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We Were Only Teasing: The Eighth Circuit Misses the Quintessence of Hostile Work Environment Claims under the ADA

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We Were Only Teasing: The Eighth Circuit Misses the Quintessence of Hostile Work Environment Claims Under the ADA

Shaver v. Independent Stave Co.[1]

I. INTRODUCTION

In *Shaver v. Independent Stave Co.*, the Eighth Circuit Court of Appeals followed the lead of two of its sister circuits[2] by holding for the first time that a hostile work environment is actionable under the Americans with Disabilities Act.[3] In announcing its rule, the court followed the analytical framework of hostile work environment claims actionable under Title VII.[4] However, the court's test for hostile work environment claims under the ADA within the Eighth Circuit has one fewer element than the test employed by the Fourth and Fifth Circuits in the same cause of action.[5] Moreover, the disability discrimination test has one fewer element than the sexual discrimination test from Eighth Circuit Title VII cases from which the disability discrimination test was borrowed.[6] In other words, suing for hostile work environment under the ADA is not only allowed within the Eighth Circuit, but it is easier to prove than the same cause of action in the Fourth and Fifth Circuits and easier to prove than racial discrimination within the Eighth Circuit. Because it is unlikely that the court intended a lesser burden for ADA plaintiffs than for Title VII plaintiffs, the holding of *Shaver v. Independent Stave Co.* is probably erroneous and should be viewed with skepticism.

II. FACTS AND HOLDING

When he was thirteen years old, Plaintiff-Appellant Christopher Shaver ("Shaver") was diagnosed with epilepsy.[7] He began receiving Social Security disability in 1991 and eventually underwent a series of operations to remove part of his brain and implant three metal plates in his skull.[8] These operations

1. 350 F.3d 716 (8th Cir. 2003).

2. *See* Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 232-35 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 175-77 (4th Cir. 2001).

3. *Shaver*, 350 F.3d at 719-20.

4. *See infra* notes 100-02 and accompanying text.

5. *See infra* notes 127-30 and accompanying text.

6. *See infra* notes 133-35 and accompanying text.

7. Shaver v. Indep. Stave Co., No. 4:01-CV-1354 CAS, 2003 U.S. Dist. LEXIS 5331, *2-3 (E.D. Mo. Mar. 6, 2003), *aff'd in part & rev'd in part*, 350 F.3d 716 (8th Cir. 2003).

8. *Id.* at *3.

allowed Shaver to manage his epilepsy with medication, and he was taken off disability in 1995 when he began working as an auto mechanic.[9]

In 1998, Shaver took a job with Salem Wood Products Company[10] ("Independent Stave") as an Optimizer.[11] In June of that year, he was injured at work and taken to the hospital by his supervisor.[12] During this emergency, the supervisor evidently learned of the metal plates in Shaver's head and reported this personal fact to Independent Stave employees on his return to the mill.[13] Soon thereafter Shaver's coworkers and supervisors began referring to him as "Platehead."[14] Although he told them that he preferred not to be teased or given pejorative nicknames, the jibes continued for the next two years.[15]

The following year, Shaver injured his right index finger at work.[16] This began a nearly year-long series of absences, work restrictions, temporary total disability payments, and reprimands.[17] On September 23, 2000, Shaver was called home in the middle of his shift to deal with a sick child.[18] He claimed that he had permission to leave from his assistant supervisor; however, when he returned an hour and a half later, his shift supervisor, Charles Bacon, gave him

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9. *Id.*

10. Shaver's suit was filed against Independent Stave Company doing business as Salem Wood Products, Inc., and Salem Wood Products Company. Because the lower court granted Independent Stave's motion for summary judgment, it did not reach the issue of whether Independent Stave and Salem were in fact the same company. Shaver v. Indep. Stave Co., 350 F.3d 716, 725 (8th Cir. 2003). The court of appeals directed this question to be resolved on remand. *Id.*

11. Salem converts oak logs into staves and headers for bourbon barrels which it then sends to Independent Stave Co. *Shaver,* 2003 U.S. Dist. LEXIS 5331, at *3. Shaver checked and marked defects in the logs with a computer so the cutters could get the most board feet out of a single log. *Id.*

12. *Id.*

13. *Id.* at *3-4.

14. *Id.* at *4.

15. *Id.* In addition to being called "Platehead," Shaver was labeled as "stupid" and accused of "not playing with a full deck." *Shaver*, 350 F.3d at 720. One coworker even suggested out of Shaver's presence that Shaver "pissed in his pants when the microwave was on." *Id.* at 721.

16. *Shaver*, 2003 U.S. Dist. LEXIS 5331, at *4.

17. *Id.* at *4. Shaver's hand was injured on November 17, 1999. *Id.* He was given a written warning for excessive absences on March 15, 2000. *Id.* On March 27, he returned to full work duty but pain in his finger prevented him from working effectively. *Id.* He was threatened with a three-day suspension on April 19 for not working and procured a doctor's note prohibiting use of his right hand until he consulted a specialist. *Id.* He received four days of temporary total disability after which the hand specialist restricted his work to one-handed duty until he could be operated on. *Id.* at *4-5. Shaver had surgery on May 9 and was placed on temporary total disability again until May 22. *Id.* at *5. He returned to work but was not released for full duty by the hand specialist until July 31. *Id.* A September 1 report listed Shaver's hand as permanently injured and possibly requiring future surgery. *Id.*

18. *Id.* at *5.

a written warning and a three day suspension for leaving work without permission.[19] Shaver shoved the papers back at Bacon and stormed out.[20] When Bacon reported the incident to Michael Transano, the mill manager, Transano fired Shaver for insubordination.[21]

In January 2001, Shaver filed a discrimination complaint with the EEOC claiming harassment, failure to accommodate his hand injury, and discharge due to disability.[22] In May, he applied for work with two small companies, both of which were owned by acquaintances of his.[23] Shaver gave Charles Bacon's name as a reference but when both prospective employers called, Bacon told them that he couldn't recommend Shaver because Shaver had a "get-rich-quick scheme" of suing the companies for whom he had worked.[24] Shaver was not hired by either company.[25] Shaver subsequently filed additional claims against Independent Stave for retaliation resulting from his earlier complaint with the EEOC and his attempt to file for worker's compensation for his hand injury.[26]

These claims ripened into the present lawsuit under the anti-harassment and anti-retaliation provisions of the ADA, as well as a supplemental claim for worker's comp.[27] The harassment claim was premised on a theory of hostile work environment which, for the sake of summary judgment, the district court assumed was actionable under the ADA.[28] The retaliation claim was based on the negative job references Charles Bacon gave to each of Staver's prospective employers, grounds the court also found to be actionable under the ADA.[29] On both claims, however, the district court granted Independent Stave's motion for summary judgment and declined to exercise jurisdiction over the worker's compensation claim.[30] The court held that

> the frequent reference to [Shaver] as 'Platehead,' both to him and behind his back, may have been insulting, mean-spirited, and unprofessional, but, as a matter of law, was not so severe and extreme that a reasonable person would find that the terms and conditions of his employment had been altered.[31]

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19. *Id.* at *5-6.
20. *Id.* at *6.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at *6-7.
25. *Id.* at *7.
26. *Id.*
27. Shaver v. Indep. Stave Co., 350 F.3d 716, 719 (8th Cir. 2003).
28. *Shaver*, 2003 U.S. Dist. LEXIS 5331, at *16.
29. *Id.* at *19.
30. *Id.* at *17, 20, 21-22.
31. *Id.* at *17.

And although Bacon had given bad references in retaliation for Shaver's suit, the court found that no "reasonable jury could find in favor of Shaver on this claim because the evidence point[ed] overwhelmingly to the conclusion that Shaver manufactured this claim by asking his acquaintances to call Bacon for a job reference, knowing that Bacon would in all probability give a negative one."[32]

On appeal, the Eighth Circuit affirmed summary judgment on the hostile work environment claim but reversed and remanded the claim for retaliation, holding that negative job references could state a cause of action under the ADA for retaliation even if Shaver "manufactured" the opportunity for Bacon to give him a bad recommendation.[33] Although the court of appeals rejected Shaver's hostile work environment on factual grounds, it held for the first time that such a claim is actionable under the ADA,[34] joining only the Fourth and Fifth Circuits[35] in doing so.

III. LEGAL BACKGROUND

In 1990, Congress passed the Americans with Disabilities Act in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[36] That mandate provided that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[37]

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[38] The Act further enumerates a list of actions that constitute discrimination.[39] Nowhere in this list or in any other provision of the ADA is there any

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32. *Id.* at *20.

33. Shaver v. Indep. Stave Co., 350 F.3d 716, 723-25 (8th Cir. 2003).

34. *Id.* at 719-20.

35. *See* Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 232-35 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 175-77 (4th Cir. 2001).

36. 42 U.S.C. § 12101(b)(1) (2000).

37. *Id.* § 12112(a).

38. *Id.* § 12102(2). *See* Sutton v United Air Lines, Inc. (1999) 527 U.S. 471 (1999) (holding that the determination of whether an individual has a disability must be an individualized inquiry); Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (creating a three-step inquiry to consider (1) whether a condition constituted a physical impairment, (2) what major life activity was hindered by such impairment, and (3) whether that major life activity was "substantially limited" by the impairment).

39. *See* 42 U.S.C. § 12112(b):

> Construction. As used in subsection (a), the term "discriminate" includes—

definition of discrimination that includes a hostile work environment.[40] Nevertheless, most district courts have indicated a willingness to allow actions for a hostile work environment under the ADA as long as the environment was "egregiously hostile."[41] These same courts, however, have almost systemati-

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(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
(3) utilizing standards, criteria, or methods of administration—
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to common administrative control;
(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Id.

40. *See id.*

41. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 292 (2000).

cally granted summary judgment to defendants for lack of sufficient evidence, thus allowing most courts of appeals to avoid the issue.[42] Until 2001,[43] those appellate courts that had considered the issue assumed, as had the district courts, that an action for hostile work environment was cognizable under the ADA but denied the claims for lack of evidence.[44] Not until the Fifth Circuit decided *Flowers v. Southern Regional Physician Services*[45] did any of the courts of appeals explicitly recognize an action for hostile work environment under the ADA.[46] The Fourth Circuit followed suit less than a month later in *Fox v. General Motors Corp.*[47] With *Shaver v. Independent Stave Co.*, the Eighth Circuit becomes the third federal circuit court of appeals to recognize hostile work environment actions under the ADA.

A. Hostile Work Environments Under Title VII of the Civil Rights Act of 1964

In 1971, the Fifth Circuit was the first to recognize claims for hostile work environment in *Rogers v. EEOC*.[48] The *Rogers* court held that a Hispanic employee could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele.[49] The court noted that the phrase "terms, conditions or privileges of employment" in Title VII "is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . ."[50]

Other courts applied the *Rogers* court's reasoning to discrimination based on religion,[51] national origin,[52] and sex.[53] Of sex discrimination, the Eleventh Circuit noted,

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42. Leah C. Myers, *Disability Harassment: How Far Should the ADA Follow in the Footsteps of Title VII?*, 17 BYU J. PUB. L. 265, 266 (2003).

43. *See* Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 232-35 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 175-77 (4th Cir. 2001).

44. *See, e.g.*, Vollmert v. Wis. Dep't of Transp., 197 F.3d 293, 297 (7th Cir. 1999); Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 666-67 (3d Cir. 1999); Wallin v. Minn. Dep't of Corr., 153 F.3d 681, 687-88 (8th Cir. 1998); McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998).

45. 247 F.3d 229 (5th Cir. 2001).

46. *Id.* at 235.

47. 247 F.3d 169 (4th Cir. 2001).

48. 454 F.2d 234 (5th Cir. 1971).

49. *Id.* at 238.

50. *Id.*

51. *See* Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976).

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[54]

Indeed, much of the litigation concerning hostile work environments has involved sexual discrimination, prompting the United States Supreme Court to develop an analytical framework for hostile work environment claims in *Meritor Savings Bank v. Vinson*.[55] In that case, Vinson was hired as a teller-trainee at what would become Meritor Savings Bank by Vice-President Sidney Taylor in 1974.[56] In the following four years, she was promoted to teller, head teller, and assistant branch manager based solely on merit.[57] In September 1978, Vinson took indefinite sick leave and was fired two months later.[58] She subsequently sued the bank and Taylor for "constantly . . . subject[ing her] to sexual harassment" during her four years at the bank.[59] She argued that Taylor's conduct violated Title VII of the Civil Rights Act of 1964 which makes it "'an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'"[60]

The Supreme Court agreed with Vinson, noting that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[61] The Court premised its ruling on EEOC guidelines which included "'[unwelcome] sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature'" among the possible violations of Title VII.[62] Such conduct would violate Title VII, said the Court, "whether or not it is directly linked to the grant or denial of an economic quid pro quo, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"[63]

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52. *See* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977).
53. *See* Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).
54. *Id.* at 902.
55. 477 U.S. 57 (1986).
56. *Id.* at 59.
57. *Id.* at 59-60.
58. *Id.* at 60.
59. *Id.*
60. *Id.* at 63 (quoting 42 U.S.C. § 2000e-2(a)(1) (2000)) (alteration in original).
61. *Id.* at 64.
62. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).
63. *Id.* (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

Not all workplace harassment "affects a 'term, condition, or privilege' of employment within the meaning of Title VII," however.[64] Therefore, the Court held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[65] This holding was clarified in *Harris v. Forklift Systems, Inc.*, seven years later.[66] In that case, the Court required a totality of circumstances test to determine whether a work environment was hostile so as to warrant relief under Title VII.[67] It noted that "[t]he effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."[68] Justice Ginsburg's concurring opinion defined the inquiry in hostile work environment cases as "whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance."[69] To demonstrate interference, the plaintiff need not show a decline in productivity, but only "that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as 'to ma[k]e it more difficult to do the job.'"[70]

B. Title VII and the ADA

As noted earlier, many courts assumed that the hostile work environment framework could apply to claims under the ADA, but few such cases survived summary judgment.[71] The basis for applying a framework developed in the context of racial or sexual discrimination to cases of disability discrimination was not simply that discrimination is discrimination, as "even broad, remedial statutes such as the ADA do not give federal courts a license to create causes of action after the manner of the common law."[72] Rather, the willingness of courts to extend the cause of action from one statute to the other was grounded in the language of both statutes.[73]

In *Flowers v. Southern Regional Physician Services, Inc.*,[74] the Fifth Circuit first noted that no other circuit had expressly recognized a cause of action under

64. *Id.* at 67.

65. *Id.* (quoting Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982)) (alteration in original).

66. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

67. *Id.* at 23.

68. *Id.*

69. *Id.* at 25 (Ginsburg, J., concurring).

70. *Id.* (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

71. *See supra* notes 41-44 and accompanying text.

72. Shaver v. Indep. Stave Co., 350 F.3d 716, 720 (8th Cir. 2003).

73. *Id.*

74. 247 F.3d 229 (5th Cir. 2001).

the ADA for hostile work environment, but several had suggested it could be allowed.[75] Because the case before it was not so easily disposed of at summary judgment, the Fifth Circuit decided to hear the issue and rule once and for all.[76] First, the court noted that the ADA's mandate that no covered entity "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . *terms, conditions, and privileges of employment*,"[77] was identical to language in Title VII making it an unlawful employment practice "for an employer . . . 'to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment.*'" [78]

The parallel language was significant since, prior to the passage of the ADA, the Supreme Court had held that the language from Title VII provided a cause of action for "harassment [which is] sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment . . . because it affects a term, condition, or privilege of employment."[79] Finding the similar language of both Title VII and the ADA "dictates a consistent reading of the two statutes," the Fifth Circuit interpreted the phrase "'terms, conditions, and privileges of employment,' as it is used in the ADA, to 'strike at' harassment in the workplace."[80] Thus, it would be "illogical to hold that ADA language identical to that of Title VII was intended to afford disabled individuals less protection than those groups covered by Title VII."[81]

In addition to having similar language, both Title VII and the ADA "are also alike in their purposes and remedial structures. Both Title VII and the ADA are aimed at the same evil—employment discrimination against individuals of

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75. *Id.* at 232. *See* Casper v. Gunite Corp., No. CIV.A.99-3215, 2000 U.S. App. LEXIS 16241, (7th Cir. July 11, 2000) ("Such a cause of action appears to exist because the ADA prohibits discrimination in the 'terms, conditions, and privileges of employment,' which is the exact same language that the Supreme Court relied upon in finding that Title VII encompasses claims of sex discrimination due to the creation of a hostile work environment in Meritor." (citations omitted)); Silk v. City of Chicago, 194 F.3d 788, 803 (7th Cir. 1999); Walton v. Mental Health Ass'n, 168 F.3d 661, 666 (3d Cir. 1999) ("This framework indicates that a cause of action for harassment exists under the ADA."); Keever v. City of Middletown, 145 F.3d 809, 813 (6th Cir. 1998); Miranda v. Wis. Power & Light Co., 91 F.3d 1011, 1017 (7th Cir. 1996) ("Such a claim [of a hostile work environment under the ADA] would seem to arise under the general prohibition against discrimination with respect to terms or conditions of employment contained in § 12112(a).").

76. *Flowers*, 247 F.3d at 233.

77. *Id.* (quoting 42 U.S.C. § 12112(a) (2000)) (emphasis added) (alteration in original).

78. *Id.* (quoting 42 U.S.C. § 2000e-2(a) (2000)) (emphasis added).

79. *Id.* (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 180 (1989)) (alterations in original).

80. *Id.*

81. *Id.* (quoting Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1106 (S.D. Ga. 1995)).

certain classes."[82] Thus the court held that, "because Title VII has been extended to hostile work environment claims, we follow the growing consensus that our harassment jurisprudence be extended to claims of disability-based harassment. As such, we find that a cause of action for disability-based harassment is viable under the ADA."[83]

Less than a month later, the Fourth Circuit came to the same conclusion in *Fox v. General Motors Corp.*[84] Following almost the exact same analysis as the *Flowers* court had, the *Fox* court compared the nearly identical language of Title VII and the ADA and presumed that Congress was aware of the Supreme Court's interpretation of "terms, conditions, or privileges of employment" when it chose to use the same language in the ADA.[85] Indeed the presumption is not even necessary to reach this conclusion, noted the court, as the ADA itself provides that "'the powers, remedies, and procedures set forth in [Title VII] shall be the powers, remedies, and procedures [the ADA] provides.'"[86] The Fourth Circuit also noted that other courts had "routinely used Title VII precedents in ADA cases" because "the ADA echoes and expressly refers to Title VII, and because the two statutes have the same purpose—the prohibition of illegal discrimination in employment."[87] Finally, the court found that interpreting the ADA in accord with Title VII was "sanctioned by the EEOC, whose regulations implementing the ADA state that 'it is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by' the employment provisions of the ADA."[88]

IV. INSTANT DECISION

Shaver appealed Independent Stave's successful motion for summary judgment to the Eighth Circuit.[89] After discussing the facts of the case,[90] Judge

82. *Id.* at 234.

83. *Id.* at 234-35.

84. 247 F.3d 169 (4th Cir. 2001).

85. *Id.* at 175-76.

86. *Id.* at 176 (quoting 42 U.S.C. § 12117(a) (2000)).

87. *Id. See* Miranda v. Wis. Power & Light Co., 91 F.3d 1011, 1017 (7th Cir. 1996) ("[I]n analyzing claims under the ADA, it is appropriate to borrow from our approach to the respective analog under Title VII."); Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 157 (3d Cir. 1995) ("[I]t follows that the methods and manner of proof under one statute should inform the standards under the other[] as well."). *See also* Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999) (holding that Title VII causation standards apply in ADA cases); Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995) (holding Title VII burden shifting rules apply in ADA cases).

88. *Fox*, 247 F.3d at 176 (quoting 29 C.F.R. § 1630.12(b) (2001)) (alteration in original).

89. Shaver v. Indep. Stave Co., 350 F.3d 716, 719 (8th Cir. 2003)

90. *Id.*

Morris Sheppard Arnold, writing for the court, noted that the Eighth Circuit had previously hinted that it was possible to bring a hostile work environment claim under the ADA but that it had never expressly held so.[91] Following the leads of two sister circuits, the court then held that such a claim was cognizable under the ADA.[92]

The court began its analysis with the observation that "[e]ven broad, remedial statutes such as the ADA do not give federal courts a license to create causes of action after the manner of the common law."[93] Therefore the court turned to the language of the ADA itself, finding that "'no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment.'"[94] Although the language said nothing about hostile work environments, the court looked to how the text was understood at the time of its passage in order to construe its meaning.[95] The court noted that Congress had borrowed the "terms, conditions, and privileges of employment" language directly from Title VII of the Civil Rights Act of 1964.[96] It also noted that other appellate courts had construed the Title VII language to create an action based on a hostile work environment since 1971[97] and that the U.S. Supreme Court had adopted this reading in 1986.[98] The Eighth Circuit therefore concluded that Congress was aware of the usage of the phrase and included it as "a legal term of art that prohibited a broad range of employment practices, including workplace harassment."[99]

The court then turned to the requirements to sustain a hostile work environment claim under the ADA, borrowing standards from other areas of antidiscrimination law.[100] In doing so, the court enumerated four elements: the plaintiff must prove (1) that he is a member of a protected class, (2) that he was subjected to unwelcome harassment, (3) that the harassment was due to his membership in that class, and (4) that the harassment was severe enough to affect the terms, conditions, or privileges of his employment.[101] It then examined each of these elements in Shaver's case.[102]

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91. *Id.* (citing Jeseritz v. Potter, 282 F.3d 542, 547 (8th Cir. 2002)).

92. *Id.* (citing Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 232-35 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 175-77 (4th Cir. 2001)).

93. *Id.* at 720 (citing Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001)).

94. *Id.* (quoting 42 U.S.C. § 12112(a) (2000)) (alteration in original).

95. *Id.*

96. *Id.*

97. *Id.* (citing Rogers v. EEOC, 454 F.2d 234, 238-39 (5th Cir. 1971)).

98. *Id.* (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986)).

99. *Id.*

100. *Id.*

101. *Id.* (citing Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 906, 907-08 (8th Cir. 2003)).

102. *Id.* at 720-23.

As to the first element, the court found that Shaver was indeed a member of a protected class.[103] Neither party contested that Shaver was qualified to perform his job at the Salem lumber mill.[104] While the defendant did contest whether Shaver was "disabled" within the meaning of the ADA, the court found two ways in which he qualified as "disabled."[105] First, in order to be considered disabled, one may prove that she suffers a physical or mental "'impairment that substantially limits one or more . . . major life activities.'"[106] Secondly, one can also qualify under the ADA if she "is regarded (accurately or inaccurately) as having such an impairment or if [she] has a record of such an impairment in the past."[107] In both cases, Shaver qualified. His epilepsy caused seizures, which the Eighth Circuit has previously held to impair "major life activities" such as speaking, walking, or seeing, and thus Shaver had a record of impairment.[108] Moreover, the record showed that his coworkers regarded him as "stupid" and "not playing with a full deck" because of his condition.[109] Since thinking is a major life activity, the court held that Shaver could have been regarded as having a disability as well.[110]

The second element of extant harassment was also decided in Shaver's favor, given his nickname of "platehead."[111] The third element of a causal relationship between the harassment and disability was disputed by Independent Stave on the grounds that "platehead" referred to Shaver's operation, not his epilepsy.[112] The court wasted little time dismissing this distinction as "too fine for us," and noted that "[e]ven if one calls a person 'pegleg' because he has a peg leg rather than because he has trouble walking, it is nevertheless the case that the nickname was chosen because the person was disabled."[113]

The real issue in the case, therefore, was whether the harassment suffered by Shaver was severe enough to alter the "terms, conditions, and privileges" of his employment.[114] The court noted that "rude, abrasive, unkind, or insensitive [conduct] does not come within the scope of the law"; only behavior "'severe and pervasive enough to create an *objectively* hostile or abusive work environment'" is actionable.[115] While a jury could easily have believed that Shaver himself found his work environment hostile, the court held that even assuming

103. *Id.* at 720-21.
104. *Id.* at 720.
105. *Id.* at 720-21.
106. *Id.* at 720 (quoting 42 U.S.C. § 12102(2)(A) (2000)) (alteration in original).
107. *Id.* (citing 42 U.S.C. § 12102(2)(B)-(C)).
108. *Id.* (citing Otting v. J.C. Penney Co., 223 F.3d 704, 710-11 (8th Cir. 2000)).
109. *Id.*
110. *Id.* at 720-21.
111. *Id.* at 721.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993)) (emphasis added).

all facts in his favor, a jury could not conclude that the harassment rose to the level required by the Title VII cases upon which this analogous cause of action was based.[116]

To bolster his otherwise weak evidence of an objectively hostile work environment, Shaver also argued that he would not have been harassed had his medical information not been disclosed to his co-workers by his supervisor without his authorization.[117] The court did not decide whether disclosure of a disability by an employer was itself a violation of the ADA because Shaver did not plead the disclosure as a separate incident of harassment.[118] However, it did note that disclosure of a disability and harassment based on that disability involved different interests.[119] The discrimination claim is statutory and actionable only by a "qualified individual with a disability," while disclosure of medical information is a privacy tort and one need not be disabled to sue for such an offense.[120] In essence, Shaver argued that discrimination not violating the ADA by itself could become actionable if it resulted from an unauthorized disclosure.[121] The court rejected this argument, finding that "Medical privacy is not a 'term, condition, or privilege' of . . . employment" because, "[i]n the absence of a statute, there is nothing to forbid an at-will employer from conditioning employment on the ability to disclose otherwise private information."[122] Even if another provision of the ADA prohibited such disclosures, Shaver had not sued under that provision and the court would not allow him to do "an end-run around his own procedural default by using such a claim to transform unactionable harassment into something actionable."[123] In the end, the court upheld summary judgment because the harassment, while potentially actionable under the ADA, did not rise to the level necessary to be objectively hostile or abusive.

V. COMMENT

In *Shaver v. Independent Stave Co.*, the Eighth Circuit became the third federal court of appeals to hold that an action for hostile work environment was actionable under the ADA.[124] However, the Shaver decision differs from its

116. *Id.* at 721-22. *See* Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 906, 909-10 (8th Cir. 2003) (upholding a hostile work environment claim based on death threats directed specifically at the plaintiff over a sustained period of time); Smith v. St. Louis Univ., 109 F.3d 1261, 1264-65 (8th Cir. 1997) (upholding a suit based on verbal abuse where the supervisor had repeatedly singled the plaintiff out and the plaintiff had been hospitalized twice as a result of the psychological trauma).

117. *Shaver*, 350 F.3d at 722.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 722-23.

122. *Id.* at 723.

123. *Id.*

124. *Id.* at 719.

predecessors in one important way: where the Fourth and Fifth Circuits had enumerated five elements[125] necessary to make out the cause of action, the Eighth Circuit enumerated only four.[126] While the high standard set in Shaver for the requisite evidence necessary to show a hostile work environment may prove difficult for future plaintiffs to meet, the action may ultimately be easier to prove in the Eighth Circuit than in the Fourth and Fifth. Indeed, in the Eighth Circuit it may also be easier to prove a hostile work environment under the ADA than under Title VII.

The *Shaver* court announced four elements: (1) the plaintiff is a member of a protected class, (2) the plaintiff was subjected to unwelcome harassment, (3) the harassment was due to his membership in that class, and (4) the harassment was severe enough to affect the terms, conditions, or privileges of his employment.[127] These elements are the same as the first four announced in *Flowers*.[128] However, the *Flowers* court also required a plaintiff to prove "(5) that the employer knew or should have known of the harassment and failed to take prompt remedial action."[129] The Fourth Circuit also requires this fifth element, holding that "an ADA plaintiff must prove . . . (5) some factual basis . . . to impute liability for the harassment to the employer."[130] Nowhere in the Eighth Circuit opinion is this fifth element present, a fact that might have profound implications for disability discrimination cases in the Eighth Circuit.

In *Shaver*, the Eighth Circuit upheld summary judgment because the plaintiff failed to produce evidence that the harassment he suffered was objectively hostile enough to warrant relief under the ADA.[131] But supposing Shaver had proven his work environment were objectively hostile, there is no requirement in the opinion that Independent Stave even needed to be aware of the harassment before being held liable! Even if all the harassment had been done secretly by a coworker, and the management of Independent Stave had been justifiably ignorant of it, the company would still be liable as long as the harassment were bad enough. This is a troubling result for employers within the Eighth Circuit.

More troubling is that the Eighth Circuit was not unaware of this fifth element when it announced its rule. Setting out the four elements of its decision, the *Shaver* court wrote, "In determining whether a hostile work environment claim has been made out under the ADA, we think it proper to turn to standards developed elsewhere in our anti-discrimination law, adapting them to the unique requirements of the ADA."[132] After setting out the four elements of

125. Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 232-35 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 175-77 (4th Cir. 2001).

126. *Shaver*, 350 F.3d at 720.

127. *Id.*

128. *Flowers*, 247 F.3d at 235.

129. *Id.* at 235-36.

130. *Fox*, 247 F.3d at 177.

131. *Shaver*, 350 F.3d at 721-22.

132. *Id.* at 720.

its new test for hostile work environment claims under the ADA, the court cites *Reedy v. Quebecor Printing Eagle, Inc.*,[133] an Eighth Circuit Title VII racial harassment case. However, the *Reedy* court applied the five element test followed in *Fox* and *Flowers*:

> to prevail on his hostile work environment claim Mr. Reedy must show that he was a member of a protected group, that he was subjected to unwelcome harassment, that the harassment was because of his membership in the group, that the harassment affected a term, condition, or privilege of his employment, *and that Quebecor knew or should have known about the harassment but failed to take prompt and effective remedial action.*[134]

The five element test has been used consistently for Title VII cases within the Eighth Circuit.[135]

If Title VII precedents are indeed the model for hostile work environment claims under the ADA, then the Eighth Circuit either omitted the fifth element of employer knowledge accidentally or intentionally. Given the court's language that "we think it proper to turn to standards developed elsewhere in our antidiscrimination law, *adapting them to the unique requirements of the ADA*,"[136] one could argue that the *adaptation* mentioned was the omission of the fifth element. This conclusion is not satisfactory, however, since it opens up employers to greater liability for disability discrimination than for sexual discrimination.

The only other interpretation is that the Eighth Circuit inadvertently erred by omitting the fifth element of knowledge. It could be argued that since Shaver could not prove the fourth element—an objectively abusive environment hostile enough to alter the terms, conditions, or privileges of employment—the court had no need to consider the fifth element of knowledge and therefore did not enumerate it. But that reasoning essentially results in reading the entire holding of *Shaver v. Independent Stave Co.* as dicta since, strictly speaking, it was not necessary for the court to enumerate any elements to affirm summary judgment other than evidence of objective hostility. Indeed, in all previous ADA hostile work environment cases, the Eighth Circuit affirmed summary judgment for the defendant employer without handing down any rule as to the elements of the

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133. 333 F.3d 906, 907-08 (8th Cir. 2003)

134. *Id.* at 908 (emphasis added).

135. *See* Rheineck v. Hutchinson Tech., Inc., 261 F.3d 751, 755-56 (8th Cir. 2001) ("To succeed on a sexual harassment claim for a hostile work environment, a plaintiff must show that (1) she belongs to a protected group, (2) she was subject to unwelcome sexual harassment, (3) the harassment was based on sex, (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.").

136. *Shaver*, 350 F.3d at 720 (emphasis added).

cause of action.[137] The court could have done the same here. Instead, the Eighth Circuit handed down a rule that does not comport with either its own discrimination jurisprudence or that of the Fourth and Fifth Circuits from whom it purportedly borrowed its analysis.

This decision, if read literally, would hold employers liable for the actions of their employees even absent constructive knowledge of the actionable behavior. Such strict liability for employers in *disability* discrimination cases would be inconsistent with the knowledge requirement (actual or imputed) in *sexual* discrimination cases. Therefore, the decision should not be read to allow such a cause of action without some evidence of the employer's culpability. The only other option is to read the rule announced in *Shaver* as dicta and require the court to enumerate a new test with all five elements when it hears another case for which the environment is objectively hostile. Any other result will unjustly imperil employers within the Eighth Circuit.

VI. CONCLUSION

Because *Shaver* announces a rule inconsistent with the precedent upon which it was based, it should be viewed with skepticism. Further, the rule allows for a kind of strict employer liability for disability discrimination where no such liability is found in either racial or sexual discrimination cases. Finally the imposition of such strict liability almost certainly exceeds Congress's intent in protecting the disabled from discrimination.

Ultimately, the Eighth Circuit's omission was harmless error in the instant case: those harassing Shaver included his supervisors, a fact that would satisfy the fifth element of the Fourth or Fifth Circuit rule requiring employer knowledge. Moreover, the addition of this fifth element would not have changed the fact that the discrimination faced by Shaver did not rise to the level necessary to state a claim under the ADA. But when the next case involving more egregious behavior comes before the courts of the Eighth Circuit, it will be error to follow the rule announced in *Shaver v. Independent Stave Co.* For that reason, the four-element test for a hostile work environment cause of action under the ADA should be read as dicta and ignored.

J. ANDREW HIRTH

137. *See* Jeseritz v. Potter, 282 F.3d 542, 547 (8th Cir. 2002).