IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1454

STORY COUNTY CASE NO. LACV051186

RONALD HAMPTON
Plaintiff-Appellant

vs.

MARTIN MARIETTA MATERIALS, INC., and DOUG ROBEY

Defendants-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR STORY COUNTY
THE HONORABLE JAMES ELLEFSON

PLAINTIFF-APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case applies existing legal principles, so the case may be transferred to the Court of Appeals. *See* IOWA R. APP. P. 6.1101(3)(a).

STATEMENT OF THE CASE

NATURE OF THE CASE: This is an appeal by Plaintiff Ronald Hampton ("Ron"), pursuant to Rule 6.103(1) of the Iowa Rules of Appellate Procedure. Plaintiff seeks reversal of the district court's Ruling granting Defendants' Motion for Summary Judgment.

COURSE OF PROCEEDINGS: On February 13, 2019, Ron filed a Petition in Story County, alleging wrongful discharge in violation of public policy. On April 2, 2019, Ron filed a Second Amended Petition, adding disability discrimination and retaliation claims under the Iowa Civil Rights Act ("ICRA").[1]

In the Second Amended Petition, Ron alleged Martin Marietta Materials, Inc. ("MMM") and Doug Robey ("Robey") retaliated against him after he submitted workers' complaints of sexual and racial harassment against Robey's friend and protegee to MMM management. On April 22, 2019, Defendants filed their Answer to Ron's Second Amended Petition.

On May 4, 2020, Defendants filed an unopposed Motion for Leave to Amend their Answer, citing the Supreme Court's adoption of the "same decision" defense in *Hawkins v. Grinnell Regional Medical Center*, 930 N.W.2d 261, 272 (Iowa 2019). (Motion for Leave) (App. Vol. 1, p. 1-2). Their new Answer asserted the "same decision" affirmative defense. (First Amd. Answer to Third Amd. Petition, p. 14) (App. Vol. 1, p. 26).

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[1] On February 24, 2020, Plaintiff dismissed his public policy and disability discrimination claims following depositions.

On August 26, 2020, Defendants filed a motion for summary judgment. Plaintiff resisted on September 10, 2020. Defendants then filed a reply brief. On October 12, 2020, the district court held a hearing.

DISPOSITION OF THE CASE: On October 23, 2020, the district court granted the summary judgment motion and dismissed Plaintiff's case without a trial. (Ruling on Defendants' Motion for Summary Judgment) ("Ruling") (App. Vol. 1, p. 475-87).

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW:

In November 2008, MMM hired Ron as a truck driver for its limestone mine in Ames. (Hampton Dep. 13:20-14:9) (App. Vol. 1, p. 525-26); (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667). Ron worked hard, and the company quickly promoted him to a lead position. *Id.* By 2014, Ron was a mine foreman, supervising a crew of about 20 workers. (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667)

Ron liked his job, and he was close with his team. *Id.* Defendants regularly gave him positive evaluations and performance bonuses. *Id.* Other supervisors frequently complimented Ron's leadership. (Dilley Affidavit ¶¶ 3-7) (App. Vol. 1, p. 560); (Shannon Affidavit ¶ 18) (App. Vol. 1, p. 567).

Justin Marshal Investigation. In January 2018, Ron transferred to a topside (above ground) foreman position. (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667). Before Ron started, he heard that the topside foreman before him, Mike

Snider, had been having problems with Lead Person Justin Marshal making racially and sexually charged comments. *Id.; see also* Dilley Affidavit ¶ 21 (App. Vol. 1, p. 561); Shannon Affidavit ¶ 16 (App. Vol. 1, p. 566). Snider had tried to report this to Plant Manager Doug Robey, but Robey had ignored him and instructed Snider to "work with him." (Snider Dep. 16:20-24, 21:6-13) (App. Vol. 1, p. 554, 555). Snider's complaints about Marshal led Robey to ignore Snider and make his job more difficult. *Id.* Neither Robey nor Snider documented Marshal's racist or sexist behavior. (Dep. Ex. 15, p. 4) (App. Vol. 1, p. 683).

Robey and Marshal were friends. (Snider Dep. 25:5-25) (App. Vol. 1, p. 556); (Dilley Affidavit ¶ 17) (App. Vol. 1, p. 561); (Shannon Affidavit ¶ 12) (App. Vol. 1, p. 566). Marshal worked for Robey's snow removal business and the two spent time together outside of work. (Robey Dep. 91:21-92:11) (App. Vol. 1, p. 549); (Dilley Affidavit ¶¶ 18-19) (App. Vol. 1, p. 561). They frequently spoke to each other at work about personal matters. (Dilley Affidavit ¶ 19) (App. Vol. 1, p. 561). Despite Marshal's dubious employment history, including previous write-ups for disrespectful and unprofessional behavior; Robey had recommended Marshal for the Lead Person job in November 2017. (Flaspohler Dep. 36:13-37:14) (App. Vol. 1, p. 507); (Gerbes

Dep. 38:2-4) (App. Vol. 1, p. 519); (Snider Dep. 16:11-17, 18-21:2) (App. Vol. 1, p. 554, 555); (Dep. Ex. 38, p. 4) (App. Vol. 2, p. 13).

For months, Robey was able to push employee complaints about Marshal under the rug. Snider tried to discipline Marshal; however, Robey gave him pushback. (Snider Dep. 27:2-10) (App. Vol. 1, p. 557). When Snider tried to discipline Marshal, Robey forbid it. *Id.* It got to a point where Snider was complaining about Marshal's inappropriate behavior to Robey on a biweekly basis. (Snider Dep. 22:8-13) (App. Vol. 1, p. 556).

About a month into Ron's topside position, he started receiving similar complaints about Marshal. (Shannon Affidavit ¶ 25) (App. Vol. 1, p. 567); (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667). For example, workers told Ron that Marshal asked a transgender employee if he could see his genitalia after he underwent gender reassignment surgery. (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667). Marshal also commented to a black employee that some workers were all going out to eat chicken after work. *Id.* The man replied that he did not like chicken. *Id.* Marshal responded, "Next thing you're going to tell me is that you don't like watermelon!" *Id.*

In February 2018, Plant Operator Keanan Shannon complained to Ron and Robey about Marshal's inappropriate behavior. (Shannon Affidavit ¶ 27) (App. Vol. 1, p. 567). Ron had Shannon and other employees draft statements,

outlining their concerns, and he turned them over to Robey. (Shannon Affidavit ¶¶ 28-30) (App. Vol. 1, p. 568). Rather than forwarding the statements to human resources, Robey shared the employees' statements *with Marshal*. (Dilley Affidavit ¶ 29) (App. Vol. 1, p. 562); (Shannon Affidavit ¶¶ 27-34) (App. Vol. 1, p. 567-68). Marshal then retaliated against the employees for "turning him in." (Shannon Affidavit ¶ 33) (App. Vol. 1, p. 568).

Marshal's degrading behavior clearly violated Martin Marietta's discrimination and harassment policies. *See* MMM Prohibition Against Harassment (App. Vol. 1, p. 488-91). Because Robey refused to stop the behavior, Ron reported it to Assistant Plant Manager Anson Flaspohler on March 12, 2018, while Robey was on vacation. (Bizal Dep. 27:12-22) (App. Vol. 1, p. 492); (Hampton Dep. 6:5-10) (App. Vol. 1, p. 524); (Shannon Affidavit ¶ 37) (App. Vol. 1, p. 568); (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667); (Dep. Ex. 14) (App. Vol. 1, p. 676-79); (Dep. Ex. 38, p. 1) (App. Vol. 2, p. 10). Flaspohler passed Ron's complaint on to Human Resources Manager Jeff Bizal, who launched an investigation. (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667); (Dep. Ex. 38, p. 1) (App. Vol. 2, p. 10).

The Marshal investigation confirmed the employees' complaints **and** found that Marshal violated MMM's anti-retaliation policy. (Dep. Ex. 38, p. 3)

(App. Vol. 2, p. 12). The investigation also called in to doubt Robey's decision to promote Marshal to Lead Person. (Dep. Ex. 38, p. 4) (App. Vol. 2, p. 13).

Robey Begins Retaliating Against Ron. On March 23, 2018, MMM fired Marshal. (Dep. Ex. 15) (App. Vol. 1, p. 680-84). **That same night, Robey called Ron at home and screamed at him for reporting Marshal.**[2] (Hampton Dep. 358:3- 59:5) (App. Vol. 1, p. 544); (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667). Robey claimed all the workers were lying about Marshal. (Hampton Dep. 82:4-18, 357:14-58:2) (App. Vol. 1, p. 530, 543-44); (Dep. Ex. 8, p. 5-6) (App. Vol. 1, p. 667-68). He called them "fucking liars." *Id.*

Ron explained that MMM's policy required him to report harassment complaints, but Robey refused to listen. (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668).

Robey's reaction shocked Ron. *Id.* Before Ron reported Marshal, they had gotten along well. (Hampton Dep. 82:4-18) (App. Vol. 1, p. 530); (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). Ron thought Robey respected him, but after the report, everything fell apart. *Id.* Robey blamed Ron for his friend Marshal

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[2] The facts in bold type are the most important ones that the district court ignored.

losing his job. (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). Ron also heard Robey was disciplined for mishandling the situation. (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667). Robey flipped like a switch, making it clear Ron had a target on his back. (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668).

Robey immediately unfriended Ron and his fiancé on Facebook. (Robey Dep. 120:12- 21:1) (App. Vol. 1, p. 550); (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). More importantly, **from March to July 2018, Robey refused to answer Ron's phone calls or speak with him at work.** (Hampton Dep. 358:12-59:5) (App. Vol. 1, p. 544); (Dilley Affidavit ¶ 54) (App. Vol. 1, p. 564); (Shannon Affidavit ¶ 51) (App. Vol. 1, p. 570); (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). He also started manipulating situations so it would seem like Ron was doing something wrong. (Shannon Affidavit ¶ 50) (App. Vol. 1, p. 569); (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). Robey sent complaints about Ron or his crew directly to Production Manager Scott Gerbes, Robey's boss, without first addressing any concerns with Ron. (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). For example, Robey complained to Gerbes that Ron was being rude and hung up on office employees. *Id.* The truth was that Ron's calls were dropped—he did not hang up. *Id.* Ron had already explained this to the office employees he was speaking with. *Id.* They understood the situation, and there was not a problem. *Id.* Regardless, Robey skipped talking to Ron and submitted a

complaint directly to Robey's manager. *Id.* He was creating mountains out of mole hills to try and get Ron in trouble. *Id.*

Robey's behavior affected Ron's ability to do his job. (Hampton Dep. 354:9-24) (App. Vol. 1, p. 543); (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). Ron complained to Gerbes about Robey's retaliation. *Id.* In early August, after nearly five months of the silent treatment, Robey finally started taking Ron's calls and responding to his questions. (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668).

Robey Retaliates Against Others. Ron was not the only employee involved in the Marshal investigation. **Robey retaliated against all of them.** (Dilley Affidavit ¶ 42) (App. Vol. 1, p. 563); (Shannon Affidavit ¶ 45) (App. Vol. 1, p. 569).

Chris Dilley. Chris Dilley participated in the Marshal investigation (Dilley Affidavit ¶ 35) (App. Vol. 1, p. 562). After MMM fired Marshal, Robey started writing up Dilley more and scrutinizing his work. (Dilley Affidavit ¶¶ 35-44) (App. Vol. 1, p. 562-63). Robey also stopped talking to Dilley and refused to answer his phone calls. (Dilley Affidavit ¶ 45) (App. Vol. 1, p. 563). Robey publicly called out Dilley during a meeting and demoted him in front of his coworkers. (Dilley Affidavit ¶ 46) (App. Vol. 1, p. 563).

Keanan Shannon. Keanan Shannon also participated in the Marshal investigation. (Dilley Affidavit ¶ 47) (App. Vol. 1, p. 563); (Shannon Affidavit

¶¶ 36-44) (App. Vol. 1, p. 568-69). Robey called Shannon a "liar." (Shannon Affidavit ¶¶ 46-47) (App. Vol. 1, p. 569). Within the first two weeks after Shannon complained about Marshal, Robey wrote him up twice. (Shannon Affidavit ¶ 40) (App. Vol. 1, p. 569). While Human Resources was investigating Marshal, a breaker box blew up in Shannon's eye, cutting his lens. (Shannon Affidavit ¶¶ 43-44) (App. Vol. 1, p. 569). Robey refused to allow Shannon to go to the hospital, and Ron cared for Shannon until he could leave work and see a doctor. *Id.* Robey began scrutinizing Shannon's work more. (Shannon Affidavit ¶¶ 46-47) (App. Vol. 1, p. 569). Robey ultimately forced Shannon out of a job. (Dilley Affidavit ¶ 47) (App. Vol. 1, p. 563); (Shannon Affidavit ¶¶ 36-44) (App. Vol. 1, p. 568-69).

Shannon called MMM's ethics hotline to complain about the retaliation from Robey. (4/16/18 Ethics Hotline Call) (App. Vol. 2, p. 2-4). MMM dismissed Shannon's concerns. (4/26/18 Nelson Investigative Report) (App. Vol. 2, p. 6-8).

Darius Ziegler. After Darius Ziegler complained about Marshal, Robey wrote him up more. (Shannon Affidavit ¶ 55) (App. Vol. 1, p. 570). Ziegler was scared because Robey threatened to fire him. (Dilley Affidavit ¶¶ 48-51) (App. Vol. 1, p. 563).

Dakota McIntyre. Dakota McIntyre was interviewed during the Marshal Investigation. (Dep. Ex. 38, pp. 1-2) (App. Vol. 2, p. 10-11). He ended up leaving and finding another job because he could not handle Robey's retaliation. (Shannon Affidavit ¶ 56) (App. Vol. 1, p. 570).

Mike Snider. After Mike Snider complained about Marshal's behavior, Robey began ignoring Snider's calls. (Snider Dep. 32:12-21) (App. Vol. 1, p. 558). Robey's behavior made it more difficult to for Snider to do his job. *Id.*

MSHA Inspection. On August 9, 2018, the federal Mine Safety and Health Administration ("MSHA") inspected MMM's Ames mine. (Flaspohler Dep. 139:16-21) (App. Vol. 1, p. 509); (Hampton Dep. 69:20-24) (App. Vol. 1, p. 529); (Dep. Ex. 7) (App. Vol. 1, p. 662).

When Ron arrived at work that day, only one truck was running because the other one had been tagged out the night before. (Hampton Dep. 83:13-85:2) (App. Vol. 1, p. 530). There was a crack in the tagged-out truck's frame, so Ron started looking for a welder to repair it. *Id.* Both topside welders were tagged out. Ron decided to repair a welder, so it could be used to repair the truck frame and get the other line running. *Id.*

The welder had been tagged out by Lead Person Jason Reifschnider because wires were exposed, hanging out of the welder's plug. (Hampton Dep. 91:13-25, 98:6-13) (App. Vol. 1, p. 532, 533). **The wires were coated; they**

were not bare wires. (Hampton Dep. 98:9-99:2) (App. Vol. 1, p. 533). This was a redundant safety mechanism, making it less likely that an employee could be electrocuted. *Id.*

Ron repaired the welder by loosening the plug's bracket, putting the jacket over the exposed wires and tightening it.[3] (Hampton Dep. 98:9-19, 102:1-6, 104:12-17) (App. Vol. 1, p. 533, 534). While Ron was making the repair, Reifschnider walked through the shop. Ron explained that he had made the repair and removed Reifschnider's tag. (Hampton Dep. 88:9-90:3) (App. Vol. 1, p. 531-32); *see also* Dep. Ex. 31, p. 2 (App. Vol. 1, p. 700). Ron believed he had correctly and permanently repaired the welder.[4] (Hampton Dep. 157:12-23) (App. Vol. 1, p. 541).

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[3] Although Ron was not the one who had tagged out the welder, MMM's policies allowed a supervisor like Ron to untag a piece of equipment after it had been repaired. (Dep. Ex. 3, pp. 3-4) (App. Vol. 1, p. 574-75). Ron did not call an electrician to repair the plug, because the repair was outside of the electrician's job responsibilities and Ron was told not to call them unless it was for something major. (Hampton Dep. 102:9-03:12, 121:2-5) (App. Vol. 1, p. 534, 537).

[4] Ron had made these types of repairs many, many times throughout his career without any problems. Hampton Dep. 66:12-20, 125:14-26:4, 128:14-29:5 (App. Vol. 1, p. 529, 538-39).

Later that day, Ron returned to the shop where the welder was located to meet Flaspohler and MSHA Inspector Jeff Breon. (Hampton Dep. 85:11-86:10) (App. Vol. 1, p. 530-31). The weight of the cord had evidently caused the jacket to pull down and once again expose the welder's coated wires. (Dep. Ex. 7) (App. Vol. 1, p. 662). This was the state of the plug:

(Dep. Ex. 6, p. 10) (App. Vol. 1, p. 607).[5]

Ron explained to Inspector Breon and Flaspohler how he had repaired the plug earlier. (Flaspohler Dep. 150:19-51:9) (App. Vol. 1, p. 511); (Dep. Ex. 6, p. 8) (App. Vol. 1, p. 605). Inspector Breon told Ron the cord can come out because of

- The weight of the plug,
- The way the workers unplug the cord by yanking it out of the wall, or
- The way the operators run the cord around the machines.

(Hampton Dep. 108:4-14, 115:15-25, 183:2-21, 364:17-65:3) (App. Vol. 1, p. 535, 536, 542, 545).

Breon issued MMM a citation for the plug; however, the citation was terminated later that day *after an electrician repaired the plug exactly the same way Ron had*. (Dep. Ex. 7) (App. Vol. 1, p. 662); (Dep. Ex. 11, p. 2) (App. Vol. 1, p. 670); (Dep. Ex. 31, p. 2) (App. Vol. 1, p. 700); (Flaspohler Dep.

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[5] MMM Midwest Division Safety Manager Barrett Eller later showed this photograph to Electrical Manager Tom Smith during his August 10 interview. *See* Dep. Ex. 11, p. 2 (App. Vol. 1, p. 670).

145:14-25) (App. Vol. 1, p. 510). Ryan Meyer, the electrician who made the repair, described to Eller how he pushed the cord back in and tightened the screws. (Dep. Ex. 11, p. 2) (App. Vol. 1, p. 670). Eller noted in his report that this was the same action Ron took. *Id.*

Inspector Breon also recommended use of a larger plug that would prevent this type of problem in the future, so Ron went to the store, bought a bigger plug, and installed it on the welder. (Hampton Dep. 146:6-20, 148:5-49:3) (App. Vol. 1, p. 540). **Ron made this repair to ensure that the problem would not happen again.** (Hampton Dep. 172:8-73:3) (App. Vol. 1, p. 91).

On August 10, 2018, MMM suspended Ron with pay as they investigated his first plug repair. (Dep. Ex. 37, p. 1) (App. Vol. 1, p. 708). **No one from MMM indicated that they believed Ron had committed a lockout/tagout ("LOTO") violation**. (Flaspohler Dep. 167:20-68:1) (App. Vol. 1, p. 512); (Dep. Ex. 24) (App. Vol. 1, p. 685). MMM Midwest Division Safety Manager Barrett Eller gathered statements from Ron, Jason Reifschnider, and two electricians. (Eller Dep. 41:23-42:9, 42:12-16, 42:12-43:7) (App. Vol. 1, p. 496-97). The electricians confirmed that the weight and size of the cord could have caused it to drop out after Ron's initial repair. (Dep. Ex. 11, p. 2) (App. Vol. 1, p. 670).

On August 11, 2018, Eller submitted his findings to Director of Human Resources Thomas Nelson. (Dep. Ex. 44, p. 1) (App. Vol. 1, p. 724). Eller concluded Ron repaired the welder "in good faith" and did not commit a LOTO violation. (Eller Dep. 82:13-17) (App. Vol. 1, p. 500); (Dep. Ex. 27, p. 4) (App. Vol. 1, p. 691).

On August 12, 2018, Nelson recommended Ron receive a coaching. (Dep. Ex. 26, p. 1) (App. Vol. 1, p. 686); (Dep. Ex. 28) (App. Vol. 1, p. 692-94). At the time, Eller and Nelson knew that: (1) MMM had received a citation; (2) coated wires on the welder were exposed at the time of the inspection; and (3) Ron was not an electrician. *See* Dep. Ex. 24 (App. Vol. 1, p. 685); (Dep. Ex. 44) (App. Vol. 1, p. 724).

On August 13, 2018, Eller spoke to Flaspohler, after which Eller and Nelson decided Ron should receive a corrective action—although they still believed Ron had acted in "good faith."[6] (Dep. Ex. 29) (App. Vol. 1, p. 695);

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[6] Although Eller claims it was Flaspohler who first showed him the photograph, this is not supported by Eller's report, indicating the electricians saw a photo of the plug. *Cf.* Eller Dep. 14:21-23 (App. Vol. 1, p. 145) and *see* Dep. Ex. 11, p. 2 (App. Vol. 1, p. 670).

(Dep. Ex. 30) (App. Vol. 1, p. 696-98); (Flaspohler Dep. 193:12-25) (App. Vol. 1, p. 514).

From that point going forward, the only thing that changed is that Defendant Doug Robey became involved. (Clock Dep. 63:15-18, 64:15-24) (App. Vol. 1, p. 494); (Eller Dep. 128:21-25) (App. Vol. 1, p. 504).

Robey told District Production Manager Scotty Gerbes that Ron was dishonest and Robey believed Ron "did not make the repair he claimed to have made to the plug." (Gerbes Dep. 90:23-91:4) (App. Vol. 1, p. 523); (Dep. Ex. 42, p. 2) (App. Vol. 1, p. 714). **Robey's input changed the course of Eller's investigation and made Gerbes believe Ron should be fired.** (Gerbes Dep. 70:23-71:2) (App. Vol. 1, p. 521); (Dep. Ex. 35, p. 1) (App. Vol. 1, p. 706).

Todd Clock is MMM's Vice President and General Manager of the Des Moines District. (Clock Dep. 15:12-19) (App. Vol. 1, p. 493). **He admitted Robey was involved in the decision to fire Ron.** (Clock Dep. 71:3-72:12) (App. Vol. 1, p. 495). Division President Bill Gahan could not remember what exactly justified Defendant's abrupt change of course after the initial investigation findings, but believed Robey's input played a part. (Gahan Dep. 40:19-22, 43:1-11) (App. Vol. 1, p. 516, 517).

On the afternoon of August 13, just hours after Robey became involved, Nelson sent an email stating MMM was firing Ron because he was "dishonest and he made the decision to use an unsafe welder." (Dep. Ex. 42, p. 2) (App. Vol. 1, p. 714). **The first and only person to accuse Ron of being dishonest was Robey.** *Id.* **Until Robey's statements to Gerbes, Nelson and Eller continued to believe Ron acted in good faith.** *See* Dep. Ex. 29 (App. Vol. 1, p. 695); Dep. Ex. 30 (App. Vol. 1, p. 696-98). **Between the time of MMM's decision to discipline Ron and the time it changed course and decided Ron should be fired, the only new information MMM received was Robey's attack on Ron's honesty.** *Compare* Dep. Ex. 42 (App. Vol. 1, p. 713-23) *with* Dep. Ex. 29, 30 (App. Vol. 1, p. 695, 696-98).

On August 15, 2018, MMM fired Ron. (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668).

ARGUMENT

THE DISTRICT COURT ERRED IN DECIDING NO JURY COULD FIND RETALIATION

There was only one claim before the district court: retaliation in violation of the ICRA. To win that claim, Ron must ultimately prove: (1) he engaged in protected activity; (2) Defendants took adverse action against him; and (3) his

protected activity was a motivating factor in the Defendants' action. *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 750 (Iowa 2006); *see also DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 12-13 (Iowa 2009); *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 602, 635 (Iowa 2017); *Manahl v. State*, 2017 WL 4317318, at *6 n.5 (Iowa Ct. App., Sept. 27, 2017). Importantly, the employee does not need to prove those elements at the summary judgment stage—he just needs to produce evidence to create a jury issue.

Defendants' summary judgment motion conceded that Ron established the first and second elements. The only issue in Defendants' motion was causation. Rather than analyze whether the jury could find Ron's protected conduct was a "motivating factor" in his termination, the district court required proof that it was a "significant factor" and one which "tip[ped] the scales decisively one way or the other." (Ruling, pp. 6, 8) (App. Vol. 1, p. 480, 482).

"The motivating-factor standard is a lower standard than the determining-factor standard." *Hawkins*, 929 N.W.2d at 271 (citing *DeBoom*, 772 N.W.2d at 13). Under this standard, "liability can sometimes follow even if [the protected activity] wasn't a but-for cause of the employer's challenged decision." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020).

The district court decided, as a matter of law, that Ron's protected activity had nothing to do with Defendants' decision to fire him and that any reasonable jury would be compelled to see things the same way.

The district court erred by: (1) applying the wrong causation standard and (2) failing to view the facts in the light most favorable to Ron, the nonmoving party.

Because this appeal is from the district court's improper entry of summary judgment, the standard of review is for correction of errors at law. *See Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). Error was preserved by Plaintiff's timely resistance to the Defendants' Motion for Summary Judgment. *See* Plaintiff's Resistance to Defendants' Motion for Summary Judgment and related filings. (App. Vol. 1, p. 322-403).

I. THE DISTRICT COURT APPLIED THE WRONG CAUSATION STANDARD

A. "MOTIVATING FACTOR" IS THE CAUSATION STANDARD UNDER THE ICRA

1. The district court relied on inapplicable authority

The district court applied the wrong causation standard for an ICRA retaliation claim, stating, "The standard for retaliatory discharge requires that a causal connection will not be found unless it was "a 'significant factor' motivating the adverse employment decision." (Ruling, pp. 6-8) (App. Vol. 1,

p. 480-82). For authority, the Ruling cited the dissent in *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 582 (Iowa 2017) (Waterman, J., dissenting). Although the *Haskenhoff* decision is lengthy and Justice Waterman's opinion appears first, the idea that retaliation claims are unique and require a higher causation standard than other claims received only three votes. The *Haskenhoff* majority held that the standard is "motivating factor." *Id.* at 582, 602, 636.

The district court also relied on *Teachout v. Forest City Community School District*, 584 N.W.2d 296 (Iowa 1998), a case alleging retaliation in violation of public policy. (Ruling, pp. 6-8) (App. Vol. 1, p. 480-82). This was the same error made by the district court in *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1 (Iowa 2009). Although *DeBoom* was an ICRA case, the causation standard provided to the jury was the one used in public policy discharge cases and said the protected characteristic must be the factor that "tips the scales decisively." *Id.* at 12-13 (citing *Teachout*, 584 N.W.2d at 301-02). This was "a higher burden of proof than is required in discrimination cases" under the ICRA. *Id.* at 13.

While the *DeBoom* court was not picky about whether the standard was called "motivating factor" or "determining factor," the important part was to define it so liability attached if the protected characteristic "played a part" in the employer's decision. *Id.* at 13. The court suggested the use of "motivating

factor" going forward would eliminate any confusion between the different causation standards applicable to ICRA claims versus public policy claims. *Id.* at 13-14.

2. The words and structure of the ICRA do not support use of a different causation standard for retaliation claims

The causation standard under our Civil Rights Act is the same for all protected classes and activities. *See Schott v. Care Initiatives*, 662 F. Supp. 2d 1115, 1120 (N.D. Iowa 2009). In contrast to federal discrimination laws, the ICRA is a unified statute. *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 10 (Iowa 2014). Thus, no fractures arise under Iowa law about issues such as causation standards. *See id.*

Some have suggested causation standard under the ICRA should instead blindly follow those under Title VII. But the words in Title VII's retaliation section are different than the words in its discrimination section. *Univ. of Texas SW Med'l Ctr. v. Nassar*, 570 U.S. 338, 348-54 (2013). Retaliation is banned in a separate section from the ban on discrimination, and the 1991 Amendment codifying the "motivating factor" standard applied only to the discrimination section. *Id.* In addition to the plain language of the statute, the *Nassar* court relied on that "fundamental difference in statutory structure" in holding that the higher causation standard in retaliation claims had not been affected by the

1991 legislation easing the causation standard for discrimination claims. *Id.* at 356.

It would make no sense to apply the *Nassar* decision to the ICRA because the logic behind that decision does not apply to the ICRA, *which uses the very same words to prohibit discrimination and retaliation*. Iowa Code Section 216.6(1) states: "**It shall be an unfair or discriminatory practice for any**: (a) **[p]erson to** refuse to hire . . . discharge any employee, or to otherwise **discriminate in employment . . . because** of the age, race . . . of such applicant or employee." IOWA CODE § 216.6(1) (emphasis added).

Section 216.11 states: "**It shall be an unfair or discriminatory practice for:** . . . (2) **[a]ny person to discriminate or retaliate against another person** in any of the rights protected against discrimination by this chapter **because** such person has lawfully opposed any practice forbidden under this chapter, obeys the provisions of this chapter, or has filed a complaint, testified, or assisted in any proceeding under this chapter." IOWA CODE § 216.11 (emphasis added).

The relevant language is exactly the same. "'[I]dentical words used in different part of the same act are intended to have the same meaning.'" *Patterson v. Iowa Bonus Bd.*, 71 N.W.2d 1, 6 (Iowa 1955) (quoting *Atlantic Cleaners & Dyers v. U.S.*, 286 U.S. 427, 433 (1932)). There is no reason to suppose the

legislature meant the same words in the same statute to convey two completely different things. If anything, public policy concerns would justify retaliation claims being *easier* to prove. After all, enforcement of our civil rights laws depends upon employees being willing to file complaints. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). "Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends." *Id.; see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180-81 (2005) (enforcement scheme of civil rights statutes would unravel if defendants could get away with retaliation).

Such an interpretation is also consistent with the legislature's instruction that the ICRA must be construed broadly to effectuate its intent. *See, e.g.* IOWA CODE § 216.18; *Pippen v. State*, 854 N.W.2d 1, 28 (Iowa 2014); *Palmer Coll. of Chiro. v. Davenport Civil Rights Comm'n*, 850 N.W.2d 326, 333 (Iowa 2014); *Goodpaster*, 849 N.W.2d at 5, 7; *DeBoom*, 772 N.W.2d at 8.

The Court should not abandon the ICRA's firmly established causation standard in favor of interpreting the language of one section of the ICRA completely differently than the exact same language in another section of the same Act.

3. The "same decision" defense is inconsistent with a higher causation standard

The "same-decision" defense only comes into play if a jury finds that discrimination or retaliation was a ***motivating factor*** in the challenged employment decision. *See McQuistion v. City of Clinton*, 872 N.W.2d 817, 828 n.4 (Iowa 2015); Eight Circuit Model Civil Instruction 5.01 (2019). In *Hawkins*, a unanimous Iowa Supreme Court recognized the same-decision defense was available ***because*** Iowa has adopted the motivating factor test for causation. *Hawkins*, 929 N.W.2d at 272 ("an employer should be entitled to the same-decision affirmative defense because we have adopted the motivating-factor test for causation"). Thus, if a party wishes to utilize the "same-decision" defense, they must accept that "motivating factor" is the causation standard.

Defendants MMM and Robey asserted the "same decision" affirmative defense. (First Amd. Answer to Third Amd. Petition, p. 14) (App. Vol. 1, p. 26). In fact, their motion to add the defense cited *Hawkins* for authority. (Motion for Leave) (App. Vol. 1, p. 1-2).

In *Ludlow v. BNSF Railway. Co.*, 2014 WL 12584323 (D. Neb. Feb. 3, 2014), *aff'd*, 788 F.3d 794 (8th Cir. 2015), the court explained how "motivating factor" and "same decision" go together.

> The "same decision" instruction requested by Defendant would not have been proper had a "determining factor" instruction been

> given to the jury. That is to say, if Plaintiff's evidence established he would not have been discharged "but for" his protected activity, then Defendant could not possibly prove Plaintiff would have been discharged regardless of his protected activity. These two fact situations are mutually exclusive.

Id. at *3.

Allowing employers to assert the "same-decision" defense while simultaneously raising the causation burden for plaintiffs would contradict the framework on which the defense relies and make it unworkable for trial courts. Accordingly, the motivating factor standard should be preserved in accordance with the Iowa Supreme Court's adoption of the "same-decision" defense.

B. PRECEDENT SHOULD BE RESPECTED

In 2009 in *DeBoom*, the Iowa Supreme Court found a plaintiff need not prove that an employee's engagement in protected activity or membership in a protected class was "*the* determinative factor" in the decision to take an adverse employment action against the plaintiff (emphasis in original). *DeBoom*, 772 N.W.2d at 13-14. Rather, the plaintiff need only prove that an employee's engagement in protected conduct or membership in a protected group was "*a* determinative factor." *Id.* To avoid confusion between the use of "***a***" determinative factor (used in ICRA claims) and "***the***" determinative factor (used in public policy claims), the Iowa Supreme Court held that use of the term "**motivating factor"** rather than "a determinative factor" "would

eliminate the confusion between the differing burdens of proof in these types of cases" and was "preferable . . . in order to eliminate confusion between tortious discharge and discrimination cases."[7] *Id.* at 9 n.4, 13-14.

In 2017, the Iowa Supreme Court decided *Haskenhoff*. One of the questions considered was how a jury should be instructed for retaliation claims under the ICRA. *Id.* While three justices opined that a plaintiff's protected conduct must be a "significant factor," a majority once again confirmed that the causation standard for all ICRA claims is a "motivating factor." *Id.* at 582, 602, 636.

Finally, in 2019, the Supreme Court once again made it abundantly clear that the "motivating factor" standard applies in all ICRA cases. *Hawkins*, 930 N.W.2d at 269-72 (Iowa 2019). Hawkins alleged both discrimination and retaliation in violation of the ICRA. *Id.* at 264. A unanimous Court held that the causation standard *for both claims* is "motivating factor." *Id.* at 270, 271-72. "In Iowa, we . . . adopted the motivating-factor standard under our statutes

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[7] Although *DeBoom* was a pregnancy discrimination case, the court gave no indication the standard might be different if it were a case of race discrimination, failure to accommodate, retaliation, or any other ICRA claim.

rather than the determining-factor standard." *Hawkins*, 929 N.W.2d at 271 (citing *Haskenhoff*, 897 N.W.2d at 634, 637; *DeBoom*, 772 N.W.2d at 13). "[I]n discrimination *and retaliation* cases under the ICRA, we apply the Price Waterhouse motivating-factor standard in instructing the jury." *Id.* at 272 (emphasis added).

The causation standard under our Civil Rights Act is the same for all protected classes and activities. *Id.* at 272. Unlike federal civil rights laws, Iowa's protections are rooted in one place—Chapter 216—which has resulted in unified standards that do not depend on the specific cause of action alleged. *Goodpaster*, 849 N.W.2d at 10. "[I]t could not be clearer that the Iowa Supreme Court does not impose a 'but for' causation standard in any ICRA employment discrimination case, based on age or any other protected characteristic, and that the appropriate causation standard in such cases is 'motivating factor.'" *Schott v. Care Initiatives*, 662 F. Supp. 2d 1115, 1120 (N.D. Iowa 2009).

It has been suggested that the decisions in *DeBoom* and its progeny improperly failed to follow earlier decisions that had indicated retaliation claims, in particular, demanded more. *See Haskenhoff*, 897 N.W.2d at 582 (Waterman, J., dissenting). It is true that several older cases used the term

substantial,[8] significant,[9] or determining[10] to describe the causation factor applicable to ICRA retaliation cases.[11] There is no suggestion, however, in any of these older cases that the court was singling out retaliation cases for a higher causation standard.

A look at the origins of that (varying) high causation standard, in fact, reveals that it did had nothing to do with the particular violation of the ICRA that was alleged. The *City of Hampton* case relied upon *Hulme II*, which said it got the high causation standard from *Hulme v. Barrett*, 449 N.W.2d 629 (Iowa 1989) ("*Hulme I*"). *See City of Hampton*, 554 N.W.2d at 535; *Hulme II*, 480 N.W.2d at 42. It is significant, however, that the entire discussion of causation

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[8] *Hulme v. Barrett*, 480 N.W.2d 40, 43 (Iowa 1992) ("*Hulme II*"); *City of Hampton v. ICRC*, 554 N.W.2d 532, 535 (Iowa 1996).

[9] *Hulme II*, 480 N.W.2d at 42.

[10] *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 639 (1998) affirmed a trial court's use of a jury instruction describing causation as "a determining factor."

[11] One might question whether the Court felt it was especially important that the precisely correct term be used, given that that term kept changing—sometimes within the same appellate decision.

standards in *Hulme I* related to the employee's claim of *age discrimination*. *Hulme I*, 449 N.W.2d at 632.

Legal doctrines do not always evolve as we assume. Plaintiff has not found a single Iowa Supreme Court case that has ever indicated allegations of retaliation require a higher showing of causation than allegations of discrimination. At least three cases plainly hold that causation is the same. They should be followed.

"The concept of *stare decisis* is an important bedrock principle in our system of justice and allegiance to precedent is a significant factor in the enduring strength of our judicial system." *State v. Liddell*, 672 N.W.2d 805, 816 (Iowa 2003). *Stare decisis* "dictates continued adherence to our precedent absent a compelling reason to change the law." From the very beginning, this Court has "'guarded the venerable doctrine of *stare decisis* and required the highest possible showing the precedent should be overruled before taking such a step.'" *Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 249 (Iowa 2018) (quoting *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005)); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (superseded by statute on other grounds) ("Consideration of *stare decisis* have special force in the area of statutory interpretation)."

The reason we bend over backwards to uphold precedent is that corporations, workers, the judicial system, and society as a whole must be able to count on the law's consistency.

> Predictability and stability are especially important in employment law. Employers must comply with both state and federal law. Human resources personnel and supervisors must apply myriad rules and regulations in complex situations. Employers and prospective employers should be able to reply on our precedents. We would generate significant uncertainty if we overrule our own long-standing precedent to diverge from settled . . . interpretations. Uncertainty invites more litigation and increasing costs for all parties. An uncertain or costly litigation environment inhibits job creation.

Haskenhoff, 897 N.W.2d at 585 (Waterman, J., dissenting).

If judicial decisions are truly interpretations of statutes and not merely policy-making from the bench, they should not change depending on the makeup of the Court. *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (*stare decisis* "permits society to assume that bedrock principles are founded in the law rather than in the proclivities of individuals"). Even if the Court believes that *DeBoom*, *Haskenhoff*, and *Hawkins* all got it wrong, respect for *stare decisis* demands caution. Even if, as a matter of policy, the Court believes Iowans would be better served if job protections for workers were narrower, it is bound by the legislature's directive to interpret the ICRA broadly.

II. THE DISTRICT COURT FAILED TO FOLLOW THE SUMMARY JUDGMENT RULES

In deciding Plaintiff's case was over, the district court ignored facts in the record and repeatedly viewed facts in the light most favorably to Defendants, violating the summary judgment standards of Iowa Rule of Civil Procedure 1.981. Summary judgment was improper because reasonable minds could have reached different conclusions about whether Ron was fired because of his protected activity. *See Goodpaster*, 849 N.W.2d at 6 (quoting *Walker Shoe Store, Inc. v. Howard's Hobby Shop*, 327 N.W.2d 725, 728 (Iowa 1982)) ("'Even if facts are undisputed, summary judgment is not proper if reasonable minds could draw from them different inferences and reach different conclusions.'").

The district court also erred by making inferences in favor of Defendants, the moving parties. *See Williams v. Davenport Commc'ns Ltd. P'ship*, 438 N.W.2d 855, 856 (Iowa Ct. App. 1989) ("Every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved."); *Schneider v. State*, 789 N.W.2d 138, 144 (Iowa 2010) (court must "indulge in every legitimate inference that the evidence will bear" in plaintiff's favor).

Contrary to the district court's factfinding, there is plenty of fodder for a reasonable jury to find that Ron's protected activity played a role in Defendants' decision to fire him.

1. Plaintiff Produced Evidence that Defendant Robey Participated in the Termination Decision

When a person with unlawful intent is "closely involved" in decision making, even if they are not the final decision maker, the discriminatory motive of that person becomes the discriminatory motive of the employer itself. *Staub v. Proctor Hosp.*, 562 U.S. 411, 419-20 (2011).[12] In other words, intent and responsibility for the adverse employment action can be attributed to an agent, like Robey, if the adverse action is the intended consequence of the agent's retaliatory conduct. *See id.*

In *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F. 3d 1316, 1323 (8th Cir. 1994), the plaintiff's supervisor did not have the authority to terminate plaintiff but participated in the suspension and termination decision. "The fact that the [supervisor] did not 'pull the trigger' [on the termination] is of little consequence." *Id.*

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[12] French author Jean de La Fontaine's tale, *Le Singe et le Chat*, retells the Aesop fable of a monkey who persuaded a cat to pull chestnuts out of a fire for them to eat. The monkey ate all the chestnuts, leaving the cat with burned paws. Aesop, "The Monkey and the Cat," (https://www.siue.edu/~jvoller/Common/AnimalTales/monkey_and_cat_fable.pdf) (last accessed September 6, 2020. The term "cat's paw" signifies someone who is duped into accomplishing the purpose of someone else.

Without ever listening to a single witness' tone of voice, facial expression, or body language, the district court accepted the testimony of some of Defendants' managers that Defendant Doug Robey did not participate in the decision to fire Ron. (Ruling, pp. 7-8) (App. Vol. 1, p. 481-82). At the same time, the court ignored the testimony of other managers who swore that Robey *did* participate in the decision. Todd Clock is MMM's Vice President and General Manager of the Des Moines District. (Clock Dep. 15:12-19) (App. Vol. 1, p. 493). **He admitted Robey was involved in the decision to fire Ron.** (Clock Dep. 71:3-72:12) (App. Vol. 1, p. 495).

> Q. Were all those individuals identified [including Doug Robey] involved with the disciplinary actions and subsequent decision to fire Ron?
> **A. Yes.**

When some witnesses' testimony directly contradicts other witnesses' testimony, it creates "a classic factual dispute that must be resolved by a jury." *Nguyen v. Lokke*, 2013 WL 4747459, at *6 (D. Minn. Sept. 4, 2013).

The timeline—including an email chain showing the entire course of the investigation—reveals how Robey's input changed the outcome from discipline to termination. *See* Dep. Ex. 39 (App. Vol. 1, p. 710-12); Dep. Ex. 42 (App. Vol. 1, p. 713-23). The emails note Robey's involvement and that any action will need his approval. *See* Dep. Ex. 29 (App. Vol. 1, p. 695). Gerbes' contact

throughout the investigation was none other than Doug Robey. (Gerbes Dep. 52:23-53:12) (App. Vol. 1, p. 520).

Investigator Barrett Eller initially found that Ron had **not** violated MMM's LOTO policy:

- No fault in Lock out Tag out Policy Subject H(2), H(3), and L
  - H(2) – Ron H. is the supervisor in charge and would be able to effectively take control of the locked our tagged out piece of equipment.
  - H(3) – The lock shall only be removed by the person who applied the lock.
    - Jason R. was informed of the removal of the tag.
    - Location practices are not consistent from those interviewed on how tagged out items are re-admitted back into service.
  - L (1) (a) – The piece of equipment had the proper tag on it stating why it was tagged out. This allowed for Ron to accurately repair it.
  - L (1) (b) – The supervisor (Ron) made certain that the repairs needed to place back into service were made.
    - Although repairs did not withhold, the attempt at good faith in that Ron correctly repaired the cord to a safe working condition can be made.

(Dep. Ex. 27, p. 4) (App. Vol. 1, p. 691). Eller reached this conclusion after interviewing electricians on the job site, eyewitness Jason Reifschnider, and Ron. (Eller Dep. 41:23-43:7) (App. Vol. 1, p. 496-97). Eller found all these witnesses credible. (Eller Dep. 53:14-25) (App. Vol. 1, p. 498). Eller knew when he drafted his initial conclusions that Ron had ineffectively repaired the welder plug. (Eller Dep. 136:17-21) (App. Vol. 1, p. 506). At this point (August 12, 2018), Eller found that Ron "made a decision in good faith to repair the welder," and his only recommendation was that Ron receive a

coaching session. (Dep. Ex. 26, p. 1) (App. Vol. 1, p. 686); (Dep. Ex. 28) (App. Vol. 1, p. 692-94). MMM's draft disciplinary form for Ron stated:

> Based on an Investigation conducted on August 10, 2018, you attempted in good faith to repair a welder receptacle and place it back into service. Supporting expert opinion suggest that the repair was not a permanent fix to exposed cords.
>
> Due to your decision to place the welder back in service and not eliminating the risk of exposed cords would re-occur, you are receiving this Formal Written Coaching and Action Plan. Going forward your work performance must immediately and consistently meet or exceed Martin Marietta's expectations of a Foreman.

(Dep. Ex. 28, p. 1) (App. Vol. 1, p. 692).

On the next day, August 13, 2018, Eller interviewed Reifschnider again, as well as Assistant Plant Manager Anson Flaspohler. (Eller Dep. 58:22-59:8) (App. Vol. 1, p. 499). Although Eller claims the only new information he learned that "the plug-in had the screws tightened all the way down," that is apparent from the photograph, which Eller had since August 10. *See* Eller Dep. 87:22-89:15) (App. Vol. 1, p. 501); *see* Dep. Ex. 11, p. 2 (App. Vol. 1, p. 670).

At this point, MMM still believed Ron had "attempted in good faith to repair a welder receptable and place it back into service." (Dep. Ex. 29) (App. Vol. 1, p. 695); (Dep. Ex. 30) (App. Vol. 1, p. 696-98); *see also* Flaspohler Dep. 193:12-15 (App. Vol. 1, p. 514). MMM's plan was to give Ron a "last and final" warning. (Nelson Dep. 31:10-32:23) (App. Vol. 1, p. 547); (Dep. Ex. 29) (App. Vol. 1, p. 695); (Dep. Ex. 30) (App. Vol. 1, p. 696-98). Nelson did not

believe the facts warranted termination. (Nelson Dep. 31:10-32:23) (App. Vol. 1, p. 547). MMM's proposed disciplinary action stated:

> Based on an investigation conducted on August 10, 2018, you attempted in good faith to repair a welder receptacle and place it back into service. Due to your action, you were placed on paid suspension on Friday, August 10, 2018 pending the investigation. During the investigation, it was evident the repair did not fix the hazard. There was opportunity for you to obtain supporting expert opinion to ensure the repair was a permanent fix to exposed cords.
>
> Due to your decision to place the welder back in service and not eliminating the risk of exposed cords would re-occur, you are receiving this Formal Final Written Coaching w/ Decision-making. Going forward your work performance must immediately and consistently meet or exceed Martin Marietta's expectations of a Foreman.

(Dep. Ex. 30, p. 1) (App. Vol. 1, p. 696).

What happened next was the pivotal event that changed MMM's decision and caused Ron's termination from employment. Inexplicably, the district court completely ***ignored*** it.

Doug Robey told his boss, District Production Manager Scotty Gerbes, that he had a "trust and accountability issue" with Ron.[13] (Clock Dep. 63:15-18, 64:15-24) (App. Vol. 1, p. 494); (Eller Dep. 128:21-25) (App. Vol. 1, p. 504); (Flaspohler Dep. 202:8-22) (App. Vol. 1, p. 515); (Dep. Ex. 31, p. 6) (App. Vol. 1, p. 704); (Dep. Ex. 35, p. 1) (App. Vol. 1, p. 706).

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[13] It was not as if Robey could have added any additional facts. Robey was not at the mine during the MSHA inspection nor did he have any personal knowledge about Ron's repair. (Robey Dep. 163:2-7) (App. Vol. 1, p. 551).

Flaspohler, Robey, and Gerbes then had a conference call. (Robey Dep. 182:4-12) (App. Vol. 1, p. 552). Because of what Robey told Gerbes, Gerbes decided that Ron had lied to Flaspohler and Robey. (Gerbes Dep. 72:3-11) (App. Vol. 1, p. 521). This led Gerbes to believe Defendants should fire Ron—a belief based entirely on what he learned from Robey. (Gerbes Dep. 71:23-72:2, 72:20-74:10) (App. Vol. 1, p. 521-22); (Dep. Ex. 35, p. 1) (App. Vol. 1, p. 706).

Gerbes then emailed MMM management employees and Eller regarding his conversation with Robey, stating:

> I would need to speak with Barrett as well but after speaking with Doug, it appears the video shows Ron did not make the repair he claimed to have made to the plug. He took a short cut to clamp down on the wire, then unplugged the welder when he was finished with it.
>
> From what I understand he has lied to both Anson and Doug about the attempted repair which has led to a trust and accountability issue.
>
> I would like Barrett to provide some more insight but based on what I have learned from the Ames management team, I am leaning toward termination of Ron based on his actions and lack of accountability.

(Dep. Ex. 35, p. 1) (App. Vol. 1, p. 706).[14] Although Robey evidently convinced Gerbes that the video somehow undermined Ron's credibility, Eller

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[14] Gerbes' reference to "the Ames management team" meant Robey. (Gerbes Dep. 72:20-25) (App. Vol. 1, p. 521).

testified there was nothing in the video that indicated Ron did not make the repair he claimed to have made. (Eller Dep. 131:2-7) (App. Vol. 1, p. 505).

Gerbes based his belief that Ron was dishonest entirely on his conversations with Robey. (Gerbes Dep. 72:3-11, 90:23-91:4) (App. Vol. 1, p. 521, 523).[15] Based solely on his conversation with Robey, Gerbes began "leaning towards termination." (Gerbes Dep. 72:20-73:16) (App. Vol. 1, p. 521).

It was only ***after*** Robey convinced Gerbes that Ron was somehow dishonest that Eller changed his report, adding two more pages. (Dep. Ex. 42, p. 2) (App. Vol. 1, p. 714); *see also* Dep. Ex. 11, pp. 6-7 (App. Vol. 1, p. 674-75). Eller did not make any suggestions for disciplinary action in his final report. (Dep. Ex. 11, pp. 6-7) (App. Vol. 1, p. 674-75); (Dep. Ex. 42, p. 2) (App. Vol. 1, p. 714). It was only after a call between Eller, Nelson, and Gerbes that they decided Ron should be fired. (Dep. Ex. 42, p. 1) (App. Vol. 1, p. 713). **Eller had not received any additional evidence since recommending Ron receive a "last and final" warning—the only new information was the**

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[15] Until August 2018, Gerbes trusted Ron's judgment and believed Ron was a hard-working, honest worker. (Gerbes Dep. 32:14-33:15) (App. Vol. 1, p. 518).

input from Robey. *See* Dep. Ex. 42, pp. 2-3 (App. Vol. 1, p. 714-15); Dep. Ex. 11 (App. Vol. 1, p. 669-75).

It was ***after*** Robey's input that Eller, Clock, Gerbes, and HR Director Tom Nelson reached the decision to fire Ron. Nelson explained the decision in an email shortly after the call. (Clock Dep. 70:19-71:2) (App. Vol. 1, p. 495); (Dep. Ex. 42, p. 1) (App. Vol. 1, p. 713). Nelson's email stated:

> I will be forwarding the investigation to Michael Hunt, Don McCunniff and Craig LaTorre. After speaking with Barret, Todd and Scotty this morning, there is evidence that Ron Hampton was dishonest and he made a decision to use an unsafe welder. Unless you ask me to go down a different path, I believe Ron Hampton needs to be terminated due to his unsafe behavior and dishonesty.

(Dep. Ex. 39, p. 1) (App. Vol. 1, p. 710).

Nelson's email does not reference MMM's LOTO policy. *Id.* Instead, the email twice mentions Ron's alleged "dishonesty,"—the exact allegation Robey (and Robey alone) had been making about Ron. A reasonable jury can find not only that Robey was involved, but that his false allegation of dishonesty was what led directly to Ron's termination. Importantly, a reasonable jury can find the retaliatory animus caused the termination no matter which causation standard is used.

The only additional information MMM received between recommending Ron should receive a corrective action and deciding to fire him was the input of Doug Robey. (Dep. Ex. 29) (App. Vol. 1, p. 695); (Dep. Ex. 30) (App. Vol. 1,

p. 696-98); (Dep. Ex. 31) (App. Vol. 1, p. 699-705); (Dep. Ex. 42) (App. Vol. 1, p. 713-23). Yet, the conclusion of Eller's report changed, finding Ron violated the LOTO policy. (Dep. Ex. 31) (App. Vol. 1, p. 699-705).

Despite the substantial evidence in the record revealing Robey's integral role in the termination, the district court accepted one side of the story as gospel, finding, "Mr. Eller considered the conduct of Mr. Hampton alone in reaching his conclusion the termination was proper." (Ruling, p. 7) (App. Vol. 1, p. 481). The district court went on to cite select portions of Eller's and Nelson's deposition testimony while simultaneously ignoring the evidence that rebutted this testimony. *Compare* Ruling, pp. 7-8 (App. Vol. 1, p. 481-82) *with* Plaintiff's Statement of Additional Facts ¶¶ 152-95 (App. Vol. 1, p. 380-86).

Defendants' own witnesses provided different accounts about whether Robey participated in the decision to fire Ron. The written documentation clearly revealed Robey's involvement. This evidence may well convince a reasonable jury that Robey's input led to Ron's termination and that such input was tainted by retaliatory animus.

Ironically, the jury could find Eller's denial of Robey's involvement to be powerful evidence of pretext and causation. If the jury believes Gerbes (and the documents), they may well find Eller is lying. A jury is entitled "to infer from the falsity of the employer's explanation that it is dissembling to cover up

a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 140 (2000).

2. The District Court Disregarded Evidence that Ron Followed the LOTO Policy

The district court also improperly inferred in Defendants' favor that they would have fired Ron regardless of Robey's involvement in the investigation because Ron violated MMM's LOTO policy. (Ruling, p. 11) (App. Vol. 1, p. 485).[16] This conclusion relies on the faulty premise that there was no genuine issue of material fact as to whether Ron did violate the policy.

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[16] Plaintiff also submitted evidence to the district court that the LOTO policy was ***not*** zero tolerance. He identified two employees—Phillip Bowers and Chris McBee, who violated MMM's LOTO policy but remained employed. (Hampton Dep. 24:14-25:3) (App. Vol. 1, p. 527).

Even more persuasive is the fact that the electrician was never fired or even disciplined. They repaired the welder exactly as Ron had. (Dep. Ex. 11, p. 2) (App. Vol. 1, p. 670). It was Ron who followed the inspector's advice to get a bigger plug so the wires would not pull out in the future. (Hampton Dep. 146:6-20, 148:5-49:3, 172:8-73:3) (App. Vol. 1, p. 540, 91).

Although it is not crystal clear exactly what Defendants contend Ron did that violated the policy, it appears they consider the following omissions to be the violations:

- Ron did not consult an electrician to fix the welder (Dep. Ex. 11, pp. 6-7) (App. Vol. 1, p. 674-75); (Flaspohler Dep. 176:4-177:12) (App. Vol. 1, p. 513);

- Ron did not fix the welder correctly before placing it back in service (Nelson Dep. 36:5-25) (App. Vol. 1, p. 548);

- Ron did not show the person who tagged out the welder that it had been fixed (Dep. Ex. 11, pp. 6-7) (App. Vol. 1, p. 674-75).

The court disregarded evidence that Ron *did* follow the LOTO policy. Under the LOTO policy, supervisors like Ron had the authority to remove an employee's locks or tags. (Flaspohler Dep. 83:3-5) (App. Vol. 1, p. 508); (Hampton Dep. 50:18-22) (App. Vol. 1, p. 528); (Dep. Ex. 3, pp. 5-6) (App. Vol. 1, p. 576-77); (Dep. Ex. 5, p. 8) (App. Vol. 1, p. 586). This was a common practice at the Ames mine. Foreman regularly removed employees' tags after making repairs every other day, if not daily. (Hampton Dep. 366:13-22) (App. Vol. 1, p. 546). It was also not unusual for a piece of equipment to be tagged out, fixed, and then need to be repaired again shortly after, requiring the equipment to be tagged out again. (Gerbes Dep. 31:16-20) (App. Vol. 1, p. 518).

MMM had no written policy stating which electrical repairs could be completed by a foreman and which required an electrician. (Eller Dep. 117:22-18:24) (App. Vol. 1, p. 502-03). Employees who were not certified electricians regularly made electrical repairs, fixing welder plugs, changing motors, and working on fuses. (Hampton Dep. 66:12-20, 125:14-26:4, 128:14-29:5) (App. Vol. 1, p. 529, 538-39); (Snider Dep. 11:12-19, 37:15-20) (App. Vol. 1, p. 553, 559); (Dilley Affidavit ¶ 62) (App. Vol. 1, p. 564); (Shannon Affidavit ¶¶ 3-4) (App. Vol. 1, p. 565). The electricians on-site told employees **not** to call them unless it was something requiring a ***major*** repair. (Hampton Dep. 102:24-103:2) (App. Vol. 1, p. 534).

More importantly, MMM's own investigator, Eller, initially found Ron had ***not*** violated MMM's LOTO policy. (Dep. Ex. 27, p. 4) (App. Vol. 1, p. 691). Eller reached this conclusion knowing MMM had received a citation for the welder, knowing that Ron was not an electrician, seeing the photograph of the plug, and knowing that the coated wires were exposed when the MSHA inspector viewed the welder. *See* Dep. Ex. 27 (App. Vol. 1, p. 688-91). Nelson knew this information as well and stated, "It is evident that Ron made a decision in good faith to repair the welder." (Dep. Ex. 26) (App. Vol. 1, p. 686-87); *see also* Dep. Ex. 27 (App. Vol. 1, p. 688-91). This is underscored by

the fact that the electricians initially repaired the welder exactly like Ron had. *See* Dep. Ex. 11, p. 2 (App. Vol. 1, p. 670).

MMM's conclusion that Ron violated the LOTO policy is obviously not dispositive. Not only is the jury entrusted with resolving that and other genuinely disputed facts, discrepancies in the investigation may imply illegal intent. In *Menovcik v. BASF Corp.*, 2010 WL 3518008, at *5 (E.D. Mich. Sept. 8, 2010), the employer asserted that it "conducted a 'thorough' investigation into the complaints regarding [the plaintiff's] conduct before terminating his services, and relie[d] upon the results of its investigation to support its decision." At the time, the plaintiff had no prior history of misconduct and there "exist[ed] significant evidence to suggest there were other motivating factors at work." *Id.* at *6. As was the case with Ron, the employer did not give the plaintiff the opportunity to respond to the claims levied against him. *See id.*

The same was true in *Smothers v. Solvay Chemicals*, 740 F.3d 530 (10th Cir. 2014). There the decisionmakers based their conclusions on the version of events they received from the plaintiff's adversary without giving the plaintiff a chance to respond. *Id.* at 542. Summary judgment for the defendant was reversed because the "decision makers ultimately relied on one-sided

information and accepted [the adversary's] allegations and negative characterizations of [plaintiff's] behavior." *Id.*

Defendants initially concluded that Ron did not violate the LOTO policy. This conclusion changed only after Robey challenged Ron's honesty. Even then, Nelson's only email detailing the reasoning for Ron's termination does not mention any LOTO policy violation. *See* Dep. Ex. 42, p. 1 (App. Vol. 1, p. 713). A reasonable jury can decide that the LOTO allegations were raised simply to make Ron's actions seem more serious than they actually were.

3. The District Court Engaged in Improper Factual Determinations Related to Pretext

Throughout its analysis, the district court repeatedly failed to view facts in the light most favorable to the Plaintiff. Rather than give Ron every reasonable inference that could be drawn from the facts, the district court gave such inferences to Defendants. The court also resolved disputed facts in Defendants' favor. The required analysis was turned on its head. A sampling of the court's failure to properly apply the summary judgment standard follows:

Improper Factual Inferences Made by District Court	**Facts and Reasonable Inferences that Should Have Been Made Under Rule 1.981**
"This conversation did not make [Gerbes] believe Mr. Hampton was a liar, but rather it made him believe there had	Because of what Robey told Gerbes during their telephone call, Gerbes believed Ron had lied to Flaspohler and Robey. (Gerbes Dep. 72:3-11) (App. Vol. 1, p. 521).

been a violation of the LOTO policy." (Ruling, p. 9) (App. Vol. 1, p. 483).	
"These statements tend to show that dishonesty was mentioned, but ultimately the LOTO violation was his primary concern." (Ruling, p. 9) (App. Vol. 1, p. 483).	Gerbes' belief that Ron was dishonest and should be fired was based on what he learned *from Robey*. (Gerbes Dep. 71:23-72:6) (App. Vol. 1, p. 521); (Dep. Ex. 42, pp. 1-3) (App. Vol. 1, p. 713-15).
"[S]ometime between the afternoon of August 10 and the afternoon of August 13, Mr. Eller found the evidence, namely the photo of the plug, supporting a different conclusion than he had initially reached." (Ruling, p. 9) (App. Vol. 1, p. 483).	After Eller had seen all the evidence and interviewed all the witnesses, he and Nelson recommended Ron should receive a "last and final" corrective action. (Dep. Ex. 29) (App. Vol. 1, p. 695); (Dep. Ex. 30) (App. Vol. 1, p. 696-98); *see also* (Flaspohler Dep. 193:12-25) (App. Vol. 1, p. 514). Eller and Nelson still believed Ron had "attempted in good faith to repair a welder receptable and place it back into service." *Id.* It was only after Robey's input that the recommendation switched to termination. *See* Dep. Ex. 42, p. 2 (App. Vol. 1, p. 714); *see also* Dep. Ex. 11 (App. Vol. 1, p. 669-75).
"This plug showed what [Nelson] interpreted as a violation of the LOTO policy by Mr. Hampton. For this reason, the photo would be a sound non-retaliatory basis for Mr. Hampton's termination."	

(Ruling, pp. 9-10) (App. Vol. 1, p. 483-84).	Nelson did not rely on the photo of the plug.[17] Instead, he, Eller, and Gerbes based their decision to fire Ron on Robey's input that Ron was "dishonest." (Dep. Ex. 42, p. 1) (App. Vol. 1, p. 713) ("After speaking with Barret, Todd and Scotty this morning, there is evidence that Ron Hampton was ***dishonest*** and he made a decision to use an unsafe welder. Unless you ask me to do down a different path, I believe Ron Hampton needs to be terminated due to his unsafe behavior and ***dishonesty***.") (emphasis added).

Simply put, the district court accepted Defendants' version of the facts, even when they were directly contradicted by other evidence that favored Plaintiff. Because this was a clear violation of Rule 1.981, the district court's decision should be reversed.

III. A REASONABLE JURY CAN FIND CAUSATION

[17] Nelson's failure to reference the photograph of the plug or the condition of the plug in his email discussing the reasons he changed his mind could lead a reasonable jury to find that this *post hoc* reason lacks credence. *See* Dep. Ex. 42, p. 1 (App. Vol. 1, p. 713).

Regardless of which causation standard is used, a reasonable jury can find Ron was fired because of his involvement in getting Justin Marshal fired. In addition to all the evidence discussed above, the district court failed to take into account Doug Robey's antagonism toward Ron's protected activity, as well as Robey's retaliation against others.

Robey's reaction to the complaints that Marshal was engaging in racial and sexual harassment indicate "a pattern of antagonism that could allow a fact-finder to infer retaliatory animus." *See Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997); *Kipp v. Missouri Hwy. and Trans. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2001) ("evidence that gives rise to an inference of retaliatory motive on the part of the employer is sufficient to prove a causal connection").

For months, Robey was able to push employee complaints about Marshal under the rug. Foreman Mike Snider tried to discipline Marshal; however, Robey gave him pushback. (Snider Dep. 27:2-10) (App. Vol. 1, p. 557). When Snider tried to write up Marshal, Robey forbid it. *Id.* It got to a point where Snider was complaining about Marshal's inappropriate behavior to Robey on a biweekly basis. (Snider Dep. 22:8-13) (App. Vol. 1, p. 556).

When Robey received written racial harassment and sexual harassment complaints about Marshal, he shared the employee statements *with Marshal.*

(Dilley Affidavit ¶ 29) (App. Vol. 1, p. 562); (Shannon Affidavit ¶¶ 27-34) (App. Vol. 1, p. 567-68). Workers knew that Ron caught flak from Robey when he tried to raise concerns about Marshal. (Shannon Affidavit ¶ 35) (App. Vol. 1, p. 568).

Robey's immediate reaction to Ron's protected activity was outrage and hostility. On the very day Marshal got fired, Robey called Ron at home and screamed at him for turning Marshal in. (Hampton Dep. 358:3-59:5) (App. Vol. 1, p. 544); (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667). Robey claimed that Ron's crew was lying and called the individuals who reported Marshal "fucking liars." (Hampton Dep. 82:4-18, 357:14-58:2) (App. Vol. 1, p. 530, 543-44); (Dep. Ex. 8, pp. 5-6) (App. Vol. 1, p. 667-68).

Workers knew Robey was upset by the result of the investigation and blamed Ron for Marshal's termination. *See* Dilley Affidavit ¶¶ 41-42, 52 (App. Vol. 1, p. 563); Dep. Ex. 8, p. 6 (App. Vol. 1, p. 668).

Starting with Robey's refusal to address Marshal's harassing behavior, continuing with Robey's blowup after Marshal's termination and his subsequent hostility toward Ron, and culminating in Robey's attacks on Ron's

credibility after the welder repair, a reasonable juror can easily find a pattern of antagonism and retaliatory motive.[18]

The Iowa Supreme Court has recognized the reality that, "[o]f course, a discriminatory motive will rarely be announced or readily apparent. Consequently, evidence concerning the employer's state of mind is relevant in determining what motivated the acts in question." *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 263 (Iowa 1991); *Vetter v. State of Iowa*, 2017 WL 2181191, at *7 (Iowa Ct. App., May 17, 2017) (same); *see also Linn Co-op. Oil Co. v. Quigley*, 305 N.W.2d 729, 738-39 (Iowa 1981) (McCormick, J., dissenting) ("[p]rinciples governing proof of discrimination are based on recognition that discriminatory motive will rarely be boldly announced or readily apparent.").

Other evidence of causation includes the way Robey retaliated against other employees who reported Marshal's racial and sexual misconduct. *See, e.g.,*

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[18] The court below responded to this evidence by pointing out that the law does not require bosses to be good and unkindness is not actionable. (Ruling, p. 7) (App. Vol. 1, p. 481). This missed the point. Robey's angry outburst (specifically for engaging in protected activity), followed by months of enhanced scrutiny and the silent treatment, is powerful evidence of causation—that Robey's false allegations of dishonesty were motivated by a desire to retaliate.

Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 644–45 (3d Cir. 1998) (employee may demonstrate pretext by showing defendant has "discriminated against other persons within [the plaintiff's] protected class or within other protected classes."). In other words, evidence of Defendant Robey's retaliatory treatment of other complainants can create an inference of retaliatory intent toward Ron. *See, e.g., Obrey v. Johnson*, 400 F.3d 691, 697 (9th Cir. 2005); *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802-03 (8th Cir. 2009); *Sprint/United Mgt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008).

Finally, and perhaps most importantly, this record overflows with pretext—evidence that Defendants are covering up something. Pretext—all by itself—is sufficient evidence on which a jury can find retaliation. *Reeves,* 530 U.S. at 147.

CONCLUSION

Because the district court erred in making credibility determinations, weighing the evidence in ways with which the factfinder could disagree, and applying an improper legal standard, its summary judgment should be reversed and the case remanded for trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiff-Appellant request to be heard in oral argument.

/s/ Amy Beck

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