of a file-stamped "Dismissal Without Prejudice" filed by the Plaintiff. My curiosity piqued, I called Plaintiff's counsel to inquire why he had chosen to simply dismiss the case, without even checking to determine if the nominal settlement offer presented by the Defendants might still be "on the table." Instead, I was told that Plaintiff's counsel intended to re-file the case. When I asked exactly how Plaintiff's counsel intended to re-file a personal injury claim **in 2008** for a "slip and fall" incident that had occurred **in 2003**, without being barred by statute of limitation, I was told that there was an "often overlooked" Iowa statute that permitted a plaintiff to dismiss their lawsuit and later re-file it, for "any reason," at "any time prior to trial - or even during trial." It was essentially "a mulligan" for plaintiffs that he had learned about during a recent seminar for trial lawyers.

And so began a rather unpleasant initial introduction to the "failure of action" statute, Iowa Code 614.10:

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

Of course, after reading the statute, it became apparent that the expansive interpretation suggested by Plaintiff's counsel disregarded the one specific exception contained in the statute: "negligence in its prosecution." Indeed, the case law interpreting the statute made it clear that a plaintiff seeking to utilize Iowa Code 614.10 to try to "save" a previously dismissed claim from the statute of limitation must **plead** and **prove** four essential elements: (1) The failure of the former action was not caused by the plaintiff's negligence or the negligence of their counsel; (2) the commencement of the new action occurred within six months following the "failure" of the first action; (3) the parties must be identical; and (4) the causes of action must be identical.

As promised, a new Petition at Law materialized several months later. In it, the Plaintiff re-asserted her personal injury claims, along with a general reference to Iowa Code 614.10. Following receipt of predictably evasive discovery responses, which failed to provide any specific explanation as to why Plaintiff had not been "negligent in the prosecution" of the previous case, I proceeded with a Motion for Summary Judgment. Plaintiff's Resistance relied upon an Affidavit by none other than her legal counsel, who stated that the decision to dismiss the previous case just prior to trial was based upon a "conscious, reasoned and reasonable" strategy decision, based upon his professional judgment that "dismissal and re-filing" was an "absolute right" under current Iowa law. Additionally, the previous case had supposedly been dismissed because "emotions ran high" during the settlement conference, so delaying trial would allow for a "cooling off period" and therefore "much increase the odds" of reaching a settlement.

Delaying trial through a voluntary dismissal and re-filing would provide additional time to determine if Plaintiff's personal injuries would be "permanent."

Amazingly, the District Court considered the conclusory and entirely self-serving Affidavit sufficient "proof" that the voluntary dismissal of the prior case was not due to "negligence in its prosecution" and therefore denied the Motion for Summary Judgment. (Postscript: The case proceeded, very briefly, but the fateful strategy choice to dismiss the previous case just before trial eventually proved costly to the Plaintiff, as a Notice of Bankruptcy by the Defendant soon followed and Plaintiff recovered nothing on her personal injury claims).

Since my initial experience with the "failure of action" statute, it became apparent, through sharing "war stories" with colleagues and reviewing subsequent published decisions, that some plaintiff's lawyers had been alerted to the existence of the "failure of action" statute and were using it – or, more accurately, abusing it – with increasing frequency to escape "jams" in the late stages of litigation. What was once described by the Iowa Supreme Court as a "seldom noticed" procedural provision, the "failure of

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ELIMINATING "MULLIGANS": *THE IOWA SUPREME COURT CLARIFIES THE "FAILURE OF ACTION" STATUTE ...* *CONTINUED FROM PAGE 10*

action" statute had "evolved" from a narrow exception to statutes of limitation intended to relieve plaintiffs from harsh results due to "technical" failures beyond their control into a nearly unfettered procedural "escape hatch" for plaintiffs lawyers who had failed to properly prepare for trial. Indeed, some plaintiffs lawyers - such as my opposing counsel several years ago - were suddenly insisting that the "absolute right" to unilaterally dismiss a case provided by Iowa Rule of Civil Procedure 1.943 extended to an "absolute right" to dismiss and then re-file pursuant to Iowa Code 614.10.

On September 30, 2011, however, the Iowa Supreme Court's decision in *Furnald v. Hughes*, 804 N.W.2d 273 (Iowa 2011), clarified the vitality of the requirement that the dismissal of the prior case not be attributable to "negligence in its prosecution." The Iowa Supreme Court observed that "saving statutes," such as Iowa Code 614.10, "are not ordinarily designed to swallow entirely the ordinary restrictions of the statute limitations," but are intended to apply only in limited circumstances, when the dismissal was due to some sort of "compulsion" and with emphasis placed on the necessity that the plaintiff present "strict proof" that he or she was **not** "negligent in the prosecution" of the previous case.

In *Furnald*, the plaintiff had voluntarily dismissed his personal injury claims two weeks prior to trial, in order to "further develop" expert testimony concerning potential permanency of his personal injuries. After the plaintiff re-filed, the District Court granted summary judgment for the defendant due to expiration of the statute limitations. On appeal, the Court of Appeals affirmed (in a 2 to 1 decision), holding that while the plaintiff may have an "absolute right" to unilaterally dismiss, without prejudice, until ten days prior to trial, pursuant to Rule 1.943, there was no "absolute right" to re-file. *See Furnald v. Hughes*, 795 N.W.2d 99 (Iowa App. 2010) (voluntary dismissal without seeking continuance constituted "negligence in prosecution" of prior case). The Iowa Supreme Court granted further review - then not only affirmed the decision of the Court of Appeals, but further clarified the narrow circumstances to which the "failure of action" statute can apply.

In a cogent opinion, Justice Appel reviewed the origins of "saving statutes," from the limited exception that accompanied the first statute of limitation enacted in England in 1623 to the statutory predecessors of Iowa Code 614.10 that have been followed in Iowa since 1851. After reviewing several early decisions on prior versions of the "failure of action" statute, which tended to reject efforts to utilize it following voluntary dismissals, Justice Appeal concluded that a "unifying theme" of the early decisions interpreting the statute was "the proposition that for a voluntary dismissal to be within the scope of the term 'fails' under the saving statute, there must be compulsion to the extent the plaintiff's entire underlying claim has been, for all practical purposes, defeated." *Id*., at 282. "If the claim can still be pursued in the underlying action, it has not `failed' and it is 'negligence' in the prosecution of the case not to press the matter to conclusion." *Id. (citing Archer v. Chicago, B. & Q.R. Co., 22 N.W. 894 (Iowa 1885));Pardey v. Town of Mechanicsville*, 83 N.W. 828 (Iowa 1900); *Ceprley v. Inc. Town of Paton,* 95 N.W. 179 (Iowa 1903).

Justice Appel noted that in *Davis v. Liberty Mut. Ins. Co.*, 55 F.3d 1365 (8th Cir. 1995), the Eighth Circuit Court of Appeals had concluded that recent cases suggested that Iowa courts had abandoned the requirement that the dismissal occur due to "compulsion'" in order to permit re-filing under the "failure of action" statute. Indeed, although Justice Appel was too diplomatic to say so, the *Davis* decision may well have been the inception of the troubling recent trend of utilizing the "failure of action" statute as a "mulligan" when faced with challenging circumstances as a trial date approaches. As the *Furnald* decision makes clear, a plaintiff is not entitled to a unilateral dismissal as an "absolute right" or a viable "strategy choice" pursuant to Iowa Code 614.10. "Such strategic choices . . . are not the kind of compulsion which awakens our saving statute." *Id*.

Although Justice Appel made it clear that the savings statue remains intact for situations in which some "procedural technicality" might otherwise deprive a plaintiff of a viable claim, he emphasized that "our saving statute is designed to protect plaintiffs only from getting ensnared in fatal technical procedural problems that cannot be avoided through due diligence in the underlying litigation." *Id*.

Therefore, rather than serving as a procedural "mulligan," ready for use at the discretion of plaintiff's counsel simply by citing some amorphous "strategy decision" by plaintiff's counsel, the *Furnald* decision should serve to return the "failure of action" statute to its intended role as a rarely utilized, and "seldom noticed," exception to the statutes of limitation in Chapter 614. ■

IDCA EXPANDS ITS SOCIAL NETWORK TWITTER: @IADEFENSE

By Ben Weston, IDCA Board Member

The IDCA is pleased to announce that it has joined numerous other state and local defense organizations in expanding its communications to Twitter. Twitter is a social media outlet that lets users communicate through 140 character messages, which often include links to interesting Internet material or photographs. Many organizations, such as DRI, use Twitter to deliver news about membership, legal developments**,** events, and other relevant information. Through its Twitter account, the IDCA plans to share with its members practice tips, event announcements, current legal news, and much more. It will also be a platform for our members to interact with the IDCA, other members, and defense counsel nationwide.

If you are new to Twitter, joining is fast and simple. Log on to www.twitter.com and follow the steps to create a profile. Once you have joined, search for @IADefense or "Iowa Defense Counsel," then click "follow." Once you are "following" IDCA, simply sign in to Twitter at your convenience to see what is new with IDCA. If you have a mobile device such as an iPhone or Android, there are apps for Twitter that make it convenient and easy to access and navigate. At your desk or on your laptop you can return to www.twitter.com or search for Twitter in any Internet search engine. The IDCA staff or I can answer any questions you may have along the way.

We hope that you will take the time to consider what Twitter and other social media outlets have to offer you personally and professionally. Social media is no longer the wave of the future in professional networking. It is here. The IDCA strives to create value for its members and to engage them on as many fronts as possible. Our recent Twitter addition was the first of several progressive steps. Look for other developments such as a revamped website and Facebook page very soon. In the meantime, the IDCA wishes you happy tweeting!

IOWA DEFENSE COUNSEL ASSOCIATION

RULES OF PROFESSIONAL REGULATION AMENDED TO REQUIRE THREE HOURS OF ETHICS BIENNIALLY

The Iowa Supreme Court in February amended Rule 41.3(2) increasing the biennial ethics attendance requirement from two to three hours. The three-hours biennial ethics requirement is applicable beginning with the 2012-2013 reporting periods. All attorneys must report a minimum attendance of three hours of ethics for the 2012-2013 reporting period on their CLE reports due on March 1, 2014.