The Supreme Court Lowers the Bar on Unlawful Retaliation Claims in Burlington Northern & Santa Fe Railway Co. v. White
**Let Your Voice be Heard!**

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The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

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Remember to Renew Your KBA Membership for 2008

NEW DEAN HOPES TO “SHINE THE LIGHT” ON WASHBURN LAW

CHIEF JUSTICE KAY McFARLAND: CELEBRATING 30 YEARS ON THE KANSAS SUPREME COURT

The Supreme Court Lowers the Bar on Unlawful Retaliation Claims in Burlington Northern & Santa Fe Railway Co. v. White
By Aïda M. Alaka

The Journal of the Kansas Bar Association November/December 2007 • Volume 76 • No. 10

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By the time you read this column, the Kansas Bar Association and the Kansas Bar Foundation will have broken ground for the construction of the new addition to the KBA headquarters. It has been a wild ride to get to this point, and there is still much to do. So join the fun, if you haven't already.

I take pen in hand at this point — and not just because we are short of our goal. I have two additional reasons.

• First, I want to provide you all with an opportunity — a terrific opportunity — to make your mark in the legal world, a mark that essentially could last forever.

• And second, I take pen in hand because my column is due.

The KBA headquarters was built in Topeka in 1980. Many lawyers and law firms donated to provide for that construction. But time has passed. We have outgrown the building. It is dated and in major need of repair. So in the 1990s, the KBA and the KBF staff and boards spent a great deal of time trying to determine what should be done.

Circa 2000, the KBA commissioned a study to find out whether we could raise sufficient funds to refurbish the building and provide the additional space that was needed. The results of the study were mixed. The answer was not exactly "yes." It was more like “maybe.” “Maybe you could raise the money, if you do not ask for too much and if you get lucky.” I think that was the real answer. But the alternatives to a major refurbishing effort were limited and substantially more expensive.

So we decided to go forth and begin a campaign to raise money for bricks and mortar and for endowments to support access to justice and similar programs. We named our campaign “Raising the Bar.” We hired a consultant. We obtained some preliminary cost figures for the reconstruction. We printed brochures. We created a committee. We created several subcommittees. We met. We twisted our hands. We met. We read about how to raise money. We met. We twisted our hands. Prices increased. Finally, we just started asking for money. And, in fact, we did not ask for too much money, and we did get lucky. We were very lucky that the lawyers and law firms we contacted truly came through for us.

I learned two very important things about fundraising through the process. First, if you ask people for money for a good cause, they will usually give it to you. Second, lawyers are good people and are willing to give.

The list of contributors to the Raising the Bar Campaign is provided on the next page. But I have to point out a few. Foulston Siefkin LLP made the largest law firm contribution, coming in at $75,000. Fleeson, Gooing, Coulson & Kitch LLC was the first law firm to become a major contributor, and it is to that firm I attribute a great deal of our success. They set the bar. They donated $50,000. Shook, Hardy & Bacon LLP was the first and still the largest contributor in the Kansas City area, in spite of having various offices around the world who compete for these dollars. They donated $50,000.

To date, we have raised approximately $1.05 million. Our original goal was $1.2 million. Now it is true that about $700,000 of the “goal” was for the KBA building and about $500,000 was for Foundation endowments. But I am the president of the KBA.

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No, I am not asking you for $50,000 — unless you happen to have it lying around. Rather, I am asking you to pledge $1,000; because for $1,000 you can “buy a brick.” The courtyard for the KBA building will be paved with bricks. Beautiful bricks. And for $1,000 you can have a brick with your name (or your grandfather’s name or your kid’s name or perhaps the name of a lawyer you wish to honor). It is your opportunity to make your lasting and enduring mark on the world of law.

And this is my column. So, while I am a fan of endowments, I am primarily interested in the BUILDING. That is where your “opportunity” comes in.

So please make a pledge. You will feel better when you do. You will also immediately become cooler, smarter, and much better looking.

... the brick that makes you a part of KBA history. We will all raise a glass.

We are underway. Our facility will be nice, very nice. This is your opportunity to be a part of it. Your pledge of $1,000 can be paid over the course of three years. So please make a pledge. You will feel better when you do. You will also immediately become cooler, smarter, and much better looking.

We will have our grand opening next June during the KBA Annual Meeting in Topeka. You can attend the conference and show others just how much you care when you show them the brick that makes you a part of KBA history. We will all raise a glass.

Linda S. Parks can be reached by e-mail at parks@hitefanning.com or by phone at (316) 265-7741.
Raising the Bar Honor Roll

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Making a Difference

By Bruce W. Kent, Kansas Bar Foundation president

First, I would like to express my appreciation for the opportunity to serve with the Board of Trustees of the Kansas Bar Foundation (KBF). They are a talented, caring group of great lawyers who are truly fun to work with.

The KBF is a 501(c)(3) charitable corporation whose primary mission is to support the philanthropic efforts of the Kansas Bar Association (KBA) and its members. The Foundation owns the Kansas Law Center building, and the KBA is its primary tenant. The primary mission of the Foundation is the creation and administration of charitable gifts and scholarships and the distribution of funding from the Interest on Lawyers’ Trust Accounts (IOLTA) program.

Kansas Law Center

This year, the KBF Board of Trustees and KBA Board of Governors are working collaboratively to enlarge and refurbish the Kansas Law Center. Together, they have successfully raised more than $1 million from many generous law firms and individuals. Through this Raising the Bar Campaign, and by making these improvements today, we are laying a path for greater member and charitable services tomorrow.

The new construction already is in full motion, and you will be invited to the grand reopening and rededication ceremony on Friday, June 20, 2008, during the KBA Annual Meeting in Topeka. Please be sure to mark your calendar so that you can be with us on this important occasion.

Planned Giving Initiative

The Board of Trustees also has decided to move forward with a planned giving program. This program will encourage members of the legal profession, and others, to establish legacy funds and endowments through the Foundation that will support our goals to educate and support Kansas lawyers’ issues and enhance the lives of the people of Kansas. Examples of the uses of the funds to be created are scholarships, CLE programs sponsored by an endowment fund to bring speakers of national prominence to Kansas, community lecture series on the law, and many other public service outreach programs.

This exciting, broad-based endeavor will give the KBA and KBF the resources and opportunity to reach out and support lawyers in their work to make Kansas a better place to live. The Foundation is presently forming a planned giving committee to further define the mission of the program. If you have an interest in serving on this project, please let it be known. It promises to be a rewarding and enjoyable experience.

KBF Scholarships

The Trustees have decided that all future KBF scholarships must have a minimum endowment of $20,000 to create awards large enough to have the needed impact on the recipients’ academic efforts.

The Trustees have set aside funds to make sure the present Justice Alex Fromme and Marvin Thompson memorial scholarships meet that new standard and can begin presenting awards.

The Case, Moses, Zimmerman & Wilson PA, law firm has established a scholarship fund for law students who demonstrate a bona fide intention to practice law in Kansas. This scholarship will be presented to its first recipient in December. The Hinkle Elkouri law firm scholarship is being established, and a Lathrop & Gage law firm scholarship will soon be fully funded as well.

In addition, the Foundation is working with the Justice Gernon family to establish the Justice Robert Gernon Loan Repayment Program.

All these benefactors are doing great things for the Bar and its future members. Please thank them when you see them. They are making a difference.

With the improvements being made at the Kansas Law Center, by establishing numerous new law student scholarships, by commencing a planned giving initiative, as well as providing the many other ongoing services of the Foundation, it promises to be a productive and exciting year.

When you are asked to give, please give it your favorable consideration. You will enjoy the purpose, the people, and helping make a difference.

Bruce W. Kent

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Mastering Your New Role as Boss

By Amy Fellows Cline, Triplett, Woolf & Garretson LLC, Wichita

One of the many new roles thrust upon young lawyers when they begin their careers is staff supervisor. Since law school and most firm mentoring programs fail to offer much guidance on this important aspect of your professional life, I thought I would share advice I have gathered from legal support staff over the past few years.

Support staff can enhance your practice in many ways, the extent of which is largely based upon the initiative you take in your supervisory role. First, find out what assets and services your staff can offer. Composition of cover letters, initial drafts of routine pleadings, preliminary interviews of potential clients or less significant witnesses, and coordination of deposition or hearing schedules by your staff can help maximize your billable time. Your staff may also be able to teach you standard office procedures, idiosyncrasies of senior attorneys for whom you work, or technology tools that may prove beneficial to particular matters.

You should also discover your staff’s preferences for common tasks or procedures. Some staff members prefer oral instructions that offer an opportunity to ask questions right away, while others prefer e-mail instructions to which they can refer when they are actually performing the task. Provide clear, complete instructions and include a context for some tasks. Just like the legal procedures we learned in law school make much more sense now that we are putting them into practice, it helps if your staff member knows the big picture and realizes why he or she is performing some tasks in a particular manner. When you dictate, speak clearly and spell out difficult or unusual names.

Encourage open communication with and questions by your staff. This will expedite the completion of tasks and improve your work product. Your staff is the last line of critique and improvement for your work product. They can provide valuable insight beyond just proofreading. Your audience is often unfamiliar with the matter addressed in your pleading or correspondence. Your staff may be in a similar position and can offer input about the clarity of your explanation of certain matters or the message you want to send.

Prioritize tasks for your staff, especially if you share the staff member with another attorney. Provide as much notice as possible regarding deadlines and the risk that the staff member may need to work late (after hours or through lunch) to complete a project. This will allow the staff member to make necessary arrangements for day care, meals, or other appointments the staff member may have scheduled. Give documents to your staff as early as you can, so they have as much time as possible to complete the project by the deadline. This can also avoid staff overtime expense for your firm.

Compliment your staff on a job well done, which can include providing some small thank-you on Administrative Professionals Day. When formally reviewing your staff’s performance, address positive aspects as well as areas for improvement. Also, it is easier for staff to meet specific guidelines for improvement rather than vague requests.

Your staff can keep you on task and organized, but only if you provide them with the tools to do so. Maintain important documents in the client’s file, rather than on your desk or in your e-mail inbox. This can be particularly important when more than one attorney is working on a matter. If you need to keep a document nearby for reference, ask a staff member to make you a working copy. Also, keep your staff apprised of certain deadlines or agreements made with clients or opposing counsel, rather than maintaining such information in personal notes on your desk. Discuss your staff how you would like deadlines calendared, including whether you want any reminder notifications. Let your staff know if someone contacts you to return a telephone message left or correspondence sent by your staff or if some intervening event makes a task you’ve given her or him unnecessary.

Last (and surely the most obvious), always treat your staff with respect. This is especially important when mistakes are made. The tact you take when handling this sensitive area can make a huge difference in staff loyalty and whether such mistakes are repeated. When discussing the mistake, keep your surroundings in mind and emotions in check. Yelling in front of others will only embarrass the staff member and create an awkward situation amongst everyone who witnesses the outburst. A private meeting in which you calmly discuss the mistake allows the staff member to focus on your message rather than their own feelings of embarrassment. Also, a specific discussion regarding how the mistake can be avoided in the future will prove more productive than a rant from you regarding the negative impact of the mistake.

I hope this advice helps you develop a cooperative and fruitful working relationship with the legal staff hired to support your professional endeavors. I’m confident once you put it into practice (if you haven’t already), you will find an untapped resource, which will help advance your career.

Amy Fellows Cline may be reached at (316) 639-8100 or at amycline@twgfirm.com.

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These days it's popular for comedians to create lists. I've decided to get into the act. Here are mine:

**Thinnest books ever published:**
- “My Days in the Final Four” by Bill Self
- “Memories of Manhattan” by Bob Huggins
- “The Adkins Diet My Way” by Mark Mangino
- “How to Win Friends and Influence People” by Bobby Knight

**Shocking surprises when you call your client:**
- “Whatever you want to do is fine, and don’t worry about the cost.”
- “Stay at the Four Seasons. You need a spacious room.”
- “I’m FedExing your bill to make sure you get it before it’s due.”

**Three things you don’t want to hear in your pretrial conference:**
- Your case is thin. Does your firm have an appellate specialist?
- So, tell me counselor, why didn’t you take his deposition when discovery was still open?
- Counsel, appellant is spelled with two ll’s.
- Trial judge to plaintiff’s counsel: “I’ve looked at the conflict of laws. Nebraska applies, and with it I’m striking your count for punitive damages.”

**Words never uttered by anyone, anytime:**
- Johnson County is a judicial hellhole. Defense verdicts are impossible there.
- Judge Wesley Brown is retiring.
- I got my ethics hours before June!

**People that I wish would go away and never return:**
- Judge Judy
- The talking legal heads on MSNBC
- Mike Nifong

**Words you never want to hear when traveling:**
- We’ve had a weather delay. Please return to the gate in four hours.
- First class has checked in full. We have a seat next to the bathroom in the back.
- I’m sorry. I don’t see a reservation in your name, and we are overbooked tonight. We have a flight at noon tomorrow.
- Southwest Airlines can put you on a wait list. Boarding group Z.

**Three things I wish they would bring back:**
- Cell phones the size of a brick, so no one would dare to be seen with them.
- Pay phones that cost a dime.
- Full-service gas stations.

**Best legal movies ever made:**
- “To Kill a Mockingbird”
- “The Verdict”
- “My Cousin Vinnie”

**Things I would love to hear from the mediator:**
- “I told your opponent their case stinks, and they should pay your costs.”
- “I called the judge. He is going to issue an order. How much are your fees?”
- “I’ve heard their presentation. They have no case whatsoever.”

**Sure things when I return from a long, stressful business trip:**
- My car’s gas gauge will be on empty.
- The ATM will tell me I’m overdrawn.
- My son will have a science project due in three hours that only I can fix.

**Trends that I wish never got started:**
- The Blackberry
- See above
- See above

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**About the Author**

Matthew Keenan grew up in Great Bend and attended the University of Kansas, where he received his B.A. in 1981 and his J.D. in 1984. For the last 21 years, Keenan has practiced with Shook, Hardy & Bacon. He may be reached at mkeenan@shb.com.

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**Enjoying Matt’s column in the Journal?**

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New Dean Hopes to “Shine the Light” on Washburn Law

By Katharine J. Jackson, Morrison, Frost, Olsen & Irvine LLP, Manhattan

Thomas J. Romig began his tenure as the dean of Washburn University School of Law on July 1, 2007. Compared to his past job experience as the Judge Advocate General (JAG) for the U.S. Army, the transition to his new position as dean has been much less eventful. He became the JAG at a critical period in American history — two weeks after the terrorist attacks of Sept. 11.

“We faced several questions of first impression for the United States,” he said, referring to the challenges he encountered in the first few months as the JAG. Although protecting the United States was paramount, “we had to determine whether active duty military actually had the legal authority to guard our nation’s airports, among other things.”

In addition to interpreting the law on pressing national issues, the JAG must lead and supervise an organization of more than 9,000 personnel, including 5,000 active and reserve military and civilian lawyers. Romig oversaw this worldwide legal practice of 328 offices in 22 countries, which includes practice areas of civil and criminal litigation, international law, and administrative law.

The Army was transformed when homeland security and global terrorism emerged as foremost national priorities. Romig’s role was to guide this transformation within the bounds of the U.S. Constitution and international law. His role became more complex — and dangerous — when the United States invaded Iraq in March 2003.

Later that year, Romig was traveling in a Black Hawk helicopter near Tikrit when a rocket struck the helicopter behind him, killing all six soldiers aboard, including members of his staff. The attack raised speculation as to whether Iraqi insurgents had breached U.S. intelligence operations and knew that Romig and other high-ranking officials, who were in Iraq on an “undisclosed mission,” were aboard the aircraft.

Although Romig is unsure whether insurgents knew of his presence on the Black Hawk, he maintained that his visit to combat territory was necessary. “I had 600 people deployed, and it was my duty to visit them to understand their work environment.”

Romig made headlines again when he publicly stated his objections to U.S. policies on the treatment and interrogation of detainees in Iraq, Afghanistan, and Guantanamo Bay. In 2005, he testified before the U.S. Senate, questioning whether U.S. policies and practices were supported by the law.

“My concern was that we had clear-cut guidelines prior to Iraq and Afghanistan that were clouded by confusing guidance on the treatment of detainees,” he said. He feared that if the United States ignored the Geneva Convention and well-settled international law in the adoption of certain techniques, the United States would endanger its own service personnel by establishing “a new, lower baseline for acceptable practices.”

“It wasn’t political — it was about doing the right thing,” he said as he described his motivation for challenging the legal underpinnings of U.S. policies. He said that he asserted his objections through the proper procedures in the system.

“A lawyer has times that the lawyer has to stand up for the right thing. My oath was to the Constitution, not to a president or a political party,” he said.

Romig has been recognized for his commitment to the law. Not only has he received numerous military decorations and badges, but also the Kansas Legislature adopted a resolution thanking him for his “distinguished and meritorious service to the nation” and commending his respect for “the rule of the law” and his “courage [in] his convictions” in defending it.

In 2005, after 34 years of service, he retired from the military as a major general. He most recently served as the deputy chief counsel for operations for the Federal Aviation Administration. When he was offered the position of dean of Washburn Law, he welcomed the opportunity to return to his home state.

Romig was born and raised in Manhattan, Kan. He graduated from Manhattan High School and earned his bachelor’s degree in social sciences from Kansas State University. He was commissioned through the Army ROTC program. After serving six years as a military intelligence officer, he was selected for the prestigious Army Fully Funded Law School program. He graduated from Santa Clara University School of Law, where he served as an editor on the Santa Clara Law Review and as a member of the Honors Moot Court Board.

“Thomas has demonstrated an exemplary level of leadership and brings to Washburn a new level of expertise,” said Dr. Jerry Farley, president of Washburn University. “I’m confident with Thomas’ broad intellectual interests, thoughtful academic temperament, and his enthusiasm about the new challenge, he will capitalize on the many strengths of the School of Law.”

(Continued on Page 12)
Welcome Fall 2007 Admittees to the Kansas Bar

Mayra Aguirre
Kristi Celine Allen
Alison Elizabeth Ambrose
Robin Rae Anderson
Carly Renae Avis
Daniel K. Back
Nicole Tasha Gordon Barker
Chad Garett Barnhart
Jennifer Hope Barrett
Kye J. Baxter
Lucas Paul Bell
Jason Wayne Belveal
Kara Suzanne Bemboom
Barry R. Bertram
Kimberly Ann Bieker
Jeffrey Thomas Biller
Christina Billiard Pribula
Kenneth Robert Blucker
Andrew L. Bolton
Douglas Richard Bradley
Anna Patrizia Braukmann
Lauren Marie Bristow
Kathleen Munch Britton
Matthew Johnathan Brooker
Jamie Brooksher
Matthew Johnathan Brooker
Kana R. Lydick
Katie Elizabeth Lula
Kerrie L. Lonard
Christopher Lewis Logan
Jonah W. Lock
Bonjwing Lee
Brandon August Lawson
Matthew Nicholas Kovar
Brandon August Lawson
Bonjwing Lee
Jonah W. Lock
Christopher Lewis Logan
Shawn Michael Ford
Kennon Jeremy Geniuk
Matthew Joseph Gigliotti
Lance Justin Gillett
Cody Matthias Gorges
Erika Jurado Graham
Shelby J. Grau
Steve Grieb
Amber Hackett
Elizabeth Marie Hafoka
Jay Rashad Hall
Shannon Rose Halpin
Thomas Eugene Hammond II
Tina Hardin
Christopher M. Harper
Kathryn Leigh Harpstrite
Andrew Wilson Hartsell
Tracy Marie Justis Hayes
Michael Scott Heptig
Thomas Herschew
Richard Allen Hickey
Patrick G. Hoffman
Matthew K. Holcomb
Dominique Honka
Sarah Elizabeth Hoskinson
Amanda Suzanne House
Andrew Carl Hronke
Ureka Idstrom
Sharon Lanette Ivy
Kasey Diane Jackson
Megan Elizabeth Jennings
Judy Jewsome
Robert Jacob Johnson
Aaron Kent Johnstun
Jameson Rees Jones
Zachary C. Jones
Kelly J. Kauffman
Brady William Keith
Kristen Clarke Kellems
Kristopher M. Kellim
Jadh Jane Kerr
Rustin James Kimmell
Joseph Allen Kinder
Jeffrey M. King
Regina Marie Klinges
Lynn Aaron Koehn
Matthew J. Koenigsdorf
Andrew Nicholas Kovar
Brandon August Lawson
Bonjwing Lee
Jonah W. Lock
Christopher Lewis Logan
Kerrie L. Lonard
Katie Elizabeth Lula
Kana R. Lydick
Derek H. MacKay
Melissa Murfin Mangan
Blane R. Markley
Joshua D. Mast
Marshall Alan McGinnis
Molly Ellen McMurray
Thomas Edmund Meade
Kevin Jon Melgaard
Richard Milone
Lara Shaker Dakhil Monahan
Jaclynn Jo Bivens Moore
Ryan Joseph Morrow
Katherine Ann Moulthrop
Valerie Megan Murphy
Michael Saxon Navarro
Blake J. Nelson
Michael James Nichols
Preston Scott Nicholson
Chadd Michael Nolen
Christopher J. Nord
Sarah Rebecca O’Loughlin
Chad E. O’Neill
Bonnie Jeanne Oesch
Michael Stephen Oesch
Jason Anthony Orospeza
Anthony Joseph Orrick
Ashley Brett Osborn
Heather Meade Faier Ousley
Karen Rachel Palmer
Christopher John Pate
Lindsey Danielle Patmon
Mark Andrew Pemberton
Terri J. Pemberton
Christopher S. Peoples
Amy Christine Petit
Tucker Poling
Nicolas Brandon Porter
Clayton James Pummill
Karen M. Quintelier
Corey Allen Rasmussen
Brendy L. Rea
Jenny R. Redix
Sarah Anne Reed
Rick Daniel Reinard
Ambriel Renn-Scanlan
Mikki Lee Rhoades
Quentin L. Rials
Celia L. Richey
Kathryn Starrett Rickley
Marian K. Riedy
Erin Marie Riffey
Matthew Foster Rigdon
Eric D. Roby
Elizabeth Dawn Rogers
Andrea Genevieve Rother
Advance Notice: Elections for 2008 KBA Officers and Board of Governors

It’s not too early to start thinking about KBA leadership positions for the 2008-2009 leadership year.

KBA President-elect (Current – Thomas E. Wright, Topeka)
KBA Vice President (Current – Timothy M. O’Brien, Overland Park)
KBA Secretary-Treasurer (Current – Hon. Benjamin Burgess, Wichita)

The KBA Nominating Committee, chaired by David Rebein, Dodge City, is seeking information about individuals who are interested in serving in the positions of president-elect, vice president, and secretary-treasurer of the Kansas Bar Association. If you are interested, or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA executive director, P.O. Box 1037, Topeka, KS 66601-1037, by Friday, Jan. 11, 2008. This information will be distributed to the Nominating Committee prior to its meeting on Friday, Jan. 25, 2008.

Board of Governors

There will be six positions on the KBA Board of Governors up for election in 2008. Candidates seeking a position on the Board of Governors must file a nominating petition — signed by at least 25 KBA members from that district — with Jeffrey Alderman by Friday, March 7, 2008. If no one files a petition by March 7, the Nominating Committee will reconvene and nominate one or more candidates for open positions on the Board of Governors. KBA districts with seats on the Board of Governors up for election in 2008 are:

• District 1: Incumbent Lee M. Smithyman is eligible for re-election. Johnson County
• District 3: Incumbent Dennis D. Depew is eligible for re-election. Allen, Anderson, Bourbon, Cherokee, Crawford, Labette, Linn, Montgomery, Neosho, Wilson, and Woodson counties
• District 5: Incumbent Teresa L. Watson is eligible for re-election. Shawnee County
• District 7: Incumbent Mary Kathryn Webb is not eligible for re-election. Sedgwick County
• District 8: Incumbent Gerald L. Green is eligible for re-election. Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties
• District 12: Vacancy to be filled by the Board of Governors. Appointee will be eligible for re-election.

KBA Delegate to ABA House of Delegates: Hon. David J. Waxse is not eligible for re-election.

In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for President-elect, Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

For more information

To obtain a petition for the Board of Governors, please contact Becky Hendricks at the KBA office at (785) 234-5696 or via e-mail at bhendricks@ksbar.org.

If you have any questions about the KBA nominating or election process or serving as an officer or member of the Board of Governors, please contact David Rebein at (620) 227-8126 or via e-mail at drebein@rebeinbangerter.com or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
New Dean  
(Continued from Page 9)

Indeed, Romig’s goal is to “shine the light” on Washburn Law, which he said deserves the recognition. He lauded the enthusiasm of the student body and praised the faculty as an impressive composite of “incredibly talented young faculty and very good and much beloved senior faculty” who provide a high quality of education.

Support from Kansas attorneys is also essential to the continued success of the law school, said Romig, but he wants more from the bar. “I want attorneys to feel at home at Washburn Law — to feel that it is Kansas’ law school — whether they are graduates or not.”

He brought Washburn Law School “home” to Washburn alumni and Kansas attorneys throughout the state and region during his four-month “Meet the Dean” tour. He traveled the 424-mile stretch of Interstate 70 in Kansas, stopping in Kansas City, Manhattan, Salina, Hays, Colby, and Goodland. He ventured north to Chicago and south to Houston, with stops in Wichita, Dodge City, and Garden City.

“The response to these events has been overwhelming,” said Julie Olson, director of Alumni Affairs for Washburn Law. “Our attendees have been very appreciative of the opportunity to personally meet Romig and hear his vision for the School of Law.”

As is typical with first-year deans, Romig will not teach a law school class this year. He will teach courses in military and administrative law in the future, and he plans to extend his research interests beyond the classroom by establishing a Center for Law and Government. The center will feature speakers from all levels of government and facilitate student internships and career placements in public service.

Romig hopes to capitalize on another major opportunity for the state of Kansas. “If the National Bio and Agro-defense facility (NBAF) locates in Manhattan, we could create a Center for Law and Homeland Security as a potential tie-in,” he said.

Although the issues he faces as the top Washburn Law administrator may be different from those he experienced as the top Army lawyer, he applies the same intelligence, enthusiasm, and ambition to his new leadership role.

“I want to make this great school even better.”

About the Author

Katharine J. Jackson is an associate with the law firm of Morrison, Frost, Olsen & Irvine LLP in Manhattan, where she serves as the assistant city attorney. She earned her B.A. in public relations from Kansas State University and her J.D. from the University of Colorado School of Law. She may be reached at (785) 776-9208 or jackson@mfoilaw.com.

James W. McElhaney
Featured Speaker

“Planning to Win: The Hunt for the Winning Story”

Mr. McElhaney regularly contributes to Litigation through his Trial Notebook articles, which share the wisdom of Angus and help us all to become better trial lawyers.

Kansas Association of Defense Counsel
29th Annual Conference

November 29th - December 1, 2007
Hyatt Regency Crown Center
Kansas City, Missouri

Go to www.kadc.org for a complete Conference schedule and registration information.
Chief Justice Kay McFarland: Celebrating 30 Years on the Kansas Supreme Court

A reception honoring Chief Justice Kay McFarland’s 30 years with the Kansas Supreme Court was held Sept. 17 at the Kansas Judicial Center. Speakers at the event included Gov. Kathleen Sebelius, KBA President Linda Parks, and Topeka attorney Gerald Goodell.

Throughout her legal career, McFarland has had a number of firsts:

- First woman elected to a judgeship in the Shawnee County District Court,
- First woman to serve as a district court judge in the state of Kansas,
- First woman appointed to the Kansas Supreme Court, and
- First woman to become chief justice in Kansas.

McFarland graduated from Washburn University in 1957 with dual undergraduate degrees in English and history-political science. She spent the next four years showing Tennessee walking horses on a circuit from Florida to Texas, before deciding to attend law school. She graduated from Washburn University School of Law and was admitted to the Kansas Bar in 1964.

She was in private practice with Merral, Scott, and Quinlan until 1971, when she became a judge in the Shawnee County District Court after defeating the incumbent for the position as the juvenile and probate courts judge. In January 1973, she became a district judge, serving until her appointment to the Supreme Court in 1977. McFarland was informed of her appointment to the Court by a phone call from Gov. Robert Bennett late Sunday evening on Sept. 18, 1977. She was told that if she wanted to start right away, rather than wait six weeks, then she needed to take the oath the next day, Sept. 19.

McFarland did not know if it was some sort of hoax; she did not even receive any paperwork confirming her. In fact, when she went to the district court to resign the next morning, District Court Judge E. Newton Vickers had not heard about her appointment, and neither had the Supreme Court offices until the governor made a public announcement that morning. McFarland began her work as a justice some 12 hours after she was appointed. In 1995 she became chief justice upon the retirement of the Hon. Richard W. Holmes.

During her tenure she has led the Kansas courts from a budget crisis that resulted in an emergency surcharge on case filings to the restoration of an adequate budget, with hiring freezes and other personnel actions no longer required. This turnaround culminated with 2006 legislative appropriations that enabled McFarland to rescind the surcharge.

She has been a part of numerous rulings on high-profile cases, such as Indian gaming and state-operated casinos, the death penalty, and school finance. The Court has also gone through many changes, including the doors being opened to the public with the addition of news cameras in the courtroom, availability of cases on the Internet, and carrying arguments on computers.

McFarland will retire in January 2009 as required by the law. Justices must retire at either the age of 70 or at the end of the six-year retention term during which he or she turns 70.

Chief Justice McFarland shares a laugh with the audience attending the Sept. 17 reception in her honor.

Deadline to Submit 2008 IOLTA Grant Applications is Dec. 31, 2007

The Kansas Bar Foundation (KBF) is soliciting grant applications for the 2008 Interest on Lawyers’ Trust Accounts (IOLTA) grant cycle that runs from April 1, 2008, through March 31, 2009. The deadline to submit applications is Dec. 31, 2007. The KBF Board of Trustees will make a decision on the applications in February 2008.

The Kansas IOLTA program, approved by the Kansas Supreme Court in 1984, is supported by more than 3,450 lawyers across the state. The program collects interest from trust accounts in which funds are nominal in amount or are expected to be held for a short period of time. IOLTA grants are primarily aimed at funding programs that provide civil legal services for low-income people, law-related charitable public service projects, and improvements to the administration of justice, with the largest share going to provide direct legal services for victims of domestic violence.

Grant applications are reviewed by the KBF’s IOLTA Committee, which is comprised of appointees from the KBF, the Kansas Bar Association, the Kansas Supreme Court, the Kansas Association for Justice (formerly the Kansas Trial Lawyers Association), the Kansas Association of Defense Counsel, and the governor’s office. The committee forwards its recommendations to the KBF Board of Trustees for final approval. In order to qualify for IOLTA funds, an organization must:

- be a 501 (c) (3) or 501 (c) (6) if a local bar association,
- use the funds for a specific charitable purpose,
- agree to an audit or a review of expenses,
- provide quarterly and year-end reports as necessary, and
- demonstrate fiscal responsibility and the ability to provide quality services.

For more information or to request an IOLTA grant application for 2008, contact Meg Wickham, manager of public services, at (785) 234-5696 or at mwickham@ksbar.org or visit www.ksbar.org/public/kbf/iolta.shtml.
Members in the News

CHANGING POSITIONS

Sara B. Anthony has joined Shank & Hamilton P.C., Kansas City, Mo.

Samantha N. Benjamin-House and Robert J. Wonnell have become shareholders in McAnany, Van Cleave & Phillips P.A., Kansas City, Kan.

Michael J. Book, Kansas City, Mo., has joined The Katz Law Firm as an associate.

Brandon H. Bauer has joined Shook, Hardy & Bacon LLP, Kansas City, Mo.

Anna P. Braukmann has joined Stinson Morrison Hecker LLP, Kansas City, Mo., as an associate.

Bobby L. Brown Jr. has joined Kiewit Industries, Overland Park.

Patrice M. Brown, Amy N. Kutschka, and Katherine E. Milberger have joined Blackwell Sanders LLP, Kansas City, Mo.

Brian R. Carman has joined Stinson, Lasswell & Wilson L.C., Wichita.

Derek S. Casey has joined Patterson Gott & Burk L.C., Wichita.

Anita K. Chancey has joined Doerner, Saunders, Daniel & Anderson LLP, Tulsa, Okla.

Douglas W. Dahl II and Kristen V. Toner have joined Lathrop & Gage L.C., Kansas City, Mo.

Brian J. Dietz has joined Spencer, Fane, Britt & Brown LLP, Kansas City, Mo.

James Charles “Chuck” Droge has been appointed district judge for the 10th Judicial District by Gov. Kathleen Sebelius.

Sarah E. Duncan has joined Johns, Littlestone & Mitchell, Clinton, Mo.

Alicia A. Edelen has joined Cordell & Cordell P.C., Overland Park.

Mark J. Galus has joined the Halbrook Law Firm P.C., Kansas City, Mo.

Kenneth J. Geniuk has joined Hill, Beam Ward, Kruse & Wilson LLC, Overland Park.

Gregory C. Graffman has joined the firm of Geisert, Wunsch & Watkins, Kansas City, Mo., as a partner. The new firm will be known as Geisert, Wunsch, Watkins & Graffman.

Martha A. Halvorsdon has joined Civil Alternatives Inc., Kansas City, Mo., as managing partner.

Matthew P. Hamner has joined Phillips, McElvy, Carpenter & Welch P.C., Camdenton, Mo.

Robert G. Harken Jr. has joined the Law Office of George Barton, Kansas City, Mo.

Patrick G. Hoffman has joined Sherman, Hoffman & Hipp L.C., Ellsworth.

Matthew K. Holcomb has joined Hinkle Elkouri Law Firm L.L.C., Wichita.


Derek G. Johannsen has joined Wallace, Matteuzy & Sloan P.C., Leawood.

Jeffrey W. Jones has joined Hamilton, Laughlin, Barker, Johnson & Watson, Topeka, as of counsel.

Shean C. Jurgensen has joined Irlgona-ray & Associates, Topeka.

Robin J. Kempf has joined the Kansas Health Policy Authority Board, Topeka, as an inspector general to audit, investigate, and conduct performance reviews.

Marta Fisher Linenberger has joined Foulston Siefkin L.L.P., Topeka.

Kana R. Lydic has joined Henson, Clark, Hutton, Mudrick & Gragson LLP, Topeka.

Timothy P. McCarthy has joined Gilliland & Hayes, Overland Park.

Kathleen L. O’Connor-Gonzales has joined Slagle, Bernard & Gorman P.C., Kansas City, Mo.

Rebecca E. Miller has joined Great West Retirement Services, Topeka.

Jason B. Moore has joined Franke Schultz & Mullen P.C., Kansas City, Mo.

Ralph F. Munyan II has become vice president and general counsel for Aplus.Net, Overland Park.

Christopher J. Pate has joined Case, Mooney & Mullen P.C., Kansas City, Mo.

Keith S. Rhodes has joined The Epstein Law Firm, Kansas City, Mo.

Eric D. Roby has joined McElligott, Ewan, Keith S. Rhodes, and Kelly, Kansas City, Mo.

Katherine E. Milberger has joined Britt & Brown LLP, Kansas City, Mo.

Jeffrey W. Jones has joined Hamilton & Associates, Topeka.

Patrice M. Brown, Amy N. Kutschka, and Katherine E. Milberger have joined Blackwell Sanders LLP, Kansas City, Mo.

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Kenneth J. Geniuk has joined Hill, Beam Ward, Kruse & Wilson LLC, Overland Park.

Gregory C. Graffman has joined the firm of Geisert, Wunsch & Watkins, Kansas City, Mo., as a partner. The new firm will be known as Geisert, Wunsch, Watkins & Graffman.

Martha A. Halvorsdon has joined Civil Alternatives Inc., Kansas City, Mo., as managing partner.

Matthew P. Hamner has joined Phillips, McElvy, Carpenter & Welch P.C., Camdenton, Mo.

Robert G. Harken Jr. has joined the Law Office of George Barton, Kansas City, Mo.

Patrick G. Hoffman has joined Sherman, Hoffman & Hipp L.C., Ellsworth.

Matthew K. Holcomb has joined Hinkle Elkouri Law Firm L.L.C., Wichita.

Laura L. Steel has joined the Johnson County District Court, Olathe.

Robin Elaine Stewart has joined Sonnenchein Nath & Rosenthal L.L.P, Kansas City, Mo.

James A. Thompson, Wichita, has become a partner with Malone, Dwire, and Jones LLC. The firm name will now be Malone, Dwire, Jones, and Thompson LLC.

Amy J. Tillery has joined the Miller Law Firm P.C., Kansas City, Mo., as an associate and Danne W. Webb has also joined the firm as a member.

Sara Welch, Olathe, has been appointed by Gov. Kathleen Sebelius as the new Johnson County district judge for Division 19.

Victoria L. Wert has joined Swanson Midgley LLC, Kansas City, Mo.

Shannon R. Wilson has joined the Sedgwick County District Attorney’s Office, Wichita.

Travis A. Wymore has joined Brown & Dunn P.C., Kansas City, Mo.


Stephen M. Zier has joined Jeld-Wen, Klamath Falls, Ore.

CHANGING PLACES

Teri L. Anderson has moved to 414 Nicollet Mall, 5th Floor, Minneapolis, MN 55401.

Stephanie L. Anglin has moved to 23560 State Line Rd., Louisberg, KS 66053.

(Continued on next page)
Oren Lee Gray Sr.

Oren Lee Gray Sr., 97, died Aug. 15, 2007, at Sweet Life Care Center in Shawnee. A long-time southeast Kansas politician and attorney, Gray was born Feb. 17, 1910, on a Labette County farm south of Parsons.

He temporarily dropped out of high school to farm for his ill father but later returned to school and graduated from Labette County Community High School at Altamont in 1929. He graduated from Parsons Junior College and attended Parsons Business University.

Gray was a grade school teacher and principal in Neosho, Montgomery, and Labette counties for a number of years. This experience prompted his first run for public office as county superintendent of schools, and he served two terms. Gray was later elected probate judge and served two terms. While he was a probate judge, he petitioned the Kansas Supreme Court to take the bar exam, even though he had never attended a four-year college or law school. His petition was successful, and he passed the bar exam in 1948.

Prior to passing the Bar, he spent two terms as district court clerk, and after passing the Bar, he served four terms as Labette County attorney in Oswego. Gray later spent 12 years in the Kansas House of Representatives. Years earlier, in 1956, he turned down an appointment as Kansas Attorney General after helping elect Gov. Fred Hall.

He opened his law practice in Parsons and later added a partner, John Sherwood, at a second office in Oswego. He served as vice president and president of the Labette County Bar Association and was vice president of the Kansas Trial Lawyers Association.

Gray was married to Jean M. McGuire almost 50 years before her death 1982. He later married Jessie Mae Harley, who preceded him in death. A daughter, René Jean Gray, also preceded him in death.

He is survived by three children, Jené Lee Sharp, Arizona, Oené LaRee Morgan, Shawnee, and Oren Lee Gray Jr., Raytown, Mo., and 12 grandchildren.
Plaza Lights Seminar is Scheduled for Dec. 7

By Robert M. Hughes, Bever Dye L.C., Wichita; Real Estate, Probate, and Trust Law Section president

I t’s hard to believe that summer is gone and we are headed into fall, which means that it will almost be time for the Plaza Lights Seminar.

The Plaza Lights Seminar is scheduled for Dec. 7 at the Country Club Plaza Marriott in Kansas City, Mo. Some of the topics that will be presented at the seminar include an update on Article 9, a summary of creditors’ rights under the Bankruptcy Act, and electronic real estate recording. A significant amount of work goes into this and all KBA seminars. Your attendance, and suggestions for topics and improvements, is greatly appreciated.

One item you should be aware of (and will be a topic at the Plaza Lights Seminar) is the Uniform Real Property Electronic Recording Act (URPERA), which was promulgated by the National Conference of Commissioners for Uniform State Laws. The goal of the URPERA is to create homogeneous conditions across the United States for land records officials to accept records in electronic form; storing electronic records; and setting up systems for processing, searching, and retrieving these records. In response to URPERA, the 2006 Kansas Legislature enacted the Uniform Real Property Electronic Recording Act (S.B. 336). This act established the Kansas Electronic Recording Commission (Commission) to adopt uniform standards to implement this act; their standards became effective on July 1, 2007. The decision to implement e-recording by a register of deeds in the state of Kansas, and to accept electronic documents for recording, is voluntary on a county-by-county basis. However, if a register of deeds determines to implement the act, they must comply with the electronic standards established by the Commission and must continue to accept paper documents as authorized by state law.

On a different matter, there has been a suggestion that Kansas consider enacting a “self-settled spendthrift trust” statute. There are currently 13 states that have self-settled spendthrift trust statutes, with Alaska being the first to enact such a statute. Several states have modeled their state law after Delaware, and the initial thought is for Kansas to consider a law similar to the Delaware statute, which is found at Delaware Code Ann. Tit. 12, Sec. 3570-3576. It would be beneficial to the members of the Real Estate, Probate, and Trust Law Section executive committee to receive comments and suggestions from members regarding a self-settled spendthrift trust statute. Assuming the executive committee believes that Kansas should have such a statute, the Probate Advisory Committee will have significant input.

I hope all of you had an enjoyable summer, and I look forward to seeing you at the Plaza Lights Seminar.

About the Author

Robert M. Hughes, Bever Dye L.C., Wichita, practices in the areas of taxation, trusts, estates, wills, probate, asset protection, succession planning, and business planning. He received his undergraduate degree from the University of Kansas in 1978; his J.D. from Washburn University School of Law in 1982; and his LL.M. in taxation from Southern Methodist University, Dallas, in 1983. He is admitted to practice in the U.S. Supreme Court, 10th U.S. Circuit Court of Appeals, U.S. Tax Court, U.S. District Court for the District of Kansas, and Kansas state courts.

Hughes is a member of the American, Kansas, and Wichita bar associations. He is also a member of the National Academy of Elder Law Attorneys and the Wichita Estate Planning Council.

Editor’s note: This article was first published in the Fall 2007 edition of the The Reporter, which is published by the KBA Real Estate, Probate, and Trust Law Section.

If you are interested in joining this or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.

Introducing Two New KBA Sections

Agricultural Law

Kansas is joining other states that offer an Agricultural Law Section devoted to specifically address the needs of the agricultural community, including farmers and ranchers, their lenders, suppliers, and service businesses.

This section plans to:

• Stimulate education programs (including CLE),
• Develop and enhance referral arrangements among general practitioners and specialists,
• Consult with and assist existing organizations that provide legal and other services to farmers and ranchers, and
• Much more!

Law Practice Management

Kansas is joining a growing list of states that have adopted Law Practice Management (LPM) sections. This section is designed to help attorneys better manage their daily practice, which will improve their ability to deliver the most efficient and highest-quality legal services to their clients.

LPM will be planning:

• Bi-annual CLEs (including ethics),
• Non-CLE programs on practical topics,
• Classes on balancing life and work,
• “Tip of the Month” e-mails,
• An LPM list serve, and
• Much more!

For more information, please contact Beth Warrington, committees and sections coordinator, at (785) 234-5696 or bwarrington@ksbar.org.
Adobe Acrobat 8 Pro Features Aimed at Attorneys

By Larry N. Zimmerman, Valentine & Zimmerman P.A., Topeka

The U.S. federal courts estimate more than 300,000 lawyers have filed electronically using the CM/ECF system introduced in 2001 (uscourts.gov). Each of the documents filed by that group of lawyers would have been filed as a portable document format (PDF) file using Adobe Acrobat 8 Pro software. If they think of Adobe at all, most of those lawyers probably think of Acrobat as little more than the virtual printer necessary to file in federal court.

Nevertheless, Adobe has been working closely with the legal community to grow Acrobat into a package with some valuable, day-to-day use for lawyers. Adobe has even started a legal blog full of Acrobat tips and trick (blogs.adobe.com/acrolaw/).

Backup and speed up your e-mail

If you use Microsoft Outlook, Acrobat installs an extension that allows you to archive entire folders. Select the button to “Create Adobe PDF from Folders” and then choose the folder you want to archive.* Acrobat creates a single file of that folder with a searchable index and every e-mail and attachment preserved. Once you have archived a folder, delete the messages in the original folder to help speed up Outlook.

Sign on the dotted line

Save a tree or two by signing documents with a digital signature stamp using Acrobat’s custom stamp feature. Scan your signature as a PDF file and use the Camera Tool to highlight your signature and import it as a custom stamp. Instead of printing an electronic form just to apply your “wet ink” signature, you can simply stamp the form with your electronic signature as provided in K.S.A. 2000 Supp. 16-1602(i). Easier still would be ordering your signature made into a font by vLetter.com ($29.95).

Virtual typewriter

Kick your clunky typewriter to the curb with Adobe’s Type-writer function. Scan any paper form to Acrobat then click the typewriter button to fill it out faster than you can load a ribbon.

Forms creator

Create forms in Word and use the Acrobat Forms Wizard to import it as a PDF. The wizard automatically aligns all the necessary form fields and allows you to add a “Send as E-mail” button to your form. When users complete your form and click Send as E-mail, you receive only the data ready to import into your case management system — no human data entry required.

Document comparison on the cheap

In Acrobat, select Advanced Tools > Compare Documents to start a wizard that allows you to set two PDF files side-by-side. A new PDF file will be created with all changes in text redlined, and a summary page listing changes will be created.

For your eyes only

Redaction

Acrobat has a new feature allowing permanent redactions with no dangerous metadata left hanging around. Simply select Advanced Tools, then Redaction to start the redaction wizard and then highlight what is to be erased. Once you apply the redaction, the original text is gone. Fortunately, the wizard reminds you of this and provides opportunity to back out without destroying evidence.

Security envelopes

Select the Secure icon from the Acrobat toolbar and choose the Create Security Envelope option. This wizard will create a virtual envelope secured by encryption into which you can drag-and-drop files, e-mails, and documents. The recipient can be allowed full access to print, edit, and use the contents of the security envelope or given rights to view on-screen only.

One-stop trial notebooks

Use the Combine Files wizard in Acrobat to collect, organize, and index as many of any type of Microsoft Office file, PDFs, or images as needed. A single PDF “binder” is created with an index pane and one-click access to any document within the notebook. Add Bates numbering, page numbering, firm letterhead, or watermarks to each item in the PDF binder with the Document–Watermark or Document–Header & Footer options.

There are freeware copycats

A myriad of free or very cheap tools have been created by an active Internet community to duplicate many or all of the features found in Adobe Acrobat 8 Professional. Virtually every software utility ever created for enhancing or replacing Adobe Acrobat can be found at www.planetpdf.com. Some assembly may be required.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Collection Attorneys Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as editor.

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
I. Introduction

All workers find themselves occasionally embroiled in conflicts at work and many find themselves shunned, transferred, or subjected to negative employment references or otherwise adversely affected after complaining about workplace discrimination or exercising other statutory rights. One frequently litigated question, which the federal courts disagreed, was whether these and other retaliatory actions violated federal anti-discrimination employment laws and, in particular, the prohibitions against retaliation contained in those laws.

In June 2006, the U.S. Supreme Court squarely addressed that issue. In *Burlington Northern & Santa Fe Railway Co. v. White*, a nearly unanimous Court adopted a broad standard for federal courts to use when analyzing claims that employers have retaliated against employees who exercised rights protected under Title VII. The Court's decision settled the split in the federal courts regarding how harmful an employer's action must be to be actionable and whether employer conduct outside of the workplace can violate Title VII. This article addresses the controversy that preceded the *Burlington* decision, the decision itself, and the impact of the decision on federal and state retaliation claims.

II. Background

Most employers know that the substantive provisions of Title VII of the Civil Rights Act of 1964 (Title VII or Act) prohibit employers from *inter alia* discriminating against employees on the basis of race, color, religion, sex, or national origin with respect to hiring, discharging, or setting the "compensation, terms, conditions, or privileges of employment." Title VII also bars employers from limiting, segregating, or classifying employees or applicants in ways that would "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of the individual's race, sex, or other protected characteristic. Although Title VII does not define "discrimination," these provisions focus on adverse employment actions affecting the fundamental nature of the employment relationship.

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**FOOTNOTES**

2. Justice Samuel A. Alito Jr. wrote a separate concurring opinion criticizing the eight-member majority position. *See id. at 2418-22* (Alito, J., concurring). See also *infra* notes 30, 87-88 and accompanying text.
In addition to its substantive provisions, Title VII includes an “anti-retaliation” provision, which makes it unlawful for an employer to “discriminate” against employees or applicants because they have opposed discrimination or “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under the Act. Thus, while Title VII’s substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status[,] [t]he anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct. The purpose of this is clear: allowing employers to retaliate against employees who, in good faith, complain about real or perceived discrimination in the workplace could chill the willingness of employees to challenge unlawful workplace practices.

While the purpose of the anti-retaliation provision may be clear, courts grappled with how to define the scope of retaliatory conduct prohibited by Title VII. The federal courts agreed that retaliation occurs when employers take adverse actions against individuals because they engaged in a protected activity. Although the courts also generally agreed that “[a]dverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, ‘snubbing’ a colleague, or negative comments that are justified by an employee’s poor work performance or history,” consensus ended there.

Because Title VII’s anti-discrimination provision refers to hiring; firing; and the terms, conditions, and privileges of employment — while its anti-retaliation provision does not — courts disagreed about whether actionable retaliation also had to affect the terms and conditions of employment; whether only “ultimate” employment decisions, such as hiring or firing were actionable; and whether Title VII protected former employees from retaliation.

The dispute went to the heart of the plaintiff’s prima facie case, which requires showing that: (1) the plaintiff engaged in protected activity — that is, opposed discrimination or participated in an investigation regarding alleged discrimination; (2) the plaintiff’s employer subjected the plaintiff to an adverse action or adverse employment action; and (3) a causal link exists between the employer’s adverse action and the plaintiff’s protected conduct. Thus, a plaintiff’s prima facie burden was directly affected by the jurisdiction in which she lived.

III. Burlington Northern & Santa Fe Railway Co. v. White

The Sixth Circuit’s decision in Burlington used the same standard for retaliation claims as it did for discrimination claims. It held that a plaintiff alleging retaliation had to show an “adverse employment action,” which it defined as a “materially adverse change in the terms and conditions” of employment.

5. 42 U.S.C. § 2000e-3(a)(2000). Individuals are protected from retaliation even when they complain about the treatment of others, whether they are members of the protected class on whose behalf they complain. See, e.g., Lyman v. Nabil’s Inc., 903 F. Supp. 1443, 1448 (D. Kan. 1995) (holding that “informal complaints expressing support of co-workers who are subjected to discriminatory employment practices” are protected under Title VII’s anti-retaliation provision); Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000) (same).


7. Petersen v. Utah Dep’t of Corr., 301 F.3d 1182, 1189 (10th Cir. 2002). (“The purpose of § 2000e-3(a) is to let employees feel free to express condemnation of discrimination that violates Title VII.”)

8. Equal Employment Opportunity Commission (EEOC), Retaliation, www.eeoc.gov/types/retaliation.html (last visited Sept. 3, 2007). See also McGowan v. City of Eufaula, 2006 WL 3720238, *4 (10th Cir. Dec. 19, 2006) (noting that “petty slights, minor annoyances, and simple lack of good manners” will not deter a reasonable worker from making or supporting a charge of discrimination”) (citations omitted); Gummell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998) (finding that the rudeness of co-workers is insufficient to support a retaliation claim since Title VII is not a “general civility code” and does not reach the “ordinary tribulations of the workplace”) (citations omitted); Ray v. Henderson, 217 F.3d 1234, 1243, 1245 (9th Cir. 2000) (noting that not every offensive statement is actionable and that “mere ostra-
Analyzing the facts under that standard, which was shared by the Third and Fourth circuits,\(^\text{16}\) the Sixth Circuit affirmed the jury verdict in favor of the plaintiff on her retaliation claim.\(^\text{17}\)

In Burlington, the defendant hired plaintiff Sheila White to work as a railroad track laborer to remove and replace track components, transport track material, cut brush, and clear litter and cargo spillage. She was the only woman working in her department. Because of her prior experience operating a forklift, when a forklift position opened soon after she started working at the yard, the company assigned her that position as her primary responsibility.\(^\text{18}\)

Only three months after she started work, White complained that her immediate supervisor told her repeatedly that women should not be working in the department, and that he “had also made insulting and inappropriate remarks to her in front of her male colleagues.”\(^\text{19}\) After investigating White’s claims, the company suspended her supervisor and required him to attend sexual harassment training.\(^\text{20}\) The company also reassigned White’s forklift duties, however, explaining that her colleagues complained that “a more senior man should have the less arduous and cleaner job of forklift operator.”\(^\text{21}\)

White filed charges with the Equal Employment Opportunity Commission (EEOC),\(^\text{22}\) alleging that the company’s actions were discriminatory and retaliatory. She subsequently filed a second retaliation charge claiming the company placed her under surveillance and monitored her daily activities. A few days after she filed the second charge, White and her immediate supervisor had a disagreement that resulted in the company placing her on an indefinite, unpaid suspension for insubordination.\(^\text{23}\)

The company eventually decided that White had not been insubordinate. It reinstated her and provided her with the backpay she lost during her 37-day suspension. The suspension became the basis for a third retaliation claim,\(^\text{24}\) and after exhausting her administrative remedies, White filed suit in federal court.\(^\text{25}\)

At trial, the district court instructed the jury to find in White’s favor if it found that she “suffered a materially adverse change in the terms or conditions of her employment,” and after the jury returned a verdict for the plaintiff, the company appealed.\(^\text{26}\) Using the same standard as that contained in the jury instructions, the Sixth Circuit affirmed the jury’s verdict.

The Supreme Court granted certiorari to resolve the circuit split on the correct standard to apply when resolving employee retaliation charges under Title VII. Specifically, the Court addressed two related issues: (1) whether the phrase “discriminate against” in Title VII’s retaliation provision confines actionable retaliation to adverse activity that affects the terms and conditions of employment, and (2) how harmful the adverse actions must be to fall within its scope.\(^\text{27}\)

The Court ultimately determined that Title VII’s anti-retaliation provision reaches a broader range of conduct than the substantive anti-discrimination provision and is not confined to adverse actions occurring in the workplace. It thus rejected the standard used by courts that required aggrieved employees to demonstrate that they were subjected to materially adverse changes in the terms or conditions of employment.\(^\text{28}\) It also therefore rejected the even stricter standards used by courts that had limited Title VII’s reach to “ultimate employment actions,” such as hiring, granting leave, and discharging.\(^\text{29}\) The Court reasoned that the failure of Congress to limit “discrimination” to the terms and conditions of employment in the retaliation provision, as it had in the substantive provision, demonstrated legislative intent to include a wider variety of conduct within its scope.\(^\text{30}\) Surveying the

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16. See, e.g., Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (requiring the alleged retaliation to constitute an “adverse employment action”) (citations omitted); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (requiring that the challenged action result in “an adverse effect on the ‘terms, conditions, or benefits’ of employment”) (citations omitted).
19. Id.
20. Id.
21. Id.
22. The EEOC is the federal agency charged with enforcing Title VII, Title I of the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), among other laws. See EEOC, Laws Enforced by the EEOC, www.eeoc.gov/policy/laws.html (last visited Sept. 3, 2007).
24. Id.
26. Id. at 2416.
27. Id. at 2408.
28. These include the Sixth, Third, and Fourth circuits. See Burlington, 126 S. Ct. at 2410.
29. These include the Fifth and Eighth circuits. See Burlington, 126 S. Ct. at 2410.
30. Burlington, 126 S. Ct. at 2411-12. Justice Alito criticized the majority’s reading of the statute as unfaithful to its language. Although he admitted that it was not “the most straightforward reading of the bare language of the retaliation provision, he favored an interpretation that would define “discrimination” as “chiefl[y] discrimination ‘with respect to ... compensation, terms, conditions, or privileges of employment.’” Id. at 2419 (Alito, J., concurring).
disparate factual circumstances that had come before the lower courts, the Court further found that an “employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside of the workplace.”

In articulating the appropriate standard to judge retaliation claims, the Court focused on the deterrent effect a wide range of employer actions could have on an employee’s willingness to address workplace discrimination. The Court’s new standard therefore requires a plaintiff to show “that a reasonable employee would have found the challenged action materially adverse,” which means that the action “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Applying its new standard to the case before it, the Court thus emphasized that the “jury was not required to find that the challenged actions were related to the terms or conditions of employment.”

Retaliation claims must be assessed on a case-by-case basis. Although the Court spoke in terms of the objective “reasonable employee,” retaliation claims may turn on a particular plaintiff’s perspective within a particular workplace. In Burlington, for example, the evidence showed that the track labor duties were more arduous and dirtier than the forklift operator position. The evidence also showed that the forklift operator position was objectively considered a better job, which White’s male co-workers resented White for occupying. According to the Court, the jury could thus reasonably conclude that the reassignment of responsibilities under these circumstances would have been materially adverse to a reasonable employee.

Moreover, even though the company eventually paid White for the 37 days she was suspended, the Court noted that a “reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.”

Although the new standard continues to require “materially adverse” employer action, the courts cannot end their analyses there. Instead, the standard requires the courts to focus on whether the alleged victim would have been deterred if she had known what the consequences of her protected activities would be. The Court’s decision not only changes the law in those circuits that had adopted a narrow interpretation of the law but may also affect similar complaints brought under other federal, and some state, laws. Moreover, the expansiveness of the decision is likely to spur an increase in retaliation claims.

IV. Effect of Burlington in the Tenth Circuit

While Burlington will affect the outcome of retaliation cases in the Tenth Circuit and its district courts, including those in Kansas, the impact may be somewhat muted because the Tenth Circuit has consistently interpreted Title VII’s retaliation provisions broadly. For example, in Rutherford v. American Bank of Commerce, the court ruled that the term “employee” in the Act includes former employees — not just current employees. The court reasoned that it should construe remedial statutes, such as Title VII, liberally and held that the Act prohibited retaliatory job references.

In Berry v. Stevinson Chevrolet, defendants asked the Tenth Circuit to reconsider Rutherford and overturn a district court’s determination that a malicious prosecution case instituted against former employees fell within the scope of the Act. The court refused to do so, noting that federal courts in several other jurisdictions had followed Rutherford in finding that filing civil or criminal charges against former employees could constitute actionable retaliation under Title VII.

The Tenth Circuit’s articulation of the prima facie retaliation case in Berry was extremely broad. It required the plaintiff to establish: “(1) protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer’s adverse action.” In its application of that standard, however, the court stated, “[M]alicious prosecution can constitute adverse employment action. ... A criminal trial, such as that to which [plaintiff] was subjected, is necessarily public and therefore carries a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects.” Although the Tenth Circuit did not appear to require a connection between the adverse action and employment when it articulated the prima facie case, the court took pains to make that connection in its holding.

Because of the Tenth Circuit’s broad interpretation of the law, federal district courts in Kansas have found “adverse employment actions” in employer conduct both within and outside the workplace, whether the employee suffered monetary losses in the form of wages or benefits. For example, courts have found adverse employment actions in verbal interrogation and reprimands, threats to withdraw supervision and not renew an employee’s contract, demo-

31. Id. at 2412 (citing Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996)).
32. Burlington, 126 S. Ct. at 2414-15 (citations omitted). The Court’s articulated formula is consistent with the view the Seventh and D.C. circuits and the EEOC had espoused.
33. Id. at 2416.
34. See id. at 2417.
35. Id.
36. 565 F.2d 1162 (10th Cir. 1977).
37. The Rutherford court looked to cases brought under the Fair Labor Standards Act (FLSA) for guidance. Although the FLSA speaks only in terms of “employees,” the Sixth Circuit had held that the FLSA protected former employees from retaliatory negative job references. Rutherford, 565 F.2d at 1165-66 (citing Dunlop v. Carriege Carpet Co., 548 F.2d 139 (6th Cir. 1977)).
38. 74 F.3d 980 (10th Cir. 1996).
39. Id. at 986 (citations omitted).
40. Id. at 985 (emphasis added).
41. Id. at 986.
tions, adverse or unjustified evaluations and reports, transfers and reassignments of duties, failures to promote, and unfavorable letters of reference to prospective employers.43

Rejecting the position taken by the Fourth, Fifth, and Eighth circuits, the Tenth Circuit has also held that employers can be liable for retaliatory harassment by co-workers when supervisors or managers "either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage the co-workers’ actions."44 This approach is consistent with the Supreme Court's view that limiting retaliation claims to employment-related actions would not deter the many forms that retaliation can take and would fail to achieve the anti-retaliation provision's primary purpose, which is to maintain unfettered access to statutory remedial mechanisms.45

Notwithstanding the Tenth Circuit's historically broad interpretation of the anti-retaliation provision, federal district courts recognize that Burlington now requires a different analysis. In Homburg v. U.P.S.,46 for example, a Kansas district court amended its recently entered order sustaining defendant's motion for summary judgment. The court recognized that its previous order applied the same standard to the plaintiff's retaliation and discrimination claims when it found the employer's requirements that plaintiff travel more and work from the office were not sufficiently adverse. In light of Burlington, the court concluded that factual questions existed regarding whether these demands were materially adverse for purposes of plaintiff's retaliation claim.47

Since Burlington, the Tenth Circuit has also found that the refusal to allow an employee to work part time in response to a wage discrimination complaint,48 termination of a male employee who complained about "reverse" sexual harassment,49 suspension, or threats to suspend, unemployment benefits,50 and co-worker harassment51 could all support Title VII retaliation claims.

V. Effect of Burlington on Retaliation Claims Under Other Laws

The Court's decision in Burlington will affect not only analysis of Title VII retaliation claims but also retaliation claims brought pursuant to other federal employment rights laws. It is also likely to affect the way in which courts analyze retaliation claims under state law.52 Individuals may bring retaliation charges under many federal laws, including the Americans with Disabilities Act (ADA)53 and the Age Discrimination in Employment Act (ADEA),54 which, like Title VII, the EEOC enforces. Though Title VII retaliation charges constitute a majority of the retaliation charges filed with the EEOC, almost 3,000 individuals across the United States claimed their employers retaliated against them in violation of these other statutes in 2006.55

Because of similarities in these laws, courts routinely apply principles enunciated in Title VII decisions to ADA or ADEA cases alleging violations of the substantive as well as anti-retaliation provisions. For example, in Sanchez v. Denver Public Schools,56 which involved Title VII and ADEA claims, the Tenth Circuit did not distinguish between the two statutes when determining the viability of the retaliation claims.57 Similarly, in Galabya v. N.Y. City Board of Education,58 the Second Circuit noted that Title VII cases defining adverse actions are applicable in ADEA cases because both statutes prohibit discrimination with respect to the compensation, terms, conditions, or privileges of employment.

The usefulness of Title VII analysis is not limited to situations in which the ADA or ADEA are at issue. Courts look to Title VII jurisprudence for guidance when assessing claims under other federal laws, including the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA), which the Department of Labor enforces. In Richmond v. Oneak Inc.,59 for example, the Tenth Circuit reviewed and rejected a plaintiff's FLSA and FMLA retaliation claims using Title VII's analytical framework.

43. See Unrein, 51 F. Supp. 2d at 1210-11 (collecting cases in which the Tenth Circuit had applied a "liberal standard" to retaliation claims but noting that it would have taken a more restrictive approach had it not been encumbered by its precedent).
44. Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998).
45. See Burlington, 126 S. Ct. at 2412 (citations omitted).
47. Id., at *1, see also Scott v. Kemphrhone, No. 05-2144-KHV, 2006 WL 1980219 (10th Cir. July 17, 2006) (noting that, following Burlington, a plaintiff is no longer required to show that she subjected to an adverse employment action).
48. EEOC v. PVNF LLC, 487 F.3d 790, 803 n.8 (10th Cir. 2007) (recognizing that Burlington could affect the continuing viability of a previous ruling that written warnings could only be actionable if they significantly change a plaintiff's employment status).
49. Smith v. Century Concrete Inc., No. 05-2105-JAR, 2006 WL 1877013, *8-9 (D. Kan. July 6, 2006) (finding that a reasonable jury could not find that the defendant's assignment of plaintiff to shoveling duty [two or three times] over a two- to three-week span would have been materially adverse to the reasonable employee).
57. 120 F.3d 205 (10th Cir. 1997) (rejecting plaintiff's claim that her termination was retaliatory under the FLSA and FMLA).
employment action’ requirement applied to retaliation clause was derived from Title VII. Finding that the FMLA’s standard in a retaliation case brought under the Eighth Circuit employed the Burlington stan-
dards to ADA claims as it applies to Title VII discrimination cases alleging violations of the Rehabilitation Act, the court generally applies ADA standards. The court, in turn, generally applies the same standards to ADA claims as it applies to Title VII claims. Applying the standard from Burlington, the court denied the defendant’s motion for summary judgment on plaintiff’s Rehabilitation Act claim because plaintiff had established a prima facie case. The court recognized that a rational fact finder could find that stripping the plaintiff of certain job responsibilities “was sufficient unusual that the associated professional stigma-
tism would have dissuaded a reasonable worker from making” protected complaints.58

Courts also refer to Title VII jurisprudence when considering alleged violations of state anti-discrimination laws. In Kansas, for example, courts have borrowed Title VII’s burden-shifting evidentiary paradigm when evaluating claims alleging a violation of the Kansas Act Against Discrimination (KAAD).64 In one post-Burlington decision, a Kansas district court rejected defendant’s motion for summary judgment on plaintiff’s KAAD and Title VII retaliation claims. Without distinguishing the statutory bases for the retaliation claims, the court found genuine issues of fact regarding whether a reasonable employee would find the defendant’s investigation into the plaintiff’s expense reports materially adverse.65

Jurisdictions outside of the Tenth Circuit have also felt the effect of Burlington on claims alleging violations of state anti-discrimination law. A retaliation claim brought pursuant to Connecticut’s Fair Employment Practices Act, for example, recently survived summary judgment based, in part, on the effect of Burlington’s new retaliation standard.66 Similarly, finding that a plaintiff’s claims of harassment, insults, and undesirable job transfers could sustain a claim under Burlington, an Illinois court reversed an administrative decision to dismiss a retaliation claim under the Illinois Human Rights Act.67 On the other hand, a Texas appellate court found an employer’s retaliatory reprimands not sufficiently adverse under the Burlington paradigm to support a claim under the Texas Labor Code.68

The Burlington decision will even influence claims brought under other state laws. This is most likely true of claims alleging that an employer has discriminated or retaliated against an employee for exercising her rights under a state workers’ compensation law.69 The extent to which state courts will find the Burlington analysis persuasive, however, will depend on whether the language or purpose of the state law at issue is analogous to the federal law.70 Kansas courts analyzing workers’ compensation retaliation claims may be particularly persuaded by the deterrence analysis found in Burlington in light of the Kansas Supreme Court’s expansion of such claims to include retaliatory demotions — not just retaliatory discharge, as is the case in some jurisdictions.71

60. 464 F.3d 1164 (10th Cir. 2006).
63. Id. at *9; see also McGowan v. City of Eufaula, No. 04-7083, 2006 WL 3720238, at *5 (10th Cir. Dec. 19, 2006) (rejecting a claim of retaliatory harassment because the plaintiff failed to show that the alleged harassment amounted to a materially adverse action); Kessler v. Wichita County Dep’t of Social Services, No. 05-2582-cv, 2006 WL 2424705, at *11 (2d Cir. August 23, 2006) (vacating summary judgment on retaliation claims brought under the ADEA and Title VII because a reasonable employee would find the defendant’s investigation into the plaintiff’s expense reports materially adverse).
VI. What to Expect After Burlington

Although the total number of discrimination charges filed at the EEOC has risen and fallen — sometimes dramatically so — between 1992 and 2006 the percentage of such charges brought under Title VII’s anti-retaliation provision has steadily increased.72 For example, in 1992, 72,302 individuals filed discrimination charges with the EEOC,73 In the same year, 10,499 individuals (or 14.5 percent) alleged retaliation under Title VII.74 In 2006, 75,768 individuals filed discrimination charges with the EEOC and 19,560 (or 25.8 percent) claimed to have been retaliated against in violation of Title VII.75 Retaliation charges are increasingly prevalent for several reasons. First, a retaliation charge can be successful even when the underlying discrimination charge is not.76 To be protected from retaliation, potential plaintiffs need only hold “a good faith, reasonable belief” that the allegedly discriminatory actions they challenge violate the law.77 Moreover, the anti-retaliation provisions protect a greater number of individuals, including former employees and those who complain on behalf of others, but who do not believe themselves to be victims. Additionally, the probability of a plaintiff recovery is favorable, at between 48 percent to 68 percent, and the median awards in such cases tend to be slightly higher than in other types of discrimination cases.78

74. Id.
76. See, e.g., Unrein v. Payless ShoeSource Inc., 51 F. Supp. 2d (D. Kan. 1999) (although the court found against the plaintiff on all of her discrimination claims, the court found that she had stated a prima facie case of retaliation, though the court ultimately found for the defendant on that claim as well); Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000) (noting that an employee is protected from retaliation even if the discrimination complained of is not legally cognizable); Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996) (jury found against plaintiff on his discrimination claim but for plaintiff on his retaliation claim); Soileu v. Guilford of Maine Inc., 105 F.3d 12 (1st Cir. 1997). In Yanowitz v. L’oreal U.S.A. Inc., 116 P.3d 1123 (Cal. 2005), the court applied the same principles to a state-law retaliation claim.
77. Treglia v. Town of Manlius, 313 F.3d 713, 719 (2d Cir. 2002). As one court explained: “Although the alleged conduct need not actually be sexual harassment to support a retaliation claim, the conduct ‘must be close enough to support an objectively reasonable belief that it is.’” Stone v. Graco Gen. Ins. Co., No. 8:05-cv-636-T-30TBM, 2006 WL 2789018 at *7 (M.D. Fla. Sept. 26, 2006) (citations omitted); see also Quinn v. Green Tree Credit Corp., 159 F.2d 759, 769 (2d Cir. 1998) (noting that the plaintiff need not establish that her complaint successfully described conduct that violated Title VII as long as she demonstrated that she had “a good faith reasonable belief” that it did).
retaliation case and remanded the case back to the district court for the calculation of possible additional damages.79

Those factors alone suggest that retaliation charges were not likely to abate even before Burlington. Now that the Burlington decision has lowered the bar for stating a prima facie case, employers can expect the number of retaliation charges to increase even further. Because plaintiffs are no longer required to show that they suffered an adverse “ultimate” employment action, many of the claims courts would have rejected under pre-Burlington standards are now likely to succeed.80

At the very least, the focus on the deterrent effect of employer actions, rather than simply on the actions themselves, may help employees survive summary judgment and get to a jury because “the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.”81 As the Seventh Circuit put it, a defendant “may have a Catbert in its management, seeking out devices that would be harmful to most people but do real damage to select targets.”82 Retaliatory exploita-

VII. How to Avoid Retaliation Claims

Under State or Federal Law

Though the Burlington Court defined the term “adverse,” it did not touch the other elements of the prima facie case of retaliation or the type of proof plaintiffs must produce to prevail on their claims. Because a wider range of employer conduct may violate the act, employers should re-examine their equal employment opportunity (EEO) policies and procedures to ensure that employee complaints of discrimination are not met with retaliatory conduct. The frequency and success rate of retaliation claims even before Burlington suggests that employers should also self-critically analyze other company policies and practices.

A. EEO policies

Regardless of size, employers should have written EEO policies that affirm their commitment to maintaining an environment that is free from discrimination. These policies should also clearly state that employees who complain in good faith about discrimination, or who exercise other rights guaranteed by state or federal law, are protected from retaliation. Because these policies are ineffective if employees are not aware of them, employers should ensure that they provide the policies to new employees, post them in areas employees are likely to see them, and include the policies in any company manual or employee handbook.

To be effective, employer policies should provide a clear system of redress. Optimal policies direct employees to report complaints to a human resources department and/or to a particular in-

79. McInnis v. Fairfield Cnty., Inc., 458 F.3d 1129 (10th Cir. 2006).

80. In one such case, the appellate court reversed the trial court’s judgment that plaintiff’s retaliation claims were limited to the circumstances surrounding her discharge. On de novo review, the court acknowledged that the lower court had used the proper standard but found that Burlington “less onerous” standard necessitated judgment for the plaintiff on her claim that her employer “blackballed” her in retaliation for filing discrimination charges. See Richard v. Bd. of Supervisors of La. State Univ., 960 So.2d 953 (La. App. 1 Cir. 2007).

81. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006) (citations omitted). To use one of the Court’s examples, a work schedule change “may make little difference to many workers, but may matter enormously to a young mother with school age children.” Id.

82. Washington v. Ill. Dep’t of Rev., 420 F.3d 658, 662 (7th Cir. 2005). The court was referring to “Catbert, the Evil Director of Human Resources in the comic strip Dilbert, [who] delights in pouncing on employees’ idiosyncratic vulnerabilities.” Id. Although this decision predates Burlington, its premise survives because of the Burlington Court’s focus on the context in which a claim arises.

83. Id.

84. Burlington, 126 S. Ct. at 2421 (Alito, J., concurring).

85. Id.
individual who is trusted and neutral. Although employee complaints to direct supervisors may be appropriate in some cases, employees who feel aggrieved by their supervisor’s conduct must have a viable alternative reporting mechanism. Additionally, having a centralized process allows employers to identify potential trends, maintain confidentiality, and standardize the complaint and investigation process. Moreover, employers should provide prompt, appropriate, and effective remedial action to address the situation that gave rise to the complaint and ensure that the complaining employee is not subjected to materially adverse circumstances that could form the basis of a viable retaliation claim.

Periodically “republishing” an employer’s anti-discrimination policy can also be advantageous. When employees complain, regardless of the merit of the complaint, employers should remind their employees about their policy and their commitment to a fair and non-discriminatory workplace. At the same time, it is important for employers to discipline employees who engage in discriminatory, harassing, or retaliatory practices or those who complain in bad faith. The failure to discipline offending employees eviscerates anti-discrimination policies.

B. Other employer policies

Though they are necessary, well-crafted EEO policies are insufficient in themselves to protect employers and their employees. Verbal interrogations and reprimands, demotions, job transfers, diminution of responsibilities, increased travel requirements, failures to promote, adverse performance evaluations, co-worker harassment, and unfavorable letters of reference to prospective employers can all be materially adverse under certain circumstances.90 Employers must be, therefore, particularly vigilant when disciplining employees who complain about discrimination or exercise any other state or federal statutory right. That does not mean that employers may not discipline these employees for bona fide nonretaliatory reasons or that they must favor them; it does mean that employers must understand how courts may judge their actions.

The prima facie case of retaliation requires evidence of a causal link between an employee’s protected activity and the employer’s adverse act.89 If the employee makes out the prima facie case, the employer has the opportunity to present a “legitimate, non-retaliatory reason” for its action,88 which the employee must ultimately prove was a “pretext” for retaliation;89 that is, “unworthy of belief” or “not the genuine motivating reason.”89

The employer’s purported motivation and the employee’s attempt to show pretext are analytically linked because plaintiffs “may demonstrate pretext by showing ‘such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s reasons for its action, that a reasonable factfinder could rationally find them unworthy of credence.’90 To do so, plaintiffs usually produce evidence that (1) the employer’s reason was false, (2) the employer did not follow written company policy, or (3) the employer did not follow unwritten company policy or practice.91 Close temporal proximity between a worker’s exercise of her statutory rights and the challenged action can also be circumstantial evidence of pretext or causation, though temporal proximity alone is rarely sufficient.92

As the federal courts continue to remind us, their role is to prevent unlawful employment practices, not act as “super personnel departments” that second guess employers’ business judgments.93 Thus, employers may legitimately transfer, terminate, or otherwise discipline workers who have recently exercised statutory rights, such as taking FMLA leave, filing workers’ compensation claims, or complaining about discrimination. Employers should ensure, however, that they have followed company policy and practice and maintained all records that relate to and can justify their actions.94 They should also be consistent in their treatment of similarly situated workers. Failure to do so may be powerful evidence of pretext in a retaliation case.95

(continued on next page)
VIII. Conclusion

The Burlington decision lowered the bar on unlawful retaliation claims. The Court logically expanded the analytical focus to include the real-world consequences of retaliation on affected employees. The decision reflects the workplace reality that employees fear a wide range of adverse consequences if they legitimately challenge discriminatory conduct or otherwise exercise statutory rights. Thus, the effect of Burlington may be to further advance the purposes of Title VII and other employee-rights legislation.

About the Author

Aïda M. Alaka is an associate professor of law at Washburn University School of Law, where she teaches legal analysis, research and writing, and employment law. She is a graduate of Loyola University Chicago School of Law. During law school, Alaka was editor-in-chief of the Loyola University Law Journal. She formerly practiced employment law, most recently as a partner in the Chicago office of Winston & Strawn. Her practice included employment litigation and counseling on a wide range of employment law issues. Her article, “Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has Smith v. City of Jackson Substantially Expanded the Rights of Older Workers Under the ADEA,” was recently published in the Albany Law Review.
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FACTS: A.A. moved to the United States from Mexico in 1989 when she was 10 years old. A.A. did not complete high school or obtain a GED. A.A. learned she was pregnant in 2003 when she was 24 years old and living in Garden City. The father left and A.A. contemplated adoption. A.A. contemplated adoption, moved in with her neighbor, Guadalupe. A.A. contemplated adoption, moved in with her neighbor, Guadalupe. A.A. contemplated adoption, moved in with her neighbor, Guadalupe. A.A. contemplated adoption, moved in with her neighbor, Guadalupe. A.A. contemplated adoption, moved in with her neighbor, Guadalupe.

Attorney Discipline

IN RE MARK J. SACHSE
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 12,956 – SEPTEMBER 27, 2007

FACTS: Respondent, a private practitioner from Kansas City, Kan., wrote to the clerk of the appellate courts surrendering his license to practice law pursuant to Kansas Supreme Court Rule 217. At the time of the surrender, a disciplinary hearing was pending on a formal complaint based on 17 separate complaints. The allegations stated violations of multiple rules in the representation of numerous clients, including KRPC 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.16 (declining or terminating representation), 3.2 (expediting litigation), 4.1 (truthfulness), and 8.4(d) (misconduct prejudicial to the administration of justice) and SCR 207 for failing to cooperate with disciplinary investigations in all 17 complaints.

Respondent had previously been informally admonished twice, placed on a two-year supervised probation once, and suspended for one year. As of the date of the surrender, the Lawyers’ Fund for Client Protection had paid out more than $27,500 in compensation to eight former clients who suffered loss due to respondent’s misconduct.

HELD: The Supreme Court reviewed the files of the disciplinary administrator’s office and found that the surrender should be accepted and the respondent disbarred.

Civil

ADOPTION, CONSENT, AND NOTARY
IN RE ADOPTION OF X.J.A.
FORD DISTRICT COURT – AFFIRMED IN PART AND
REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 96,003 – SEPTEMBER 7, 2007

FACTS: A.A. moved to the United States from Mexico in 1989 when she was 10 years old. A.A. did not complete high school or obtain a GED. A.A. learned she was pregnant in 2003 when she was 24 years old and living in Garden City. The father left and A.A. contemplated adoption and allegedly told Guadalupe that she would give the baby to Guadalupe’s sister, M.A., and M.A.’s companion because they were unable to conceive. Guadalupe and M.A. stayed with A.A. while she was in labor. A.A. was in the hospital for three days following the birth. Three days after the birth, A.A. signed a consent to the adoption. The adoption attorney told M.A. that A.A.’s signature required an acknowledgment. M.A. took the consent to a notary acquaintance that prepared her tax returns. M.A. explained the situation and then the notary notarized the paper, but the mother was not present, and there was no evidence that the notary knew A.A. Before completion of adoption proceedings, A.A. filed a motion to withdraw her consent claiming she did not sign anything she believed was a consent to adoption. The district court held that the adoptive parents substantially complied with the consent statutes, approved the consent and adoption, and terminated the natural mother’s parental rights. The Court of Appeals reversed because of the adoptive parents’ failure to substantially comply with the Uniform Law on Notarial Acts.

ISSUES: (1) Adoption, (2) consent, and (3) notary

HELD: Court found the district court correctly placed the burden of providing prima facie evidence on the adoptive parents on the issue of A.A.’s signature appearing on the consent. However, the court erred in shifting the burden of proving involuntary consent to A.A. once the adoptive parents had establishing her signature on the consent. It erred because the prima facie evidence of other matters typically provided by the acknowledgment were still missing, e.g., that the consent was voluntary. Court reversed on this matter.

Court stated substantial competent evidence supported the district court’s finding that the adoptive parents were common-law husband and wife and, therefore, the district court had jurisdiction to grant a decree of adoption to them.

DISSENT: J. Davis dissented and held the baby should be returned to A.A. J. Davis stated that the majority decision has the result of increasing litigation on the issue of consent in adoption cases and nullifies the explicit statutory requirement that a consent to adoption be acknowledged by a public officer and replaces it with an evidentiary hearing.

STATUTES: K.S.A. 20-3018(b); K.S.A. 53-501, -502, -503, -508, -509; and K.S.A. 59-2102, -2111, -2113, -2114, -2121, -2128, -2130, -2143

EASEMENTS AND IMPROVEMENTS
CITY OF ARKANSAS CITY V. BRUTON ET AL.
COWLEY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 94,893 – SEPTEMBER 7, 2007

FACTS: Ronald and Rebecca Bruton own and reside on a 5.4 acre plot of land that is located within the city of Arkansas City. Their property borders the Arkansas River and is subject to a 1935 easement granted to the city for flood protection. In 2000, the city...
attempted to enter the Bruton's property in order to make improvements to the dike. The city filed for a restraining order against the Brutons and an order declaring that the city had a lawful easement encompassing the Bruton's property, as well as the authority to construct and maintain the dike on that property. The district court issued the restraining order. The city completed improvement to the existing dike on the Bruton's property. The district court granted judgment in favor of the city finding the 2000-2001 levee improvements by the city did not breach the easement agreement because the change in the configuration of the levee was within the easement's stated purpose. The Court of Appeals reversed the district court's grant of summary judgment holding that the district court erred in finding the instrument ambiguous, focused exclusively on the stated purpose and ignored the specific express restrictions imposed on the scope and location of the easement, and failed to recognize that a genuine issue of material fact precluded summary judgment.

ISSUES: (1) Easements and (2) Improvements

HELD: Court found that because the city's recent improvements to the dike did not involve any land other than the land used in the original easement and because the improvements constituted maintenance within the meaning of the easement, it held that the city's improvements in 2000-2001 did not exceed the scope and limitation of the easement. Court held the district court correctly granted summary judgment in favor of the city as to the Brutons' inverse condemnation and declaratory judgment counterclaims even though the district court's decision erroneously concluded that the 1935 easement was ambiguous. Court found the trial court was right for the wrong reason.

DISSENT: J. Luckert held that summary judgment should have been denied. A jury should weigh the evidence and determine whether the improvements constituted maintenance in accordance with the 1935 plans and specifications.

STATUTES: None

TORTS, WORKERS' COMPENSATION, AND IMMUNITY

EDWARDS V. ANDERSON ENGINEERING INC.

CRAWFORD DISTRICT COURT – AFFIRMED

NO. 96,203 – SEPTEMBER 7, 2007

FACTS: Crossland Heavy Contractors (Crossland) built a storm drainage system for the city of Pittsburg and retained Anderson to test failed pipe. Crossland worker (Edwards) was fatally injured while cutting a failed pipe as directed by an Anderson engineer. Edwards' family filed wrongful death action. Anderson filed motion for summary judgment, claiming construction design professional immunity provision in K.S.A. 2006 Supp. 44-501(f). District court denied that motion, and Anderson filed interlocutory appeal.

ISSUES: (1) Appellate practice and (2) construction design professional immunity

HELD: Noncompliance with Supreme Court Rules 6.02(f) and 6.05 cited as reminder to practicing bar of these frequently violated rules.

Denial of Anderson's motion is affirmed, notwithstanding district court's mischaracterization of legal questions as disputed issues of fact. Statutory requirements for immunity under K.S.A. 2006 Supp. 44-501(f) are stated and applied. Here, Anderson was a construction design professional retained to perform professional services on a construction project, and its representative performed professional duties on the site of the construction project. Anderson's marking of cut lines on a concrete pipe was a design plan or specification. Edwards suffered injuries during the construction project on which his employer, Crossland, failed to comply with safety standards. Edwards' injuries were compensable under Workers' Compensation Act. Anderson did not contractually assume responsibility for safety practices on the construction site. Because a genuine material dispute remains whether proximate cause of Edwards' death was Crossland's failure to comply with safety standards, or Anderson's negligence in preparing the design plan or specification for cutting the pipe, summary judgment was inappropriate.

STATUTES: K.S.A. 2006 Supp. 44-501 sections (a), (b), and (f), -508 sections (a) and (k); and K.S.A. 20-3018(c), 44-501 et seq., -504(a), 74-7003(i)

Criminal

STATE V. THOMPSON

MCPherson DISTRICT COURT – AFFIRMED

COURT OF APPEALS – REVERSED


FACTS: Thompson convicted of multiple drug crimes based on evidence found in his car after he was stopped for a faulty headlight; the officer returned Thompson's license, wished him a good day, and then asked for and obtained Thompson's consent to search car. Thompson appealed, claiming trial court erred in not granting motion to suppress evidence from the car because Thompson's consent was not voluntary. Court of Appeals reversed, 36 Kan. App. 2d 252 (2006), finding Thompson had no objective reason to believe he was free to end his conversation and drive away after the return of his documentation. Supreme Court granted state's petition for review and denied Thompson's cross petition on a sufficiency of evidence claim.

ISSUE: Fourth Amendment

HELD: Extensive discussion of general principles in Supreme Court, Tenth Circuit, and Kansas cases relevant to when an investigatory traffic stop turns into a consensual encounter and to application of the totality of circumstances test. Under totality of circumstances in this case, the traffic stop terminated and Thompson consented to a continuation of the encounter and to the searches. In examining totality of the circumstances, Court of Appeals erred in making lack of disengagement legally paramount, considering officer's pre-stop subjective intent as an important factor in considering whether the encounter was consensual, and considering Thompson's state of mind.

DISSENT (Beier, J, joined by Rosen, J.): For a traffic stop to be converted into a voluntary encounter, more that the totality of circumstances in this case should be required. Because the nature of the encounter did not change, the detention of Thompson beyond the time necessary to effectuate the purpose of the traffic stop violated the Fourth Amendment. The state failed to show that passage of time or some other event or circumstance purged the taint of the unconstitutional detention.

STATUTES: K.S.A. 2006 Supp. 65-4160; and K.S.A. 8-1568, 22-2402, 65-4152(a)(2) and (3), -4159, -4162(a)(3), -7006(a)

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The U.S. Bankruptcy Court for the District of Kansas gives notice of Proposed Local Rules of Practice and Procedure.

The Proposed Local Rules amend the present Local Rules as recommended by the Bench and Bar Committee of the U.S. Bankruptcy Court for the District of Kansas with the approval of the court.

Interested persons, whether members of the bar or not, may submit comments on the Proposed Local Rules addressed to the Clerk of the U.S. Bankruptcy Court for the District of Kansas at 401 N. Market, Room 167, Wichita, KS 67202. All comments must be in writing and must be received by the clerk no later than Dec. 1, 2007, to receive consideration by the court.

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Copies of the Bench and Bar Committee minutes, at which most of the proposed changes were discussed, are also available at www.ksb.uscourts.gov.
Civil

AUTOMOBILE INSURANCE COVERAGE
KEMPER INSURANCE COMPANIES V. WEBER ET AL.
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 96,316 – OCTOBER 12, 2007

FACTS: On Sept. 29, 2000, Sandy Taylor rented a passenger van from Thrifty Rent-A-Car in Kansas City and invited Ted, Emily, Daniel, Heather, and Jennifer to drive to a football game in Boulder, Colo. Only Ted was listed as an additional driver. No additional insurance was purchased. While Emily was driving, she lost control and rolled the van while dodging a tumbleweed. Sandy had car insurance with Farmers. Emily had insurance with Kemper. Kemper tendered policy limits of $300,000, which was divided pursuant to a stipulated order. Farmers paid Thrifty $20,420 for damages, and Sandy paid the $300 deductible on her Farmer’s policy. Farmers paid the cost of Sandy’s defense in a civil lawsuit filed against her by Daniel and Heather. All five passengers sued Emily for their medical expenses. Those suits are stayed pending appeal. Farmers denied coverage and refused to participate in the suits against Emily. The district court concluded that because Sandy was not operating the vehicle at the time of the accident, she was not a “user” for insurance purposes. The district court determined Sandy’s policy with Farmers did not extend coverage to Emily and granted Farmor’s motion for summary judgment. However, under the intervenor’s estoppel claim, the district court concluded on reconsideration that Farmers’ act of reimbursing Thrifty for the cost of the van essentially acknowledged the van was an “insured car” under Sandy’s insurance policy.

ISSUE: Automobile insurance coverage

HELD: Court held that under Sandy’s policy with Farmers, the rental vehicle was Sandy’s “insured car.” When Sandy handed the keys to Emily to drive, Sandy’s use of the car did not end; the car remained an insured car and continued to be used by Sandy. Thus, Sandy’s liability coverage extended to Emily as an “insured person” who was using the “insured car.” Because the district court concluded Sandy’s policy with Farmers did not extend coverage to a rental car driven by Emily, the court reversed the district court’s grant of summary judgment in favor of Farmers on this issue and granted summary judgment in favor of the intervenor’s on the coverage issue. The court concluded a ruling on the estoppel claim was moot.

STATUTES: None

BANKS, BANKING, AND CONTRACTS
LINDEN PLACE LLC V. BANK
JOHNSON DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
NO. 97,252 – SEPTEMBER 21, 2007

FACTS: See facts of full opinion for details concerning loan by Stanley Bank to Williams Building & Development Corp. (Williams) for residential construction project on land owed by Linden Place LLC. Also see response from Stanley Bank’s executive vice president to Linden Place about concerns of Williams’ misuse of loan proceeds that could impact subordinated interest of Linden Place in three model homes to be constructed by Williams. Linden Place filed action against Stanley Bank for breach of fiduciary duty and tortious interference with existing contractual relations. District court granted summary judgment to the Stanley Bank, finding no fiduciary relationship. Linden Place appealed.

ISSUES: (1) Breach of fiduciary duty and (2) tortious interference

HELD: Error to grant summary judgment on breach of fiduciary duty claim. Under circumstances of case and summary judgment standards, there exists the possibility of a brief fiduciary duty based on Stanley Bank’s assurance that Linden Place should not be alarmed and that expenditures would be monitored more carefully in the future. Denison State Bank v. Madeira, 230 Kan. 684 (1982), is distinguished.

No error in granting summary judgment on the tortious interference claim. No evidence from which a jury could conclude that Stanley Bank intentionally and maliciously procured a breach by Williams of his contract with Linden Place.

CONCURRENCE AND DISSENT: (Marquardt, J.): Concurs with affirming the dismissal of Stanley Bank’s tortious interference with contract claim. Dissents from majority’s reversal of summary judgment on breach of fiduciary contract claim. No evidence in record on appeal for a reasonable person to find Stanley Bank had any fiduciary duty to Linden Place.

STATUTE: K.S.A. 60-256(c)

DIVORCE, SETTLEMENT AGREEMENTS, AND STATUTE OF FRAUDS
IN RE MARRIAGE OF TAKUSAGAWA
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 95,508 – SEPTEMBER 7, 2007

FACTS: Mieko and Fusao Takusagawa were married in 1971 and divorced in 2003. Several financial issues remained. Two days before trial, they apparently settled the matter. The events leading up to the settlement were that Mieko received an e-mail from Fusao concerning a purported tax violation when Mieko failed to disclose to U.S. customs approximately $100,000 USD in Japanese yen. Mieko later refused to sign, and subsequently filed a motion to set aside, the settlement agreement, alleging that Fusao’s e-mail constituted a threat; that her agreement to settlement was made under duress or coercion; and that the terms were unfair, unjust, and inequitable and void. The trial court found no basis to set aside the separation agreement due to coercion and approved the agreement as fair and equitable to the parties.

ISSUES: (1) Divorce, (2) settlement agreements, and (3) statute of frauds

HELD: Court held that when an oral divorce settlement agreement is recited on the record in court and acknowledged by the parties, any applicable requirements of the statute of frauds for a written, signed memorandum evidencing the agreement are met. The transcript suffices even if it is prepared later because a memorandum need not be prepared before formation of the contract to fulfill requirements of the statute of frauds. A written signature or mark by the party to be charged with the agreement is not needed when that party has acknowledged his or her assets to it on the record during a court hearing. Court found no evidence of duress or coercion to set aside the agreement.

STATUTES: K.S.A. 2006 Supp. 16-1601, -1602(c), (d), (f), (h), (l); K.S.A. 20-301; K.S.A. 2006 Supp. 23-201(b); K.S.A. 33-105, -106; K.S.A. 60-1610(b)(3); and K.S.A. 84-2-201
FACTS: Ashley was arrested for DUI. He consented to a breath test, and the results indicated a blood alcohol level above the legal limit. Officers completed and signed the suspension notice. Officer Glaser personally handed the completed DC-27 form to Ashley. Officer Doherty was present when Ashley was served with the suspension notice, although Doherty did not actually see Glaser hand the DC-27 form to Ashley. The Kansas Department of Revenue affirmed Ashley's suspension. Ashley appealed to district court claiming he was not properly served with notice because the notice had been served by Glaser and not by Doherty, who actually performed the breath test. The district court found Ashley had been properly served.

ISSUES: (1) DUI and (2) suspension notice

HELD: Court held that under the facts and circumstances of this case, either the officer who investigated the offense and requested the device to perform the test was qualified to serve the notice, either the officer who investigated the offense and requested the device to perform the test was qualified to serve the notice, or the officer who actually operated the device to perform the test was qualified to serve the notice of suspension of driving privileges pursuant to K.S.A. 8-1002(c).

STATUTES: K.S.A. 8-1001(b), -1002(c), -1020(a), (d), (h)(2); and K.S.A. 77-614(b)

FEDERAL SUPREMACY, PRE-EMPTION, AND MOTOR CARRIERS

STATE EX REL. KLINE V. TRANSMASTERS TOWING
DOUGLAS DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED NO. 96,967 – OCTOBER 5, 2007

FACTS: State alleged that Transmasters Towing committed multiple violations of Kansas Consumers Protection Act (KCPA). District court granted Transmasters’ motion to dismiss, finding the KCPA claims were pre-empted by the Interstate Commerce Commission Termination Act (ICCTA) that prohibited enactment or enforcement of a law related to price, route, or service of a motor carrier, and finding the ICCTA exception for state regulation of nonconsensual tow prices did not apply. State appealed.

ISSUE: Pre-emption

HELD: Court interpreted and applied the express pre-emption clause in ICCTA, the statutory exception authorizing a state to enact or enforce a law relating to price of nonconsensual towing, and the unconscionable acts or practices provisions of KCPA. Under facts of case, unconscionable price claims brought under K.S.A. (b) are not pre-empted by ICCTA express pre-emption clause in 49 U.S.C. § 14501(c)(1) because these claims are included within pre-emption exception in 49 U.S.C. § 14501(c)(2)(C). District court’s ruling to the contrary is reversed. District court’s dismissal of KCPA claims relating to Transmasters’ route or service as pre-empted by ICCTA is affirmed.

STATUTES: 49 U.S. §§ 14501(c)(1), 14501(c)(2)(C) (2000); and K.S.A. 50-623 et seq., -626(b)(9), -627 -627 (a), -627(b), -627(b)(1), -627(b)(2), -627(b)(5)

LANDFILL PERMIT AND STANDING
BOARD OF COUNTY COMMISSIONERS OF SUMNER COUNTY ET AL. V. HON, BREMBY ET AL.
SHAWNEE DISTRICT COURT
REVERSED AND REMANDED NO. 96,658 – OCTOBER 5, 2007

FACTS: In 2003, the Kansas Department of Health and Environment (KDHE) held public hearings in Harper County regarding a proposed permit to Waste Connections to construct and operate a municipal solid waste landfill. Members of the Tri-County Concerned Citizens Inc. (TCCCI) and other groups submitted comments on the permit. KDHE formally responded to the comments. In 2005, KDHE granted Waste Connections a permit to construct and operate the landfill. The Board of County Commissioners of Sumner County, TCCCI, and Donald Holland filed a petition for review in Shawnee County seeking to stay the effectiveness of and nullify the permit and later amended the petition alleging damages and procedural injuries had or would result from operation of the landfill. The district court dismissed the petition for lack of standing, finding none of the petitioners were parties to the agency proceedings under the Kansas Act for Judicial Review.

ISSUES: (1) Landfill permit and (2) standing

HELD: Court stated that under Kansas law, citizens are entitled to standing as a “party” based upon their opportunity to participate as a group or individually in the public hearing process preceding issuance of a permit. Consequently, the court concluded the district court erred and held that the petitioners were entitled to standing as “parties.” Court also held that it in prior cases it had determined that TCCCI meets the three-part standing test of NEA-Coffeyville, 268 Kan 384, and there was no reason to reconsider application of that criteria.

STATUTE: K.S.A. 77-501, -601, -611

TEACHER CONTRACT AND LAPSE IN TEACHER CERTIFICATION
RETTIE V. U.S.D. 475
GEARY DISTRICT COURT

FACTS: Rettie was a tenured teacher qualified to teach early childhood handicapped classes and employed by U.S.D. 475 for the 2003-2004 school year. Rettie renewed her contract with U.S.D. 475 for the 2004-2005 school year beginning on Aug. 9, 2004. On July 7, 2004, Rettie’s teacher’s certificate lapsed due to her failure to complete the prescribed continuing education requirements. Rettie applied for a substitute teacher’s certificate, which was granted on July 12, 2004. U.S.D. 475 terminated Rettie’s position with the school district due to the lapse in her certificate. The Board of Education acknowledged that it passed no resolution before or after Rettie received her termination letter authorizing or approving the termination based on the belief that the contract was void. Rettie took classes and received her teacher’s certificate on Dec. 23, 2004. The trial court ruled that Rettie did not possess any property right to continued employment requiring a due process hearing.

ISSUES: (1) Teacher contract and (2) lapse in teacher certification

HELD: Court held U.S.D. 475 was within its authority to terminate Rettie’s employment for the 2004-2005 school year due to her failure to obtain a valid teacher’s certificate in the programs for which she was hired to teach. However, as a tenured teacher she was entitled to protection under the Teachers Due Process Act (TDPA) even though her certificate lapsed for not completing continuing education requirements. Court held that the teaching contract could not trump the due process policy embodied in the TDPA and U.S.D. 475’s failure to comply with the Act violated Rettie’s due process rights.

STATUTE: K.S.A. 2006 Supp. 72-5438, -5445(b)

TORTS
HALE V. BROWN

FACTS: Traffic congestion resulted when Packard’s car left roadway and hit a tree. Hale was injured 35 minutes after Packard’s accident, when Brown failed to respond quickly enough to the conges-
tion and hit Hale’s car. Hale sued Packard and Packard’s employer for Hale’s injuries. District court granted defendants’ motion to dismiss, finding Packard’s negligence was not sufficiently connected to Brown’s negligent driving. Hale appealed.

ISSUE: Causation

HELD: Detailed discussion of proximate cause, including Restatement (Third) of Torts § 29, comment d, illus. 6, which is not adopted. Viable arguments for Hale are not persuasive. Case law in other jurisdictions supports district court’s conclusion that follow-on accidents caused by distraction of an initial wreck or inattention of a later driver is not sufficiently probable to support proximate cause. District court’s judgment is affirmed.

STATUTES: None

WORKERS’ COMPENSATION
COONCE V. GARNER
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 97,091 – SEPTEMBER 28, 2007

FACTS: Coonce entitled to workers’ compensation benefits for on-the-job injury. After insurance carrier videotaped Coonce being active contrary to assessed limitations and his deposition answers, it filed a complaint with Fraud and Abuse Investigation Section of Kansas Division of Workers’ Compensation. Director of that section found Coonce had violated K.S.A. 44-5,120(d)(4)(A) and (B) by giving false deposition answers. Maximum $2,000 fine imposed for each of 10 violations. Kansas Department of Labor (KDOL) and district court both denied Coonce’s petitions for review. Coonce appealed.

ISSUES: (1) Violations of K.S.A. 44-5,120(d)(4), (2) number of violations, and (3) reasonableness of fine

HELD: Plain language of K.S.A. 44-5,120(d)(4) supports agency’s determination that Coonce’s conduct fell within scope of statute, which includes misrepresentations while “attempting to obtain workers’ compensation benefits.” Under facts, KDOL’s finding that Coonce violated the act at least 10 times during deposition in an attempt to obtain workers’ compensation benefits is supported by substantial evidence.

Under facts and K.S.A. 44-5,120(g), each false or misleading statement or misrepresentation by Coonce during his deposition constituted a separate violation upon which a $2,000 fine could be imposed. No authority for Coonce’s claim that deposition should be viewed as one “statement.”

Assessment of $20,000 fine against Coonce was not unreasonable, arbitrary, or capricious under facts of case.

STATUTE: K.S.A. 44-5,120, -5,120(d), -5,120(d)(4), -5,120(d)(4)(A) and (B), -5,120(g), -5,120(g)(1), 77-601 et seq., -621

Criminal

STATE V. BRANSON
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 96,422 – SEPTEMBER 21, 2007

FACTS: Branson convicted of violating a protection from abuse order to stay away from Hird’s home and business. Branson claimed consent and acquiescence by Hird temporarily allowing Branson to be at Hird’s house and basement. District court found Branson had violated the protection order, notwithstanding Hird’s acquiescence. Branson appealed.

ISSUE: Protection from abuse orders

HELD: Protection from abuse statute is discussed, finding it reflects a concern for public peace and safety. The consent of a victim is not a defense to the crime of violating a protective order under K.S.A. 2005 Supp. 21-3843(a)(1).

STATUTES: K.S.A. 2005 Supp. 21-3843, -3843(a)(1); and K.S.A. 21-3102(1), 60-3101 et seq., -3106(a), -3107(e), -3107(f), -3110

STATE V. BROWN
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 96,593 – SEPTEMBER 21, 2007

FACTS: Brown ordered to live at halfway house for one year as a condition of his probation. When probation later revoked, district court refused to grant any allowance for the time Brown lived at the halfway house. Brown appealed.

ISSUE: Sentencing credit

HELD: Under facts of case, the halfway house was a residential facility under K.S.A. 21-4614a. As a condition of probation, Brown was required for one year to live at a halfway house where his liberty was restricted, and he was required to participate in various rehabilitative programs. Case is remanded for district court to compute Brown’s sentence with credit for days spent at the halfway house while on probation.

STATUTE: K.S.A. 21-4614, -4614a

STATE V. ELROD
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 96,146 – SEPTEMBER 14, 2007

FACTS: Elrod convicted of two counts of criminal sodomy and two counts of indecent liberties with a child involving his stepdaughter, D.T. The incidents happened over several years beginning when D.T. was 10 years old. Authorities became aware of the incidents when D.T. told a school administrator.

ISSUES: (1) Sufficiency of the evidence, (2) amended complaint, (3) multiplicity, (4) jury instructions, and (5) cumulative error

HELD: Court rejected Elrod’s claim that there was insufficient evidence to prove criminal sodomy because “blowing raspberries” on D.T.’s vaginal area does not constitute criminal sodomy. Court stated that K.S.A. 21-3501(2) only requires that there be oral contact with the female genitalia in order to satisfy the definition of sodomy; vaginal penetration is not required. Court stated it was perplexed by the state’s decision to amend the information after the conclusion of the trial to include two counts of indecent liberties. Court held that the information in place at the time of the trial contained all the elements of the crime and the jury heard sufficient evidence to support convictions for indecent liberties with a child. Court rejected Elrod’s claim of multiplicity and that he was convicted multiple times for conduct occurring on the same date. Court held that it was undisputed that Elrod’s only defense was that the alleged abuse never happened and that given D.T.’s testimony regarding the repeated and ongoing nature of the abuse, there were many acts that could have served as the basis of Elrod’s convictions. Court held it was error for the trial court to admit evidence of an incident that occurred in Missouri as evidence independent of K.S.A. 60-455. Court held the harmless error analysis was applicable because the trial court instructed the jury that it could consider the incident only “for the purpose of showing the relationship between the defendant and child, and the existence of a continuing course of conduct between the parties.” Any error stemming from the trial court’s failure to make a particularized inquiry into prejudice was harmless. Court held the jury instructions were not clearly erroneous when using the word “until” in the instruction, “You must presume that he is not guilty until you are convinced from the evidence that he is guilty.” However, court stated that the use of the word “unless” is the better practice. Court found this was not a case where the cumulative error rule would apply.

STATUTES: K.S.A. 21-3501(2), -3505; and K.S.A. 60-455

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STATE V. GLYNN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 93,413 – SEPTEMBER 14, 2007

FACTS: DNA evidence from cheek saliva swabs obtained with a warrant supported Glynn’s conviction in separate and prior home invasion case. State v. Glynn, Appeal No. 93,124 (April 6, 2007) (unpublished opinion), petition for review filed. Same DNA evidence used to identify and convict Glynn of aggravated kidnapping, rape, and aggravated sodomy in present case. Glynn appealed, claiming district court erred in denying motion to suppress the DNA evidence as unlawfully obtained and exceeding scope of the warrant, and as violating Glynn’s right to privacy. Glynn also claimed error in district court’s denial of motion for change of venue, claimed charges were multiplicitious because they arose out of a single act of violence, and claimed insufficient evidence supported the convictions.

ISSUES: (1) Use of DNA profile in separate case, (2) search and seizure issues, (3) venue, (4) multiplicity, and (5) sufficiency of evidence

HELD: Issue of first impression in Kansas. District court correctly denied motion to suppress. Once law enforcement has lawfully obtained a material sample and DNA profile there from, a defendant has no additional constitutional protected privacy in that evidence and it may be used in the investigation of other crimes for identification purposes in the same manner as fingerprint evidence may be used without the requirement of obtaining an additional search warrant in the case under investigation.

No merit to fruit of poisonous tree argument. Manner of obtaining saliva sample was not unreasonable and did not exceed scope of warrant.

No abuse of discretion to deny motion for change of venue.

Charges in case were not multiplicitious under State v. Schoonover, 281 Kan. 453 (2006).

Substantial competent evidence supports all convictions in this case.

STATUTES: K.S.A. 2006 Supp. 21-2511 and K.S.A. 22-2502(a)

STATE V. HALL
MCPHERSON DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 95,896 – SEPTEMBER 21, 2007

FACTS: Hall appealed district court’s decision to revoke probation, arguing the district court lacked jurisdiction due to state’s unreasonable delay in prosecuting its motion to revoke Hall’s probation.

ISSUES: (1) Due process and (2) unreasonable delay in revocation of parole

HELD: No Kansas case addresses these specific circumstances. State v. Nicholson, 243 Kan. 747 (1988), is distinguished. A defendant must be brought before the tribunal on revocation proceedings as long as the defendant’s whereabouts are known, which includes the defendant’s confinement on other convictions. Particularly because the Uniform Mandatory Disposition of Detainers Act does not apply, rational in cases underlying State v. Haines, 30 Kan. App. 2d 110, rev. denied, 273 Kan. 1038 (2002), is adopted. Under facts of case and specifically due to (1) state’s unexplained six-year delay in prosecuting a probation violation, (2) fact that Hall could have been transported to McPherson County for revocation proceedings during his incarceration on subsequent conviction, (3) Hall’s unanswered correspondence requesting timely resolution of the revocation motion, (4) state’s failure to comply with district court’s order to transport Hall to resolve this matter, and (5) potential prejudice to Hall of the unresolved detainer and its impact on program eligibility during his incarceration, Hall’s due process rights were violated and the state is barred from its belated efforts to prosecute

the revocation motion. Reversed and remanded with directions to discharge the defendant.


STATE V. LAWRENCE
SHAWNEE DISTRICT COURT
REVERSED AND REMANDED
NO. 96,104 – SEPTEMBER 21, 2007

FACTS: District court dismissed criminal charges against Lawrence, finding the trial date set at 313 days violated the statutory 180-day speedy trial deadline. State appealed.

ISSUE: Statutory speedy trial

HELD: Applying State v. Brown, 283 Kan. 658 (2007), no violation of the standard 180-day speedy trial limit in this case. Periods of delay examined, including Lawrence’s request for jury trial after nonjury trial date set, withdrawal of counsel, and requests for continuances by state and new counsel. Contrary to state’s argument, the 90-day period for rescheduling a trial on a defense continuance under K.S.A. 2006 Supp. 22-3402(3) is not added onto the otherwise applicable 90- or 180-day time limit under K.S.A. 2006 Supp. 22-3402 subsections (1) and (2). The term “original trial deadline” in K.S.A. 2006 Supp. 22-3402(3) means the speedy trial deadline in place at the time a trial setting is continued at the defendant’s request.

STATUTES: K.S.A. 2006 Supp. 22-3402 sections (1), (2), (3), and (5); and K.S.A. 22-2902

STATE V. MOFFIT
SALINE DISTRICT COURT – AFFIRMED
NO. 96,452 – SEPTEMBER 7, 2007

FACTS: Pursuant to a plea agreement, Moffit convicted of conspiracy to unlawfully manufacture methamphetamine. Over state’s objection, district court granted a dispositional departure and placed Moffit on probation. State appealed on question reserved.

ISSUE: Applicability of K.S.A. 65-4159(b)

HELD: Question reserved is one of first impression. Rules of statutory construction are stated and applied. K.S.A. 65-4159(b) does not prohibit a sentencing judge from granting probation to a defendant convicted of conspiracy in violation of K.S.A. 21-3302(a) and K.S.A. 65-4159(a).

STATUTES: K.S.A. 2006 Supp. 22-3602(3); and K.S.A. 21-3301, -3301(d), -3302 sections (a) and (d), -4721(a), 65-4107(d)(3), -4150(a), -4159 sections (a), (b), and (d)

STATE V. WHILLOCK
JEFFERSON DISTRICT COURT – REVERSED IN PART, SENTENCE VACATED, AND REMANDED
NO. 97,244 – SEPTEMBER 7, 2007

FACTS: Police stopped Whillock on report of intoxicated driver and observed half-empty bottle and 6-year-old child in Whillock’s truck. Pursuant to plea agreement, Whillock entered no contest plea to third felony DUI, and court dismissed charges of endangering a child and transporting an open container. Based on presence of the minor, district court sentenced Whillock to serve mandatory 30 days in addition to sentence imposed for third felony DUI, pursuant to K.S.A. 2006 Supp. 8-1567(h). Whillock appealed, claiming this 30-day enhancement violated Apprendi. Whillock also claimed trial court failed to consider Whillock’s ability to pay the ordered Board of Indigent Defense Services’ (BIDS) reimbursement and erred in assessing $100 BIDS application fee in the journal entry without oral pronouncement at sentencing.

ISSUES: (1) Apprendi claim, (2) BIDS reimbursement for attorney fees, and (3) BIDS application fee
HELD: Consideration of the one-month enhancement in K.S.A. 2006 Supp. 8-1567(h) is issue of first impression for Kansas appellate courts. Statute is not unconstitutional on its face, but was unconstitutionally applied in this case where Whillock neither stipulated to presence of child under 14 years old in his vehicle, nor consented to the court finding such a fact. Because that fact was not proved to a jury beyond a reasonable doubt, Apprendi was violated when district court used that fact to increase Whillock’s sentence by 30 days under the statute. Whillock’s sentence is vacated and case is remanded for resentencing.


BIDS application fee order is reversed. Record on appeal does not indicate Whillock was ever ordered or otherwise directed to pay BIDS application fee to clerk of the court, either when he applied for court-appointed counsel or up to time of sentencing. Improper for that fee to appear for first time in journal entry of sentencing.

STATUTES: K.S.A. 44-501 sections (a), (b), and (f), -508 sections (a) and (k); and K.S.A. 20-3018(c), 44-501 et seq., -504(a), 74-7003(i)

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**Kansas Supreme Court Issues New Child Support Guidelines**

**September 14, 2007**

The Kansas Supreme Court has issued Administrative Order No. 216, which amends the Kansas Child Support Guidelines. These changes will be effective Jan. 1, 2008.

The Code of Federal Regulations (45 C.F.R. § 302.56) requires each state’s child support guidelines to be reviewed at least once every four years to ensure that application of the guidelines results in determinations of appropriate child support amounts. To meet this requirement, the Kansas Supreme Court convenes the Kansas Child Support Guidelines Advisory Committee every four years for the purpose of reviewing the existing guidelines and recommended changes to the Kansas Supreme Court.

Led by the Hon. Nancy Parrish, the Child Support Guidelines Advisory Committee began meeting on a monthly basis in April 2005. During this time, the committee considered a report from the Kansas Department of Social and Rehabilitation Services (SRS) on deviations from the child support guidelines in IV-D cases, surveyed the public, and conducted two surveys of attorneys, judges, hearing officers, and court trustees. The committee also held a public hearing in May 2007 using video webcasting technology. Members of the Child Support Guidelines (CSG) Advisory Committee personally hosted four sites where individuals could view the live webcast and submit comments and questions via e-mail. Two of the sites, Topeka and Wichita, had members of the public in attendance. A small number of people participated in the webcast by submitting e-mail questions to the CSG Advisory Committee members serving on the panel.

Jodi Messer-Pelkowski, professor of Economics at Wichita State University, conducted an extensive analysis of economic data and provided the committee with her recommendations. Based on Pelkowski’s data, the Court adopted changes to the age categories recommended by the committee. The age categories were formerly from age 0-6, 7-15, and 16-18, and have been amended to from age 0-5, 6-11, and 12-18. These changes, along with a small increase in the schedules, constitute the primary changes to the Kansas Child Support Schedules.

The Court also adopted changes to the Shared Residency Formula, now referred to as the Shared Expenses Formula, which clarify the circumstances in which use of this formula is likely to be effective. The Parenting Time Adjustment was also modified to increase the maximum percentage adjustment allowed when parents share an equal or nearly equal amount of time with the child, and to clarify other circumstances when this adjustment is and is not allowed.

Numerous other changes were made, including updates to bring the Child Support Guidelines in line with the federal and state tax law, and updates to various Web sites referenced in the guidelines.

A full strikeout version of the revised Kansas Child Support Guidelines, as well as reports from the Kansas Child Support Guidelines Advisory Committee, the SRS Report on Deviations and Adjustments, the economist’s report, and a video recording of the public hearing held on May 15, 2007, are available at the Kansas Supreme Court Web site at www.kscourts.org. Requests for additional information can be obtained by contacting Mark Gleeson at gleeson@kscourts.org.
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Jonathan L. Booze
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15  Immunity: The Good, the Bad, and the Ugly
Thomas Haney Jr.
Telephone CLE

16  Alternative Dispute Resolution Buffet
Best Western Airport, Wichita

20  Current Issues in Securities Regulations – Part I
Gail E. Bright
Rescheduled from Sept. 25
Telephone CLE

DECEMBER

7  Plaza Lights Institute
Marriott Country Club Plaza, Kansas City, Mo.
Co-sponsored by Bremyer & Wise LLC, McPherson; Martindell, Swearer & Shaffer LLP, Hutchinson; and Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita

11  Representing the ERISA Claimant in an Administrative Appeal
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