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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1467
Marshall County No. LACI009957

DAVID ALAN FEEBACK,

Plaintiff-Appellant,

vs.

SWIFT PORK COMPANY, TROY MULGREW and TODD CARL,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR MARSHALL COUNTY
THE HONORABLE BETHANY CURRIE, JUDGE

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case is appropriate for transfer to the Iowa Court of Appeals because it presents the application of existing legal principles. *See* Iowa R. App. P. 6.1101 (3)(a).

STATEMENT OF THE CASE

Appellant initiated this action against Swift Pork Company, Troy Mulgrew, and Todd Carl on May 29, 2018, alleging discrimination, retaliation, harassment, and wrongful termination pursuant to a public policy. (J.A. pp.18–26); (J.A. pp.31–39). Appellees answered on July 16, 2018. (J.A. pp.40–45). Defendants filed a Motion for Summary Judgment on all counts on August 14, 2020. (J.A. pp.46–47); (J.A. pp.48–80). Appellant resisted the Motion for Summary Judgment on September 15, 2020. (J.A. pp.316–317); (J.A. pp.318–357). The Court held hearing on the Motion on September 28, 2020. (J.A. pp.598–636). On October 12, 2020, the Court ruled in favor of Appellees' Motion for Summary Judgment on all Claims. (J.A. pp.637–656 (hereinafter "Order")). Notice of Appeal was filed on November 12, 2020. (J.A. p.1006).

STATEMENT OF THE FACTS

The Plaintiff, David Feeback, filed this action against Defendants Swift Pork Company, JBS Swift & Co., Troy Mulgrew, and Todd Carl, asserting

claims for age discrimination, retaliation, harassment, and wrongful termination. (J.A. pp.22–24).[1] Mr. Feeback began his employment with Swift Pork on April 28, 1988, as a production worker. (J.A. p.402). He worked for Swift Pork for nearly 30 years. (J.A. pp.18, 21, 405). At the time of his termination, Mr. Feeback was employed as a Cut Floor Superintendent. (J.A. p.402). Defendant Todd Carl was the Plant Manager for Swift Pork and Mr. Feeback's immediate supervisor. (J.A. p.402). Defendant Mulgrew was the General Manager for Swift Pork. (J.A. p.402).

During Mr. Feeback's employment at Swift Pork, he had seen multiple managers experience harassment if they remained at the company after the age of 55. (J.A. pp.403, 167, 168, 186–88, Feeback Tr. 84:10–24, 85:6–22, 103:25–105:2). Mr. Feeback has watched as dozens of employees with no prior disciplinary record began receiving repeated disciplinary infractions and negative performance reviews. (J.A. p.404). Mr. Feeback also has seen Swift Pork demote, terminate, and/or force out many older employees. None of these employees had any prior performance issues. (J.A. pp.404–05). For

[1] On September 15, 2020, Plaintiff filed a Motion for Leave to Amend Petition and Amended Petition to remove JBS Swift & Co. as a Defendant as it is currently known as Swift Pork Company. (J.A. pp. 27–28). The Court granted this motion on September 16, 2020. (J.A. pp.29–30). Then, on September 16, 2020, Plaintiff dismissed Count II of his Petition, which claimed Retaliation in violation of the ICRA. (Pl. Dismissal without Prejudice as to Count II).

example, in approximately 1996, Barry Carl was employed as the Human Resources Director when he quit because of how he was treated. (J.A. p.404). In approximately 1996 or 1997, Vern Casselman, Operations Manager, was demoted and ultimately resigned. (J.A. p.404). He was approximately 58 years old. (J.A. p.404). Mr. Casselman never had any prior performance issues and had never been written up for disciplinary issues. (J.A. p.404). In approximately 2009, Cheryl Hughlette, Human Resources Manager, was terminated; she was approximately 56 years old. (J.A. p.404). In approximately 2005 or 2006, Bernie Proczech, Head of Operations, was terminated; he was in his early 60s. (J.A. p.404). In approximately 2009 or 2010, Doug Ridout, Superintendent for Rendering, was terminated; he was approximately 62 or 63 years old. (J.A. p.404). In approximately 2001 or 2002, Bob McKernen, Maintenance Engineer, was terminated; he was approximately 63 or 64 years old (J.A. p.405). In approximately 2008, Mr. Harris, corporate Human Resources Director, was terminated; he was in his early 60s. (J.A. p.405). In approximately 1994, Charlie Freese, General Forman, was demoted; he was approximately 59 years old. (J.A. pp.404, 188–189, Feeback Tr. 105:15–106:8). In approximately 2004, Elmer Freese, General Forman, was demoted; he was approximately 62 or 63 years old. (J.A. pp.404, 189–90, Feeback Tr. 106:25–107:13). As Mr. Feeback explained in

his deposition, Elmer Freese "was demoted when he was in his—getting close to retirement." (J.A. p.189–90, Feeback Tr. 106:25–107:13).

In total, Mr. Feeback estimates that he has seen between 15 and 20 managers with previously good employment records forced out after reaching age 56 or older. (J.A. p.405). Indeed, Swift Pork has a high management turnover rate and a low retirement rate. (J.A. p.405). In Mr. Feeback's nearly 30 years with Swift Pork, he estimates that he has worked with hundreds of employees in supervisory and management roles. (J.A. p.405). Of those employees, Mr. Feeback can recall only five or six employees who retired with the title of manager; three or four employees who have retired with the title of supervisor, and only one employee who has retired with the title of superintendent. (J.A. p.405). Mr. Feeback himself would have been eligible to retire within two years of his termination. (J.A. p.405).

Like these prior employees, Mr. Feeback met applicable job qualifications, was qualified for the positions that he held, and he performed his job in a manner that met or exceeded expectations. (J.A. p.402). Prior to Mr. Feeback's termination in January 2016, he had no reason to believe that there were any issues with his work performance. (J.A. p.403). Mr. Feeback never received a negative performance evaluation, and he received annual raises. (J.A. p.403). Most recently, Plaintiff received a raise of approximately

$2,000–$2,500 in June of 2015. (J.A. p.403). He also received a bonus in 2015. (J.A. p.125, Feeback Tr. 42:11–12).

Indeed, in deposition Defendant Carl concedes that the only performance reviews that Defendants were able to produce were positive. (J.A. pp.413, 413–14. Carl Tr. 37:17–39:24; 40:15–41:15). Defendants cited a change in the computer program that the company used to justify their inability to produce any negative performance reviews. (J.A. pp. 414, 414, Carl Tr. 41:16–22; 42:5–18).

Also, like these past employees, Mr. Feeback began to experience a campaign of harassment toward the end of his tenure at Swift Pork. (J.A. p.403). For example, Defendant Carl began engaging in obstructionist behavior and would turn minor issues into larger ones to make it seem as though Mr. Feeback was creating problems. (J.A. p.403). On more than one occasion, he told Mr. Feeback he was "asleep at the wheel" or that that cut floor was "out of control." (J.A. p.403, 149, 153–54, Feeback Tr. 66:14–22; 70:19–71:3). Mr. Feeback brought safety concerns to Defendant Carl in 2015. (J.A. p.403, 136–41, Feeback Tr. 53:17–58:23). Defendant Carl made negative comments concerning the cost of alleviating Plaintiff's safety concerns. (J.A. p.146 Feeback Tr. 63:18–22). After that, whenever Mr. Feeback tried to discuss safety issues with Defendant Carl, Defendant Carl

became angry. (J.A. p.403). During one phone conversation, Defendant Carl became so angry that he hung up on Plaintiff. (J.A. p.403).

Defendant Carl also tried to turn Defendant Mulgrew against Mr. Feeback by saying things that were not true. (J.A. p.403). For example, in December 2015, Mr. Feeback asked Defendant Carl if he could remain on the cut floor during a staff meeting due to lack of staff. (J.A. p.403). Defendant Carl gave Mr. Feeback permission to do so. (J.A. p.403). However, Defendant Carl did not communicate this permission to Defendant Mulgrew, causing Defendant Mulgrew to become upset when Mr. Feeback did not attend the meeting. (J.A. p.403) Mr. Feeback believes Defendant Carl deliberately chose not to tell Defendant Mulgrew that he had his permission not to attend the meeting. (J.A. p.403).

Meanwhile, in late 2015, Defendant Mulgrew directed multiple obscenity-laden comments at Mr. Feeback. On one occasion, Defendant Mulgrew entered the employee bathroom while Mr. Feeback was on break and told Mr. Feeback that "you're in here fucking around." (J.A. pp.405, 155, Feeback Tr. 72:1–10). On a separate occasion, Defendant Mulgrew encouraged Mr. Feeback to "fuck" a woman on a pheasant hunting trip. (J.A. pp.156–57, Feeback Tr. 73:24–74:23).

Mr. Feeback knew that Swift Pork's anti-harassment, anti-discrimination, and Open Door policies allowed him to make complaints to his supervisor, to Human Resources, or via a corporate hotline. (J.A. p.409) However, he did not use these channels to make a complaint because he knew that it would be futile. (J.A. p.409) Mr. Feeback had seen past employees terminated, harassed, isolated, demoted, or forced out after making complaints using internal company channels. (J.A. p.409). In approximately 2005, one past manager, Dean Whelden, had been demoted after making a complaint. (J.A. p.409). Plaintiff had seen other managers terminated for making complaints. (J.A. p.409). As a result, Plaintiff believed that he would lose his job if he made a complaint using these channels. (J.A. p.409). It would have been especially futile for Plaintiff to bring a complaint to his immediate supervisor because Plaintiff's immediate supervisor was Defendant Carl, one of the individuals engaging in the harassment (J.A. p.409). Even if Plaintiff were to use the corporate hotline to make a complaint, he believed that Defendants would find a way to terminate his employment or argue that his job performance had slipped. (J.A. p.409).

As a Cut Floor Superintendent, Mr. Feeback was required to make sure a certain number of safety meetings and trainings were done within his department throughout the year on an annual basis. (J.A. p.273). Early in the

second week of December, two supervisors asked Mr. Feeback for permission to hold the December 2015 safety meeting on December 31. (J.A. p.174, Feeback Tr. 91:18–24). The safety meetings usually last between 15 and 20 minutes. (J.A. pp.174–75, Feeback Tr. 91:25–92:4). New Year's Eve day is not a holiday under the company's collective bargaining agreement. (J.A. p.176, Feeback Tr. 93:3–8).

Defendant Mulgrew learned about the meeting and sent the supervisors at the meeting home. (J.A. pp.175, 175, 175, Feeback Tr. 92:5–8; 92:16–21; 92:22–23). Defendant Mulgrew then called Mr. Feeback and Defendant Carl into his office. (J.A. pp.174–75, 176, Feeback Tr. 91:18–92:23; 93:9–14). During that meeting, Defendant Mulgrew criticized the absenteeism rate in Mr. Feeback's department. (J.A. pp.176–77, Feeback Tr. 93:19–94:3). Following Mr. Mulgrew's criticisms, Mr. Feeback defended himself by noting that the turnover rate in his department is between 10 and 11 percent while some departments had turnover rates of 30 to 40 percent. (J.A. pp.176–77, Feeback Tr. 93:23–94:2). Defendant Mulgrew responded to Mr. Feeback's attempt to defend his performance by telling Mr. Feeback that he should be sitting there with his mouth shut and his arms open. (J.A. p.177, Feeback Tr. 94:2–6). Defendant Mulgrew said that another employee had told him that Mr. Feeback "told him that he was the worst supervisor [Plaintiff] had." (J.A.

p.177, Feeback Tr. 94:7–12). Mr. Feeback, however, did not have a meaningful opportunity to respond to Defendant Mulgrew's statement because Defendant's comments to Plaintiff about keeping his "mouth shut" created an environment in which Defendant felt that he could not speak. (J.A. p.177, Feeback Tr. 94:7–15). Mr. Feeback was taken aback at Defendant Mulgrew's statements, behavior, and overall demeanor. (J.A. p.178, Feeback Tr. 95:8–11). As a result, he did not say anything when the meeting was over. (J.A. pp.178–79, Feeback Tr. 95:22–96:1).

Later in the day on December 31, 2015, Mr. Feeback sent two text messages. (J.A. p.730). The first text message read "FUCK You !" (J.A. p.730). The second read "Believe who and what you want." (J.A. p.730). The text messages were received by Defendant Mulgrew. (J.A. p.730) However, the messages were not intended for Mr. Mulgrew; they "went to Mr. Mulgrew by mistake." (J.A. p.180, Feeback Tr. 97:2–5). The messages were meant for another person, a personal friend of Mr. Feeback's named Tim Turner. (J.A. pp.180–81, Feeback Tr. 97:18–98:13). Mr. Feeback did not discover that the text messages had been inadvertently sent to Defendant Mulgrew until much later in the evening. (J.A. p.180, Feeback Tr. 97:6–11). He did not text anything else to Defendant Mulgrew that evening. (J.A. p.180, Feeback Tr. 97:12–14). At that time, Plaintiff decided not to send any further texts to his

friend and to put his phone in his pocket. (J.A. p.180, Feeback Tr. 97:20–98:2).

In his deposition in this case, Defendant Mulgrew said he "can't really speak to what" the second text message stating "believe who or what you want" was referencing. (J.A. p.428, Mulgrew Tr. 66:2–23). Defendant Mulgrew also acknowledged that the text message "believe who or what you want" did not seem to fit in the context of the safety meetings. (J.A. p.428, Mulgrew Tr. 66:21–67:5). Defendant Mulgrew focused the first text message in his explanation for the texts. (J.A. p.428, Mulgrew Tr. 66:21–67:5). Defendant Mulgrew also admitted that he had sent a text message to the wrong person at least once. (J.A. pp.428–29, Mulgrew Tr. 68:19–69:2). He also acknowledged that it was "possible" that the text messages Plaintiff sent were meant for someone else. (J.A. p.429, Mulgrew Tr. 71:4–7).

Defendant Mulgrew sent a screenshot of the text messages to Defendant Carl and to Pete Charboneau, the Human Resources Director at the Marshalltown facility. (J.A. p.274); (J.A. p.280). At that time, however, no investigation had been conducted into the veracity or appropriateness of the messages. On January 1, 2016, at 3:11 p.m. Defendant Mulgrew also sent a text message to Defendant Carl stating "Feeback not allowed to work." (J.A.

pp.432–33, Mulgrew Tr. 96:23–97:13). Defendant Carl responded "Amen." (J.A. pp.432–33, Mulgrew Tr. 96:23–97:13).

In written discovery requests sent September 10, 2019, Plaintiff requested that Defendant provide "[a] complete set of any documents which reflect any communications any Defendant has had with any person(s) including the Plaintiff (other than those with its counsel in this case that remain protected by attorney-client privilege) pertaining to the allegations in the Petition regardless of the format and wherever situated." (J.A. p.436). The January 1, 2015 text messages were not provided. (J.A. p.431, Mulgrew Tr. 91:21–94:10). Instead, they were provided in the middle of Defendant Mulgrew's deposition on July 15, 2020. (J.A. p.431, Mulgrew Tr. 91:21–94:10).

Mr. Charboneau suspended Mr. Feeback in connection with the text messages, stating that the purpose of suspending Mr. Feeback "would have been because of the text that he sent to Mr. Mulgrew." (J.A. p.420, Charboneau Tr. 53:6–12). Mr. Charboneau also stated that Mr. Feeback was suspended because "[h]e wasn't practicing best work environment." (J.A. p.420, Charboneau Tr. 53:13–17). Mr. Charboneau also stated that he made the conclusion that the text message Mr. Feeback sent violated company

policy as soon as Mr. Feeback returned to work on January 2, 2016. (J.A. p.421, Charboneau Tr. 59:7–11).

Mr. Feeback was formally notified of his termination via certified mail on January 4, 2016. (J.A. p.849, Charboneau Tr. 96:8–17). The letter memorializing Plaintiff's suspension states that Plaintiff is "being placed on suspension effective today as a result of a [Best Work Environment] incident." (J.A. p.738). The letter also provides a line at the bottom for Plaintiff to attach his signature. (*Id.*). The letter states that "[b]y signing below, you agree to understand that you are being placed on suspension, and will be contacted in regards to a future meeting with you about your employment status. (*Id.*). The letter makes no mention of a pending further investigation. (*Id.*). Mr. Charboneau himself admits that the letter "does not say anything about investigation." (J.A. p.420, Charboneau Tr. 53:13–24). Mr. Charboneau also admitted that the statement in the letter that "in this circumstance you were in violation of the BWE policy as it would be expected that you do not allow tolerance for this type of activity" was a "conclusion." (J.A. p.420, Charboneau Tr. 54:16–23).

The date 12/31/2015 appears at the top of the letter. (J.A. p.738). However, Mr. Charboneau admits that it was not written on this date. (J.A. p.419, Charboneau Tr. 50:8–21). The letter also states that the incident "in

which [Plaintiff] participated" took place on 12/9/2015. (J.A. p.738). However, Mr. Charboneau also admits that this date was incorrect. (J.A. p.419, Charboneau Tr. 51:3–5). The letter, which was not provided to Plaintiff, until after 5 p.m. on July 14, 2020, the day before the deposition of Defendant Charboneau was set to take place, provides signature lines for Plaintiff, Mr. Charboneau, and Defendant Carl. (J.A. p.738). However, no signatures appear on the document. (*Id.*). Mr. Charboneau admitted that he never had Plaintiff sign this letter. (J.A. p.420, Charboneau Tr. 55:23–24).

Although Mr. Feeback was notified of his termination via certified mail on January 4, 2016 (J.A. p.850, Charboneau Tr. 96:8–17), his employment was effectively terminated on over the phone on January 2, 2016. (J.A. p.850, Charboneau Tr. 96:4–5). Indeed, Mr. Charboneau also stated that he made the conclusion that the text message Plaintiff sent violated company policy as soon as Plaintiff returned to work on January 2, 2016. (J.A. p.841, Charboneau Tr. 59:7–11). Even at this point, the decision to terminate Plaintiff's employment already had been made by the afternoon of January 1, 2016, as evidenced by the text exchange between Defendant Carl and Defendant Mulgrew. On January 1, 2016, at 3:11 p.m. Defendant Mulgrew also sent a text message to Defendant Carl stating "Feeback not allowed to work." (J.A. pp.850–51, Mulgrew Tr. 96:23–97:13). Defendant Carl responded "Amen."

(J.A. pp.850–51, Mulgrew Tr. 96:23–97:13). Both Defendants Carl and Mulgrew participated in a conference call with Mr. Charboneau that evening, and the three of them decided not to let Mr. Feeback return to work. (J.A. p.415, Carl Tr. 77:22–78:20).

Defendants' actions demonstrate that they never had any intent to conduct a meaningful investigation into the text messages. Mr. Charboneau stated that he concluded that the text message Plaintiff sent violated company policy as soon as Plaintiff returned to work on January 2, 2016. (J.A. p.421, Charboneau Tr. 59:7–11). Mr. Charboneau also stated that "[t]he text was pretty black and white." (J.A. p.420, Charboneau Tr. 55:13–17). According to Mr. Charboneau, the text messages were "pretty straightforward. Mr. Feeback sent Mr. Mulgrew a text that was inappropriate." (J.A. p.420, Charboneau Tr. 56:21–23). However, Mr. Charboneau admitted that he did not investigate the second text message that read "believe who and what you want." (J.A. p.422, Charboneau Tr. 71:25–72:22). Mr. Charboneau also admitted that "[t]he second line, believe who, is not black and white. It's a pronoun." (J.A. p.422, Charboneau Tr. 71:25–72:18). Indeed, Mr. Charboneau admitted "I guess I did not check to see who who was. No, I did not. I just believed it was Troy Mulgrew." (J.A. p.423, Charboneau Tr. 74:1–3).

Additionally, Mr. Feeback told Mr. Charboneau that the text was not meant for Defendant Mulgrew. (J.A. p.421, Charboneau Tr. 58:6–9). Mr. Feeback also provided Mr. Charboneau the name of the text messages' intended recipient. (J.A. p.421, Charboneau Tr. 58:10–12). However, Mr. Charboneau did not make any attempt to contact that individual or to show that person screenshots of the text message conversation. (J.A. p.421, Charboneau Tr. 58:13–20). When asked if he did "[a]nything to figure out if [Plaintiff] was telling the truth," Mr. Charboneau admitted "[n]o I did not." (J.A. p.421, Charboneau Tr. 58:21–23). Furthermore, Mr. Charboneau did not keep any notes of his conversations with Plaintiff or with Defendant Mulgrew. (J.A. p.421, Charboneau Tr. 58:24–59:1). Mr. Charboneau also does not have any notes of the termination meeting with Plaintiff. (J.A. p.421, Charboneau Tr. 59:12–14). Defendant Mulgrew, the plant General Manager, also does not have any notes of his meeting with Mr. Charboneau. (J.A. p.427, Mulgrew Tr. 61:11–21).

Swearing and cursing was common at the Swift Pork Plant in Marshalltown, and Mr. Feeback would hear employees cursing all day long when he was at work. (J.A. p.405). In approximately 1996, Barry Carl, 47, was working as the Human Resources Director when he told the Operations Manager, Vern Casselman, to "get the fuck out of [his] office." (J.A. p.406).

In the 2000s, Defendant Carl walked into Mr. Feeback's office and called him a "motherfucker." (J.A. p.405). Defendant Carl is still employed with Swift Pork. (J.A. p.405). In 2002, Maintenance Superintendent Gary Grieves, 30, called Mr. Feeback a "son of a bitch" and a "motherfucker." (J.A. p.406). In 2003 and 2004, Mr. Feeback remembers that the Second Shift Plant Manager Russ Crawford, 30, would routinely say "fuck this" and "fuck that." (J.A. p.406). In approximately 2007 and 2008, training director, Jenny Mora, 30, routinely would use the phrases "fuck" and "son of a bitch." (J.A. p.406). In 2010, Second Shift Superintendent, Fred Ross 40, told Mr. Feeback "I fucking hate you, you son of a bitch." (J.A. p.406). In approximately 2008, Mr. Feeback saw Superintendent of Slaughter Rod Landt, 45, screaming and cussing at a supervisor regarding comments that the supervisor had made to a USDA inspector. (J.A. p.405). Mr. Landt made comments like: "What the fuck are you doing?"; "you son of a bitch"; "What the fuck is wrong with you?"; "What the fuck were you thinking?" (J.A. p.405). During the altercation, Mr. Feeback also saw Mr. Landt grab the supervisor. (J.A. p.405). Mr. Landt was not terminated, and he ultimately retired with the company as a Superintendent. (J.A. p.405).

Mr. Feeback recalls that the amount of swearing increased in approximately 2006 or 2007 when JBS took over the company, and once that

happened, pretty much anything went when it came to language. (J.A. p.409). During Mr. Feeback's employment with Swift Pork, he also heard more than 70 individuals swear at or in front of superiors, using words, including, but not limited to "fuck you" and "son of a bitch. (J.A. pp.406–09). The majority of these employees were under the age of 40. (J.A. pp.406–09). However, to the best of Mr. Feeback's knowledge, none of these employees were terminated as a result of using thing language. (J.A. pp.406–09).

ARGUMENT

ISSUE I: The District Court Erred in Granting Summary Judgment on Count I—Age Discrimination by Applying the Incorrect Causation Standard. Even if the District Court had Applied the Proper Causation Standard, it Nonetheless Erred by Taking the Place of a Finder of Fact and Improperly Discounting Plaintiff's Evidence of Pretext.

Preservation of Error

Plaintiff preserved the issue in resisting the Motion for Summary Judgment, both in brief and in hearing, and in the Notice of Appeal. (J.A. pp.346–48, 613–17, 1006, Mot. Summ. J. Hr'g Tr. 16:20–20:10).

Standard of Review

Review of a District Court ruling on a motion for summary judgment is for corrections of errors at law. *Albaugh v. The Reserve*, 930 N.W.2d 676, 682

(Iowa 2019) (citing *Jahnke v. Deere & Co.*, 912 N.W.2d 136, 141 (Iowa 2018)).

"Summary Judgment is proper when the moving party has shown 'there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Jahnke*, 912 N.W.2d at 141 (quoting *Homan v. Branstad*, 887 N.W.2d 153, 163 (Iowa 2016)). "In granting summary judgment, the district court may not try issues of fact 'but must determine only whether there are issues to be tried.'" *Banwart v. 50th St. Sports, LLC*, 910 N.W.2d 540, 551 (Iowa 2018) (quoting *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006)); *accord Bauer v. Stern Fin. Co.*, 169 N.W.2d 850, 853 (Iowa 1969) ("In ruling on a motion for summary judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one that does."). A genuine issue of fact exists "if a reasonable fact finder could return a verdict or decision for the nonmoving party based on those facts." *Parish*, 719 N.W.2d at 545 (citing *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988)). "The evidence is viewed in the light most favorable to the nonmoving party." *Id.* at 543 (citing *Fischer v. UNIPAC Serv. Corp.*, 519 N.W.2d 793, 796 (Iowa 1994)); *see also Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012).

In ruling upon a motion for summary judgment, "the court considers the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any." *Estate of Beck v. Engene*, 557 N.W.2d 270, 271 (Iowa 1996) (citing *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996)). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ., P. 1.981(3); *see also Hagenow v. American Family Mut. Ins. Co.*, 846 N.W.2d 373, 376 (Iowa 2014) (same); *Schaefer v. Cerro Gordo Cty. Abstract Co.*, 525 N.W.2d 844, 846 (Iowa 1994) ("The record on summary judgment includes the pleadings, depositions, affidavits, and exhibits."); *Hall v. Barrett*, 412 N.W.2d 648, 652 (Iowa Ct. App. 1987) ("Our law is clear that, in the summary judgment context, the matters before a court are those which are on file when the hearing is held." (citing *Neoco, Inc. v. Christenson*, 312 N.W.2d 559, 560 (Iowa 1981))).

"A court examining the propriety of summary judgment must 'view the entire record in the light most favorable to the nonmoving party.'" *Linn v. State*, 929 N.W.2d 717, 730 (Iowa 2019) (quoting *Bass v. J.C. Penney Co.*, 880 N.W.2d 751, 755 (Iowa 2016)). "The court must also indulge on behalf

of the nonmoving party every legitimate inference reasonably deduced from the record in an effort to ascertain the existence of a fact question." *Id.*; *see also Bagelman v. First Nat'l Bank*, 823 N.W.2d 18, 20 (Iowa 2012); *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000).

"In ruling on a motion for summary judgment, the court does not weigh the evidence." *Linn*, 929 N.W.2d at 717 (citing *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996)). Rather, "the court inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." *Id.* (citing *Clinkscales*, 697 N.W.2d at 841; *Bitner*, 549 N.W.2d at 300). "When the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, there is a genuine issue for trial." *Id.* (citing *Bitner*, 549 N.W.2d at 300). The burden of showing undisputed facts that would entitle the moving party to summary judgment rests with the moving party. *Id*. (citing *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011)).

On review of a summary judgment, an Appellate Court first determines if there are any genuine issues of fact in dispute and then determines whether the district court correctly decided that the moving party is entitled to judgment as a matter of law. *State v. Ashburn*, 534 N.W.2d 106, 108 (Iowa 1995). "In deciding whether a fact question exists for trial at the summary

judgment stage, the court does not weigh the admissible evidence tending to prove a fact against the admissible evidence opposing it in deciding whether a genuine issue of fact exists for trial." *Taft v. Iowa Dist. Court ex rel. Linn Cty.*, 828 N.W.2d 309, 315 (Iowa 2013). Iowa courts have long held that the rule is "that courts prefer a trial on the merits," and that rule requires liberality in construing statements by the parties. *Orcutt v. Hanson*, 163 N.W.2d 914, 917 (Iowa 1969). "[T]he district court is not to make credibility assessments, as such assessments are 'peculiarly the responsibility of the fact finder.'" *Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W. 772, 776 (Iowa 2010) (quoting *Estate of Hadedorn ex rel. Hadedorn v. Peterson*, 690 N.W.2d 84, 88 (Iowa 2004)). When discrepancies occur in the summary judgment record, the court must not usurp the role of the jury by granting summary judgment. *See Smidt v. Porter*, 695 N.W.2d 9, 22 (Iowa 2005); *accord Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 468 (Iowa 2000) (holding that witness credibility is for the jury to determine); *Field v. Palmer*, 592 N.W.2d 347, 353 (Iowa 1999) (same).

Argument

A. *The District Court erred in failing to apply the motivating-factor test in its analysis of Plaintiff's age discrimination claim.*

Chapter 216 of the Iowa Civil Rights Act (ICRA) provides that "[i]t shall be an unfair or discriminatory practice for any . . . [p]erson to . . . discharge any employee, or to otherwise discriminate in employment against any . . . employee because of . . . age . . . , unless based upon the nature of the occupation." Iowa Code § 216.6(1)(1).

The Iowa Supreme Court has recently changed how it evaluates discrimination claims under the ICRA. *See Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 271–72 (Iowa 2019). In employment discrimination cases, the Iowa Supreme Court has "adopted the motivating-factor test for causation in ICRA discrimination cases." *Id.* Under this standard, an employer is liable at trial "when the employee proves by a preponderance of the evidence that the discrimination was a motivating factor in the employer's actions." *Id.* at 272. There is no burden shifting framework to apply for employment discrimination cases. *See id.* ("To clarify, we no longer rely on the *McDonnell Douglas* burden-shifting analysis and determining factor standard when instructing the jury."). The standard remains the same for summary judgment. *Hedlund v. State*, 930 N.W.2d 707, 734 (Iowa 2019), as amended (Sept. 10, 2019) (Appel, J., concurring in part, dissenting in part); *see also Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 830 (Iowa 2007) (noting that summary judgment must be decided by reference to the

evidentiary standard at trial); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996) (same); *Hike v. Hall*, 427 N.W.2d 158, 159 (Iowa 1988) (same); *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988) (en banc) (same); *Kapadia v. Preferred Risk Mut. Ins.*, 418 N.W.2d 848, 849–50 (Iowa 1988) (same); *Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987) (en banc) (same).

Accordingly, under the applicable causation standard, the key inquiry is whether a genuine issue of material fact exists as to whether age was a motivating factor in Mr. Feeback's termination. Notably, however, both the Defendants' summary judgment briefs and the District Court's Order are devoid of any mention of the Supreme Court's decision in *Hawkins* or the motivating-factor test. (*See* J.A. pp.645–48, 60–66, 446–54). Plaintiff highlighted this flaw in his Resistance Brief, (J.A. p.348). However, the District Court nonetheless analyzed Plaintiff's age discrimination claim using only the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (*See* J.A. pp.645–48). This is in error.

As an initial matter, "[i]t would certainly be odd, to say the least, to apply a standard at summary judgment that is different than the standard at trial." *Hedlund*, 930 N.W.3d at 726 (Appel, J., concurring in part, dissenting in part). And the standard at trial is clear: "[i]n discrimination . . . under

ICRA, we apply the *Price Waterhouse* motivating-factor standard in instructing the jury . . . we no longer rely on the *McDonnell Douglas* burden shifting analysis." *Hawkins*, 929 N.W.2d at 272. Indeed, the Iowa Supreme Court, in its entirely, applied the motivating-factor test at the summary judgment stage. *See Hedlund*, 930 N.W.2d at 723; *id.* at 736–741 (Appel, J., concurring in part, dissenting in part). To be sure, the majority in *Hedlund* concluded that it "need not decide th[e] issue" of whether the *McDonnell Douglas* or the motivating-factor test applies. *Id.* at 719 (majority opinion). However, the Court still assessed the facts under both standards, noting that the Plaintiff there failed to raise a genuine issue of material fact under either standard. *Id.* That is not the case here.

Here, Plaintiff has demonstrated that his age was, at minimum, a motivating factor in his termination. The crux of Plaintiff's employment discrimination claim is that he was ostensibly terminated for swearing while other, *younger* employees were not. (J.A. pp.346–48). In both his deposition and his affidavit, Plaintiff identified such individuals. (J.A. pp.405–09, 155, 156–57, Feeback Tr. 72:1–10, 73:24–74:23). Indeed, the District Court made the following findings of undisputed material fact:

> Mr. Feeback has heard Swift Pork Company employees swearing at work frequently. He contends several supervisors throughout the years used the term "fuck" while at work. Sometime in

> the 2000s, Mr. Carl walked into Mr. Feeback's office and called him a "motherfucker." In 2002, Maintenance Superintendent Gary Grieves called Mr. Feeback a "son of a bitch" and a "motherfucker." Mr. Feeback contends that in 2010, Second Shift Superintendent Fred Ross told Mr. Feeback, "I fucking hate you, you son of a bitch." In 2008, Mr. Feeback saw Superintendent of Slaughter Rod Landt screaming and cussing at a supervisor regarding comments the supervisor had made to a USDA inspector, saying "What the fuck are you doing?", "What the fuck is wrong with you?", and "What the fuck were you thinking?" Mr. Feeback asserts Mr. Landt was not terminated and he ultimately retired with the company as a Superintendent. According to Mr. Feeback, when JBS took over the company in 2006 or 2007, the amount of swearing he heard at work increased. Mr. Feeback contends he heard at least 73 employees swear at or in front of their superiors, saying things like "fuck you" and "you son of a bitch." ***To the best of Mr. Feeback's knowledge, none of the employees were terminated as a result of using this language.***

(J.A. pp.642–43) (emphasis added). At the time, Barry Carl was 47 years old; Gary Grieves was 30; Fred Ross, 40; and Rod Landt, 45. (J.A. pp.332, 405–06). Mr. Feeback was 60 years old. (J.A. p.641).

In fact, the District Court found that Defendant Mulgrew himself "used the term 'fuck' in Mr. Feeback's presence on two occasions." (J.A. p.643). "While on a pheasant hunting trip in 2014, Mr. Mulgrew encouraged Mr. Feeback to 'fuck' a woman. In 2015, Mr. Mulgrew entered the employee bathroom while Mr. Feeback was on a break and told Mr. Feeback that 'you're

in here fucking around.'" (J.A. p.643). Mr. Feeback also identified more than 70 other employees that he had personally heard swear at, or in front of, supervisors. (J.A. p.332–35, 406–09, 643). Of these employees, almost all of them were under the age of 40. (J.A. p.332–35, 406–09).

These facts simply do not reasonably support Defendants' assertion that they terminated Mr. Feeback solely for swearing at Defendant Mulgrew when similar conduct did not cost other, younger employees their jobs. Instead, these facts suggest that another discriminatory factor motivated Defendants' decision. Defendants' lack of any meaningful investigation into Mr. Feeback's alleged conduct adds credence to this conclusion. (*See* Issue I.B below).

Moreover, this disparate treatment was consistent with Defendants' past employment practices. Plaintiff had watched Swift Pork demote, terminate, and/or force out past managers who remained at the company over age 55. (J.A. pp.404–05, 189–90, Feeback Tr. 106:25–107:13). Like Mr. Feeback, none of these employees had any prior performance or disciplinary issues. (J.A. pp.404–05, 189–90, Feeback Tr. 106:25–107:13).

To be sure, Swift Pork may avoid liability at trial by proving by a preponderance of the evidence that it would have made the same decision even if it had not improperly taken the Plaintiff's age into account. *Hawkins*, 929

N.W.2d at 217–72. However, the so-called "same-decision defense" does not save Defendants at the summary judgment stage. First, as the Supreme Court noted, the same-decision defense is an affirmative defense that must be "properly pled and proved." *Id.* at 272. Defendants have not done so. (*See* J.A. pp.43–44). Second, even if Defendants had properly pled the same-decision defense, it would not be a proper matter for summary judgment. *See Hoefer v. Wis. Educ. Ass'n Tr.*, 470 N.W.2d 336, 338 (Iowa 1991) (holding that matters that turn on "the subjective nature of motive and intent" are "generally poor candidates for summary judgment"); *see also Hedlund*, 930 N.W.2d at 715 ("Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions." (quoting *Banwart v. 50th St. Sports, LLC*, 910 N.W.2d 540, 544–45 (Iowa 2018))); *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005) (per curiam).

Because a genuine issue of material fact exists as to whether age improperly motivated Mr. Feeback's termination, summary judgment was improper. Accordingly, Plaintiff asks the Court to reverse the District Court's ruling on issue of age discrimination and remand for further proceedings.

B. Plaintiff also can establish a genuine issue of material facts under the *McDonnell Douglas* framework

The District Court's failure to engage in the required motivating-factor analysis is, by itself, sufficient grounds for reversal. However, reversal also is warranted based on the District Court's incorrect analysis under the *McDonnell Douglas* burden-shifting framework.

If a plaintiff lacks direct evidence of discrimination, he may defeat a motion for summary judgment by satisfying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004). The *McDonnell Douglas* framework requires the plaintiff first to "present[] a prima facie case of intentional discrimination." *Id.* If the plaintiff does so, the employer then must "articulate a nondiscriminatory justification" for the employment action. *Floyd v. Mo. Dep't of Soc. Servs., Div. of Family Servs.*, 188 F.3d 932, 936 (8th Cir. 1999). Finally, the plaintiff must point to "sufficient evidence that one or more of the [employer's] proffered nondiscriminatory reasons is a pretext for unlawful discrimination." *Griffith*, 387 F.3d at 736–37.

For purposes of summary judgment, the District Court assumed that Mr. Feeback made out a prima facie case of age discrimination. (Order p. 10).[2]

[2] The basic elements of a prima facie case of discrimination in employment are: (1) plaintiff is a member of a protected class; (2) plaintiff was performing the work satisfactorily; and (3) plaintiff suffered an adverse employment action. *See Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 741–42 (Iowa 2003) (citing *Sievers v. Iowa Mut. Ins. Co.*, 581

However, the District Court concluded that Mr. Feeback failed to produce evidence from which a reasonable jury could conclude that Swift Pork's proffered reason for termination was pretextual. (J.A. p.647). The District Court's conclusion fails as a matter of logic and as a matter of law.

The District Court began with the correct initial premise. Namely, that "a variety of employees . . . have sworn . . . in front of their own supervisors on many occasions and to his knowledge, none of them have been terminated due to their language." (J.A. p.647). The District Court also rightly rejected Defendants' argument that these facts were based on hearsay. (J.A. p.647). ("As Mr. Feeback points out, they are not hearsay because he is not offering the statements for the truth of their assertions, but rather, to demonstrate the statements were made."); *see also State v. Dullard*, 668 N.W.2d 585, 589–90 (Iowa 2003) (explaining that if a statement is not offered for the truth of the matter asserted, "it is not hearsay and is excluded from the rule by definition." (citing 2 John W. Strong, et al., *McCormick on Evidence* § 249, at 100 (5th ed. 1999)). The District Court even acknowledges that "[t]his information tends to demonstrate that the legitimate reason given for his own termination is pretextual." (J.A. p.647).

N.W.2d 633, 638 (Iowa 1998)). Defendants did not challenge any of these elements in the District Court and likewise assumed that Plaintiff could establish a prima facie case of age discrimination. (J.A. pp.60–62).

From here, however, the District Court jumps to its (faulty) conclusion that Mr. Feeback lacks evidence that his age played a role in his termination. (J.A. p.647). Even if such evidence were required—and, as explained below, at the summary judgment stage it is not—the District Court's analysis misses a key logical step. It is not just that other Swift Pork employees swore at or in front of supervisors and kept their jobs; it's that other, *younger* employees swore at or in front of supervisors and kept their jobs. (*See* Issue I.A above). In missing this logical step, the District Court misses the point. The fact that younger employees engaged in the same conduct yet kept their jobs suggests that Defendants' purported nondiscriminatory reason for termination was pretextual.

The facts demonstrating that Swift Pork had previously demoted or terminated older employees further support Plaintiff's argument. The District Court completely discounts this evidence on the grounds that "Mr. Feeback's 'awareness' still constitutes hearsay testimony." (J.A. p.648). The District Court, however, glosses over a key fact: Plaintiff was a supervisor. (J.A. p.638) (noting Plaintiff was a Cut Floor Superintendent). As such, he would have had personal knowledge of management decisions. At minimum, Plaintiff would have known based on his own observations whether employees were terminated or demoted and how old they were at the time the

termination or demotion occurred. *See Orcutt*, 163 N.W.2d at 917 ("The rule that courts prefer a trial on the merits requires liberality in construing statements by competent persons as ultimate facts sufficient to sustain a conclusion as to their import."); *Eaton v. Downey*, 118 N.W.2d 583, 586 (Iowa 1962) ("If a real good faith defense is shown by the affidavit the motion for summary judgment should be denied."). The District Court fails to explain how this knowledge or these observations can be hearsay. Moreover, Plaintiff's argument on this point also relies in part on deposition testimony. (J.A. pp.167, 168, 186–88, Feeback Tr. 84:10–24; 85:6–22; 103:25–105:2). The District Court provides no explanation whatsoever as to why deposition testimony should not be considered.

Plaintiff is not required to "offer affidavits written by each of the employees explaining the situation and stating their employment ended because of their age," as the District Court suggests. (J.A. p.647). Nor must he "offer affidavits written by current or former supervisors at Swift Pork stating the company had a policy to demote or terminate employees over the age of 55 or that they have personally demoted or terminated employees due to their age." (J.A. pp.647–48). Putting aside the absurdity of requiring a Plaintiff to procure affidavits in which company officials admit that they "had

a policy" to engage in age discrimination just to avoid summary judgment, this is plainly more than the law requires.

The Iowa Rules of Civil Procedure expressly contemplate the use of affidavits and depositions as permissible forms of evidence at the summary judgment stage. *See* Iowa R. Civ. P. 1.981(3) (providing that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law"); *see also Hagenow*, 846 N.W.2d at 376 (same); *Schaefer*, 525 N.W.2d at 846 ("The record on summary judgment includes the pleadings, depositions, affidavits, and exhibits."); *Hall*, 412 N.W.2d at 652 ("Our law is clear that, in the summary judgment context, the matters before a court are those which are on file when the hearing is held." (citing *Neoco*, 312 N.W.2d at 560)). Indeed, in the federal employment discrimination context, the Eighth Circuit has held that "[n]either the absence of written reports *nor the self-serving nature of affidavits*, interrogatory answers, or deposition testimony make such evidence inherently infirm." *Stewart v. Rise, Inc.*, 791 F.3d 849, 860 (8th Cir. 2015). "As such, we generally do not discount such evidence at the summary judgment stage." *Id.* Indeed, it is difficult to imagine how *any* affidavit by a party or an employee

of a party could be anything *other* than self-serving. It appears that the District Court's language is intended only to diminish the value and weight of Plaintiff's evidence.

To be sure, a court *may* discount a plaintiff's self-serving affidavit or deposition testimony *if* it clearly contradicts the plaintiff's earlier testimony under oath or where the plaintiff offers no explanation for the inconsistencies. *Stewart*, 791 F.3d at 861; *Frevert v. Ford Motor Co.*, 614 F.3d 466, 474 (8th Cir. 2010). As noted above, however, Mr. Feeback's affidavit is consistent with his deposition testimony and his position throughout this case. Based on these facts, summary judgment was improper and the District Court's ruling on age discrimination should be reversed.

Even if this Court were to conclude that the above facts still were insufficient to warrant reversal, reversal nonetheless would be proper on the grounds that Swift Pork's professed nondiscriminatory reason for termination lacks credence. In evaluating a discrimination claim based on indirect evidence, the U.S. Supreme Court has held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502,

511 (1993) (holding that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination"); *accord Farmland Foods v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 741–42 n.1 (Iowa 2003); *Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519–20 (Iowa 2003). This is because, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves*, 530 U.S. at 148. The Iowa Supreme Court has since reiterated that "[o]nce a trier of fact rejects all legitimate reasons as possible reasons for the termination, it may find it more likely than not that the employer based his decision upon an impermissible reason." *Smidt v. Porter*, 695 N.W.2d 9, 16 (Iowa 2005). Therefore, "because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability," it is error to "proceed[] from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." *Reeves*, 530 U.S. at 149; *see also Smidt*, 695 N.W.2d at 16; *Farmland Foods*, 672 N.W.2d at 741–42 n.1; *Casey's Gen. Stores*, 661 N.W.2d at 519–20.

As far as his prima facie case of discrimination: (1) Plaintiff is over the age of 40 (J.A. p.641); (2) Mr. Feeback "met applicable job qualifications, was qualified for the position he held, and he generally performed his job in a

manner that met or exceeded expectations" (J.A. p.643); and (3) Plaintiff's employment was terminated in January 2016 (J.A. p.640). *See Farmland Foods*, 672 N.W.2d at 741–42 (citing *Sievers*, 581 N.W.2d at 638) (setting forth the elements of a prima facie case of discrimination).

Then, as outlined for the District Court in Plaintiff's Resistance Brief, Defendants' justification for Mr. Feeback's termination lacks credence because Defendants did not conduct a meaningful investigation into the text messages that Mr. Feeback sent. (J.A. pp.346–48). As a result, there simply was nothing on which a credible reason for termination could be based.

On December 31, 2015, Mr. Feeback sent two text messages to Defendant Mulgrew. (J.A. pp.639, 271). The first text message read, "FUCK You !" and the second text message read, "Believe who or what you want." (J.A. pp.639–40, 271). Mr. Feeback testified in deposition that these text messages were not intended for Defendant Mulgrew, but rather were sent to him by mistake. (J.A. pp.180, 180–81, Feeback Tr. 97:2–5, 97:18–98:13). Defendants, however, did nothing to determine whether the text messages were, in fact, sent by mistake. Plaintiff provided the name of the text messages' intended recipient to Mr. Charboneau, the person responsible for the investigation. (J.A. p.421, Charboneau Tr. 58:10–12). However, Mr. Charboneau did not make any attempt to contact that individual or to show

that person screenshots of the text message conversation. (J.A. p.421, Charboneau Tr. 58:13–20). When asked if he did "[a]nything to figure out if [Plaintiff] was telling the truth," Mr. Charboneau admitted "***[n]o I did not.***" (J.A. p.421, Charboneau Tr. 58:21–23) (emphasis added). Furthermore, Mr. Charboneau did not keep any notes of his conversations with Plaintiff or with Defendant Mulgrew. (J.A. p.421, Charboneau Tr. 58:24–59:1). Defendant Mulgrew, the plant General Manager, also does not have any notes of his meeting with Mr. Charboneau. (J.A. p.427, Mulgrew Tr. 61:11–21).

Mr. Charboneau also admitted that he did not investigate the second text message that read "believe who or what you want." (J.A. p.429, Charboneau Tr. 71:25–72:18). In deposition, he admitted, "I did not check to see who who was. No, I did not." (J.A. p.430, Charboneau Tr. 74:1–3). Defendant Mulgrew also testified that he "can't really speak to what" the second text message "believe who or what you want" was referencing. (J.A. p.428, Mulgrew Tr. 66:2–23). Defendant Mulgrew instead admitted that the text message "believe who or what you want" did not seem to fit in the context of the safety meetings. (J.A. p.428, Mulgrew Tr. 66:21–67:5). Further, he acknowledged that it was "possible" that the text messages were, in fact, meant for someone else as Plaintiff contended. (J.A. p.429, Mulgrew Tr. 71:4–7).

Based on this complete lack of any investigation, a reasonable juror could conclude that Defendants' nondiscriminatory reason for termination was false. As such, summary judgment was inappropriate. *See, e.g.*, *Reeves*, 530 U.S. at 147; *Haggenmiller v. ABM Parking Servs., Inc.*, 837 F.3d 879, 885 (8th Cir. 2016); *Betz v. Chertoff*, 578 F.3d 929, 933 (8th Cir. 2009); *Loeb v. Best Buy Co.*, 537 F.3d 867, 873 (8th Cir. 2008).

However, the District Court ignored all of these facts in its discrimination analysis. Instead, the Court granted summary judgment in favor of Defendants because Plaintiff "has not provided any specific facts demonstrating his age had a determinative influence on his termination." (J.A. pp.646–48). This is error. *See Reeves*, 530 U.S. at 149; *Smidt*, 695 N.W.2d at 16. Because the facts establish a prima facie case of discrimination and demonstrate that Swift Pork's asserted justification for termination was false, it was an error to grant summary judgment. Therefore, Plaintiff asks that this Court reverse the District Court's grant of summary judgment on Plaintiff's age discrimination claim and remand for further proceedings.

II. The District Court erred in granting summary judgment on Count II—Harassment by improperly discounting and disregarding evidence demonstrating the harassment of the Plaintiff was based on age.

Preservation of Error and Standard of Review

Plaintiff preserved the issue in resisting the Motion for Summary Judgment, both in brief and in hearing, and in the Notice of Appeal. (J.A. pp.336–39, 1006, 622–24, Mot. Summ. J. Hr'g Tr. 25:24–27:01).

The Standard of Review is the same as discussed under Issue I on pages 32–36. Appellant incorporates that Standard of Review as if stated here.

Argument

To establish a hostile-work environment claim under the Iowa Civil Rights Act, the Plaintiff must show that (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; and (4) the harassment affected a term, condition, or privilege of employment. "If a plaintiff establishes that a supervisor effected a tangible work action against the plaintiff, the defendant employer of corporate entity is liable for the harassment." *Farmland Foods v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 741 & n.2 (Iowa 2003) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998)). A tangible work action is any action that's "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant

change in benefits." *Id.* (internal quotation marks omitted) (quoting *Ellerth*, 524 U.S. at 761).

For purposes of summary judgment, Defendants did not dispute the first two elements of Plaintiff's harassment claim. (J.A. p.649). Instead, the District Court granted summary judgment in favor of Defendants in part because it concluded that Mr. Feeback failed to provide evidence that his harassment was based on age. (J.A. pp.649–50). In reaching this conclusion, the District Court improperly discounted Plaintiff's affidavit and completely disregarding the deposition testimony of Mr. Feeback and Defendant Carl.

In resisting Summary Judgment, Plaintiff outlined how the harassment that Mr. Feeback experienced fit a familiar pattern at Swift Pork. (J.A. pp.337–39). Prior to his termination, Mr. Feeback had never received any negative performance evaluations, and instead received annual raises. (J.A. p.403). Indeed, in deposition Defendant Carl concedes that the only performance reviews that Defendants were able to produce were positive. (J.A. pp.413, 413–14, Carl Tr. 37:17–39:24; 40:15–41:15). Defendants cited a change in the computer program that the company used to justify their inability to produce any negative performance reviews. (J.A. pp.414, 414, Carl Tr. 41:16–22; 42:5–18). Moreover, Mr. Feeback even received a raise approximately six months before his termination. (J.A. pp.403, 193, Feeback

Tr. 110:20). He also received a bonus in 2015. (J.A. p.125, Feeback Tr. 42:11–12).

However, like the many older managers who had come before him, Mr. Feeback began to experience harassment. Plaintiff provided the District Court with multiple examples. (J.A. pp.337–37). For example, Defendant Carl began engaging in obstructionist behavior and would turn minor issues into larger ones to make it seem as though Mr. Feeback was creating problems at work. (J.A. p.403). This behavior also was designed to create conflict between Mr. Feeback and the General Manager, Defendant Mulgrew. In December 2015, Mr. Feeback asked Defendant Carl if he could remain on the cut floor during a staff meeting due to lack of staff. Defendant Carl gave his permission. However, Mr. Carl did not communicate this permission to Defendant Mulgrew, causing Defendant Mulgrew to become upset when Mr. Feeback did not attend the meeting. (J.A. p.403).

Defendant Carl also would make repeated false critical statements about Mr. Feeback and blame Mr. Feeback for the misconduct of others. (J.A. pp.148, 150, Feeback Tr. 65:8–13; 67:16–25). On more than one occasion, he told Mr. Feeback he was "asleep at the wheel" or that that cut floor was "out of control." (J.A. pp.403, 149, 153–54, Feeback Tr. 66:14–22; 70:19–71:3).

Meanwhile, in late 2015, Defendant Mulgrew directed multiple obscenity-laden comments at Mr. Feeback. On one occasion, Defendant Mulgrew entered the employee bathroom while Mr. Feeback was on break and told Mr. Feeback that "you're in here fucking around." (J.A. p.405); (J.A. p.155, Feeback Tr. 72:1–10). On a separate occasion, Defendant Mulgrew encouraged Mr. Feeback to "fuck" a woman on a pheasant hunting trip. (J.A. pp.156–57, Feeback Tr. 73:24–74:23)

Plaintiff explained that this harassment was but the latest chapter in Swift Pork's long history of discrimination against older employees. Over at least the last 25 years, employees at Swift Pork have found workplace life increasingly difficult after they reach age 55. (J.A. pp.403, 167, 168, 186–88, Feeback Tr. 84:10–24; 85:6–22; 103:25–105:2). As Mr. Feeback has testified, these employees had no prior history of disciplinary action or workplace performance issues. (J.A. p.404). Yet, after the age of 55, these same employees, particularly those in management positions, begin to experience campaigns of harassment if they remained with the company. (J.A. pp.403–04, 167, 168, 186–88, Feeback Tr. 84:10–24; 85:6–22; 103:25–105:2). In multiple cases, the harassment grew so severe that the employee resigned. For example, in the late 1990s, Operations Manager, Vern Casselman, 58, ultimately resigned after a campaign of harassment that included his

demotion. (J.A. pp.404, 187–88, Feeback Tr. 104:8–105:2). Other employees such as Charlie Freese, 59, and Elmer Freese, approximately 62/63, suffered demotion as a part of campaigns of harassment. (J.A. pp.404, 188–89, 189–90, Feeback Tr. 105:15–106:8; 106:25–107:13). As Mr. Feeback explained in his deposition, Elmer Freese "was demoted when he was in his—getting close to retirement." (J.A. pp.189–90, Feeback Tr. 106:25–107:13). Still other employees were terminated. (J.A. pp.404–05). This harassment would explain the low number of managers and supervisors to retire with Swift Pork. (J.A. p.405). Mr. Feeback himself would have been eligible to retire within two years of his termination. (J.A. p.405).

Nevertheless, the District Court improperly rejected Plaintiff's evidence of Swift Pork's pattern of harassment of older employees. Because the District Court discounted all evidence of a pattern of harassment, it necessarily rejected any argument that the harassment of Mr. Feeback fit this pattern and was yet another example of harassment based on age.

The District Court completely discounted this evidence because "Mr. Feeback relies on his own affidavit . . . to show that other employees over the age of 55 without prior disciplinary action or workplace performance issue were terminated or demoted." (JA. p.650). The Court then repeated its

erroneous conclusion that Mr. Feeback's affidavit was not only self-serving, but also "full of inadmissible hearsay evidence." (J.A. p.650).

As explained above, Mr. Feeback's personal knowledge of management decisions and his personal observations that older employees with good performance histories were terminated or demoted do not constitute hearsay. (*See* Issue I above). Furthermore, the Iowa Rules of Civil Procedure expressly permit the use of affidavits at the summary judgment stage. *See* Iowa R. Civ. P. 1.981(3). As such, "[n]either the absence of written reports *nor the self-serving nature of affidavits*, interrogatory answers, or deposition testimony make such evidence inherently infirm." *Stewart*, 791 F.3d at 860; *see also Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 818 (8th Cir. 2002) ("[P]laintiff's testimony alone created a genuine issue of material fact . . ."); *Durukan Am., LLC v. Rain Trading, Inc.*, 787 F.3d 1161, 1164 (7th Cir. 2015) ("In the summary judgment context, we long ago buried—or at least tried to bury—the misconception that uncorroborated testimony from the non-movant cannot prevent summary judgment because it is self-serving.") (quotation omitted). Indeed, in the harassment context specifically, Eighth Circuit held that it was improper for the District Court to discount Plaintiff's affidavit when it granted summary judgment in favor of the Defendant on Plaintiff's hostile work environment claim. *Stewart*, 791 F.3d at 860–61.

Even if this Court were to disregard Plaintiff's affidavit, his argument also is supported by the deposition testimony. In his deposition, Plaintiff explained that:

> During my course of working for JBS for about 28 years, percentagewise, someone retiring from management was so low that it was unbelievable. And throughout my career, I saw them—And, in fact, I replaced a person that had been on the cut floor in Marshalltown when he was 58 years old, I believe. And they did it to him too and other people also.

(J.A. p.187, Feeback Tr. 104:04–11). Plaintiff also identified several older employees who experienced harassment during their employment at Swift Pork. (*See, e.g.*, J.A. p.167, Feeback Tr. 84:10–24 (Doug Ridout); J.A. p.188, Feeback Tr. 85:06–22 (Cheryl Hughlette); J.A. pp.187–88, Feeback Tr. 104:08–105:02 (Vern Cassselman); J.A. pp.188–89, Feeback Tr. 105:15–106:08 (Elmer Freese); J.A. pp.189–190, Feeback Tr. 106:25–107:13 (Charlie Freese)). Additionally, Plaintiff's statements regarding his job performance are supported by Defendant Carl's deposition testimony. (*See* J.A. pp.413, 413–14, Carl Tr. 37:17–39:24; 40:15–41:15) (stating that the only performance reviews that Defendants produced were positive).

The District Court, however, makes no mention whatsoever of any deposition testimony. Instead, the District Court ignored this evidence without explanation and incorrectly stated that Mr. Feeback's argument relied on his

affidavit alone. (J.A. p.650). In disregarding this evidence, the District Court not only improperly weighed the evidence, it removed the evidence from the scales entirely.

A jury may well reject Mr. Feeback's narrative, but that is the province of the jury not a District Court judge. *See Stewart*, 791 F.3d at 860 ("A jury may well accept [Defendant's] narrative. We may not, however, discount evidence as urged by [Defendant], nor may we view the facts in the light [Defendant] suggests."). Indeed, the impropriety of discounting Plaintiff's affidavit is especially clear where, as here, the evidence Defendants and the District Court seek to discount is at least partially corroborated by Mr. Feeback's deposition testimony. *See Stewart*, 791 F.3d at 861. Defendants may contend that Mr. Feeback's affidavit differs from his deposition testimony in that he remembered more detail in the affidavit. However, "nuances simply do not reach the level of assertions that 'directly contradict []' testimony under oath and that might support the discounting of evidence as a matter of law." *Stewart*, 791 F.3d at 861 (quoting *Frevert*, 614 F.3d at 474). It is improper for a court to discount and disregard affidavit and deposition testimony as the Court did here. "In ruling on a motion for summary judgment, the court does not weigh the evidence." *Linn*, 929 N.W.2d at 730; *Clinkscales v. Nelson Sec, Inc.*, 697 N.W.2d 836, 841 (Iowa

2005) (per curiam); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996). Therefore, it was error for the District Court to do so here, and Plaintiff respectfully asks that the Court's ruling be reversed.[3]

III. The District Court erred in granting summary judgment on Count II—harassment by improperly weighing evidence meant for the jury and misapplying Iowa law as to the severity and pervasiveness of the harassment.

Preservation of Error and Standard of Review

Plaintiff preserved the issue in resisting the Motion for Summary Judgment, both in brief and in hearing, and in the Notice of Appeal. (J.A. pp.339–42, 1006, 622–24, Mot. Summ. J. Hr'g Tr. 25:24–27:01).

The Standard of Review is the same as discussed under Issue I on pages 34–38. Appellant incorporates that Standard of Review as if stated here.

Argument

As to the fourth element of Mr. Feeback's harassment claim, a term, condition, or privilege of employment is altered "'[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' ... "sufficiently severe or pervasive to alter the conditions of the victim's

[3] Finally, any contention that the harassment of Mr. Feeback was based on the December 31, 2015 safety meeting is completely illogical. The harassment began long before the safety meeting was even scheduled and there could be no harassment after the safety meeting because Mr. Feeback was terminated almost immediately after.

employment and create an abusive working environment." ' " *Haskenhoff v. Homeland Energy Sols.*, LLC, 897 N.W.2d 553, 571 (Iowa 2017) (citing *Farmland Foods v. Dubuque Human Rights Comm'n*, 672, N.W. 2d 733, 743 (Iowa 2003)). To establish this element, a plaintiff must show that he "subjectively perceived the conduct as abusive and that a reasonable person would also find the conduct to be abusive." *State v. Watkins*, 914 N.W.2d 827, 844 (Iowa 2018). In evaluating the reasonable person standard, the factfinder considers: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening or humiliating or whether it was merely offensive; and (4) whether the conduct interfered with the employee's job performance. *Id.*

The District Court properly presumed for the purposes of summary judgment that Mr. Feeback subjectively perceived Defendants' conduct as abusive. (J.A. p.651). But the District Court nevertheless concluded that Mr. Feeback "failed to meet his burden" under the reasonable person standard that the harassment affected a term, privilege, or condition of his employment. (J.A. pp.651–52). Yet, the District Court's analysis is little more than a rote recitation of some of the incidents of harassment followed by a blanket assertion that "[v]iewing the totality of Mr. Carl's and Mr. Mulgrew's actions,

the Court finds Mr. Feeback failed to show a hostile work environment." (J.A. pp.651–52).[4]

The District Court's analysis fails to meaningfully engage with the relevant law on the issue. Its logic also contains multiple flaws that erode its conclusion. When on views the totality of the Defendants' actions in practice rather than simply in passing, it becomes clear that the District Court's conclusion as the severity and pervasiveness of Plaintiff's harassment was improper.

Despite the District Court's assertion to the contrary, it did not view totality Defendants' actions. Instead, the Court listed each individual instance and claimed to be viewing them together. However, the Court's discussion of the harassment still focuses on each isolated incident. As the Court explains, "Mr. Carl made a comment on *one occasion*," "Mr. Carl hung up on Mr. Feeback *once*," "Mr. Mulgrew used the word 'fuck' when speaking to Mr. Feeback *once* in 2014 . . . and *once* during a break in 2015." (J.A. p.651) (emphasis added). The Court concludes that these were "isolated" events. (J.A. pp.651–52). But this conclusion ignores state and federal law on the

[4] To be sure, the District Court notes in passing that "Mr. Feeback has not alleged any threats of physical harm or that he was humiliated by the conduct complained of." (J.A. p.652). The Court, however, provides no explanation or authority as to why a lack of physical threats or humiliation would be dispositive. This is likely because it cannot.

issue. As the Iowa Supreme Court makes clear "'[a] hostile work environment is a cumulative phenomenon,' and a series of individual episodes of inappropriate behavior eventually can amount to a hostile environment." *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 470 (Iowa 2017) (quoting *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 421 (8th Cir. 2010)). Accordingly, courts must consider whether the "totality of [Defendants'] actions, verbal and physical, could amount to actionable harassment." *Alvarez*, 626 F.3d at 421; *see also Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 355 (8th Cir. 1997). In short, one isolated incident, plus another isolated incident, plus another isolated incident, and another isolated incident, equals harassment.

A second flaw in the District Court's analysis is that it fails to take into account the short period of time in which these instances of harassment occurred. The harassment at issue here took place over the course of *months* not years. Defendants' obstructionist behavior, false critical statements, and unprofessional comments began in June 2015 at the earliest and ended with the start of the new year with Mr. Feeback's termination. As a result, all of these alleged incidents took place over the course of—at most—eight months. This abbreviated timeline means that Defendants' incidents of harassment amount to far more than "occasional criticism" or "isolated events" as the

District Court stated. Instead, where a Plaintiff experiences repeated harassment over a short period of time, as Mr. Feeback did, Courts have concluded that the evidence is sufficient to support a finding that the conduct was severe enough to alter the terms or conditions of a plaintiff's employment. *See Simon Seeding*, 895 N.W.2d at 470.

Finally, the District Court's analysis understates the true egregiousness of Defendants' actions. The District Court's analysis of the behavior of Defendants Carl and Mulgrew ignores a critical fact: their status as Mr. Feeback's immediate supervisor and the plant's General Manager. Courts recognize that where "two supervisors were primarily responsible for creating and maintaining the . . . hostile atmosphere," it "makes the behavior all the more egregious." *Delph*, 130 F.3d at 356 (citing *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 677 (7th Cir. 1993)).

In sum, when properly viewing the totality of Defendants actions over the short period of time in which they actually occurred while properly considering the egregiousness of Defendant Carl's and Defendant Mulgrew's behavior as supervisors, a reasonable jury could infer that Defendants engaged in unlawful age harassment of Mr. Feeback. Thus, judgment as a matter of law is improper.

IV. The district court erred in granting summary judgment on Count IV—wrongful termination in violation of public policy by making

improper credibility determinations and by improperly disregarding evidence related to Plaintiff's termination and safety complaints.

Preservation of Error and Standard of Review

Plaintiff preserved the issue in resisting the Motion for Summary Judgment, both in brief and in hearing, and in the Notice of Appeal. (J.A. pp.348–57, 1006, 607–22, Mot. Summ. J. Hr'g Tr. 10:07–25:23).

The Standard of Review is the same as discussed under Issue I on pages 34–38. Appellant incorporates that Standard of Review as if stated here.

Argument

Iowa law recognizes that an at-will employee cannot be terminated for reasons contrary to public policy. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 893 (Iowa 2015). "[I]n order to prevail on a wrongful discharge claim in violation of public policy, the plaintiff must show the protected conduct was a determining factor in the adverse employment action." *Id.* at 898 (citing *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 229 (Iowa 2004); *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 301 (Iowa 1998); *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 686 (Iowa 1990)). The District Court assumed for the purposes of Summary Judgment that a clearly defined and well-recognized public policy protects Mr. Feeback's safety complaints. (J.A. p.653). The Court also found that "[t]here is no dispute that Mr. Feeback made

safety complaints to Mr. Carl." (J.A. p.654). However, the District Court erroneously concluded that "there is no indication in the record that the safety complaints were the reason Mr. Feeback was terminated." (J.A. p.654). In reaching this conclusion, the District Court failed to indulge on behalf of Plaintiff "every legitimate inference reasonably deduced from the record" as the law requires. *See Linn*, 929 N.W.2d at 730; *see also Bagelman*, 823 N.W.2d at 20; *Crippen*, 618 N.W.2d at 565. Instead, the District Court either completely ignored or heavily discounted Plaintiff's evidence that Defendants Carl and Mulgrew were involved in the decision to terminate Mr. Feeback and that the reasons given for the termination lacked credibility. Such weighing of evidence by the District Court is not permitted. *Clinkscales v. Nelson Secs., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005); *see also* Iowa R. Civ. P. 1.981(3).

In their Motion for Summary Judgment, Defendants contended that Mulgrew and Carl were not the decision makers in Mr. Feeback's termination. However, there is ample reason to believe that this is indeed not the case. Defendants Mulgrew and Carl met with Mr. Charboneau as part of the "investigation" before Mr. Charboneau terminated Mr. Feeback's employment over the phone on January 2, 2016. (J.A. pp.774–76, Carl Tr., 77:2–78:20; J.A. p.850, Charboneau Tr. 96:4–5). Even before that meeting, Defendants Carl and Mulgrew already had decided to terminate Plaintiff's

employment as evidenced by their text exchange on the afternoon of January 1, 2016. On January 1, 2016, at 3:11 p.m. Defendant Mulgrew also sent a text message to Defendant Carl stating "Feeback not allowed to work." (J.A. pp.850–51, Mulgrew Tr. 96:23–97:13). Defendant Carl responded "Amen." (*Id.*).

In other words, the decision was made, authorized and ratified by the individual defendants prior to even the start of any investigation. At the very least, there is enough information here, giving the light most favorable to the Plaintiff, that Mulgrew and Carl were actually part of the decision to terminate and authorized the termination. The District Court ignored this evidence and instead improperly concluded that Mr. Charboneau alone made the decision to fire Mr. Feeback. (J.A. p.654). Further, the Court determined that Charboneau did not know of the complaints when he made the determination to terminate. This is derived from his deposition testimony. This would be seen as self-serving testimony that can also be called into question by the meeting prior to the investigation and the fact that very little was indeed investigated. Contrast this to the doubt the Court made when looking at Plaintiff's "self-serving" deposition. (J.A. pp.654–55). This weighing of the evidence is specifically prohibited. Indeed, the Court is not even to test as to the Court's skepticism. (*Clinkscales*, 697 N.W.2d at 841 "Mere skepticism of

a Plaintiff's claim is not a sufficient reason to prevent a jury from hearing the merits of the case"). This is precisely what the Court did on more than one occasion. For example, it was held that "Mr. Feeback has not produced any specific evidence to rebut his testimony" that Mr. Charboneau had no knowledge of the safety complaints. (J.A. p.654). However, Plaintiff did provide circumstantial evidence that prior to the investigation, Mr. Charboneau had a meeting with the two individual defendants in this case, coupled with the fact that nothing was really investigated, and the text message sent showing that the decision to terminate was made prior to the investigation. (*See* Issue I.B above). The fact is that this does fairly create an inference that he knew of the complaints, that this did not need to be investigated as they were waiting for a reason to terminate Feeback. However, the Court ignored this. Elsewhere in the opinion, the Court actually goes out of its way to evaluate evidence and inferences, stating it "tends to show Mr. Carl's anger was not directed toward Mr. Feeback or his complaints, but was his general disposition." (J.A. p.641, n.3). This is precisely the type of weighing that is not permitted per *Clickscales*. In addition, as the Iowa Supreme Court pointed out in *Taft v. Iowa District Court ex re. Linn County*:

> In deciding whether a fact question exists for trial at the summary judgment stage, the court does not weigh the admissible evidence tending to prove a fact against the admissible evidence opposing it in

> deciding whether a genuine issue of fact exists for trial. *See, e.g.*, *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994). Similarly, inferences raised from the admissible evidence tending to prove or disprove a fact are not weighed against each other at the summary judgment stage, but instead are weighed against "the abstract standard of reasonableness, casting aside those which do not meet the test and concentrating on those which do." *Id.*

828 N.W.2d at 315.

The District Court also ignored Plaintiff's evidence demonstrating the causal connection between Mr. Feeback's conduct and his discharge. As explained above, Plaintiff must show that the protected conduct was the determining factor in the adverse employment action. *See Rivera*, 865 N.W.2d at 898 (Iowa 2015); *Lloyd*, 686 N.W.2d at 229; *Teachout*, 584 N.W.2d at 301; *Smith*, 464 N.W.2d at 686. Iowa caselaw "has consistently stated a determining factor is one that tips the balance in an employment decision." *Rivera*, 865 N.W.2d at 898 (citing *Teachout*, 584 N.W.2d at 302 n. 2; *Smith*, 464 N.W.2d at 686). "In order to be the determining factor, it is not necessary the protected conduct be 'the main reason behind the decision,' but it must be the factor that makes the difference in the employment outcome." *Id.* (quoting *Smith*, 464 N.W.2d at 686); *see also Davis v. Horton*, 661 N.W.2d 533, 536 (Iowa 2003) (analogizing determining factor to the "final straw in [the employer's] decision to terminate [the plaintiff's] employment").

Here, Plaintiff provided evidence to show that after he complained, Defendant Carl was aggressive and angry with him. Defendant Carl made negative comments concerning the cost of alleviating Plaintiff's safety concerns. (J.A. p.146, Feeback Tr. 63:18–22). After that, whenever Mr. Feeback tried to discuss safety issues with Defendant Carl, Defendant Carl became angry. (J.A. p.403). During one phone conversation, Defendant Carl became so angry that he hung up on Plaintiff. (J.A. p.403).

Moreover, Plaintiff showed that this is a pattern of Swift Pork. (J.A. pp.404–05, 167, 168, 186–88, Feeback Tr. 84:10–24; 85:6–22; 103:25–105:2). Further, when the text message incident involving Plaintiff and Mulgrew occurred, Defendants made an immediate decision that Plaintiff would not be returning to work. When Defendant Carl learned of this decision, he immediately responded "Amen." (J.A. pp.432–33, Mulgrew Tr. 96:23–97:13). Plaintiff's evidence of how many people have used profanity at the Swift Pork Marshalltown plant combined with Defendants extremely quick decision to fire Plaintiff, shows that there was another real reason behind Mr. Feeback's termination. (*See also* Issue I.B above).

Further, Mr. Charboneau's testimony that he had no knowledge is a credibility decision the jury will need to decide. Contrary to the District Court's conclusory assertion (J.A. p.654), Appellant has provided ample

evidence to challenge his credibility. Mr. Charboneau had a meeting with the individual defendants immediately after the incident occurred. (J.A. p.415, Carl Tr. 77:2–78:20). Mr. Charboneau did not keep any notes of his conversations surrounding the incident. (J.A. p.421, Charboneau Tr. 58:24–59:01). Defendant Mulgrew, the plant General Manager, also does not have any notes of his meeting with Mr. Charboneau. (J.A. p.427, Mulgrew Tr. 61:11–21). Mr. Charboneau also made no effort to determine whether Mr. Feeback was telling the truth when he said he sent the text messages by mistake. Plaintiff provided the name of the text messages' intended recipient. (J.A. p.421, Charboneau Tr. 58:10–12). However, Mr. Charboneau did not make any attempt to contact that individual or to show that person screenshots of the text message conversation. (J.A. p.421, Charboneau Tr. 58:13–20). In fact, when asked if he did "[a]nything to figure out if [Plaintiff] was telling the truth," Mr. Charboneau admitted "***[n]o I did not.***" (J.A. p.421, Charboneau Tr. 58:21–23) (emphasis added). Appellant presented all of this information to the District Court. (J.A. pp.353–54). The District Court ignored it, and instead somehow concluding that "Mr. Feeback has not produced any specific evidence to rebut [Mr. Charboneau's] testimony." (J.A. p.654). As shown above, this is patently false.

Moreover, in its analysis, the District Court imposed an additional

fourth requirement, contrary to Iowa law. (J.A. p.653) (stating that the Plaintiff must establish that "the employer had no overriding business justification for the discharge"). Iowa law, however, is clear. "The lack of a legitimate business justification is not an element of the claim that the plaintiff must prove." *Rivera*, 865 N.W.2d at 898. "Plaintiffs are rarely required to prove a negative." *Id.*

Defendants here claim that as they had a good faith belief in the reason for discharge, *i.e.*, that Plaintiff sent the text message to Mulgrew, that they had an "overriding business justification for Plaintiff's termination". (J.A. pp.78–79).

However, "the fact that the Plaintiff does not have the burden to show the employer lacked an overriding business justification does not mean evidence related to an employer's legitimate business reasons has no relevance in a wrongful discharge in violation of a public policy case." *Id.* at 898–99. "Indeed, an employer will prevail if it convinces the fact finder that the legitimate business reasons supporting the action were so strong as to defeat the conclusion that the protected conduct was the determining factor in the adverse employment decision." *Id.* Moreover, as the Court explained in *Rivera*:

> [W]e believe there may be some relatively rare circumstances when an employer is entitled to an

> affirmative defense of an overriding business justification. As noted by Professor Perritt in his revised treatise, there may be occasions in which an employee is in fact terminated because of protected conduct, but the employer should nonetheless prevail. *See* Perritt II § 7.08, at 7–100.1. For instance, in *Harman v. La Crosse Tribune*, an employee claimed he was fired for conduct protected by the First Amendment to the United States Constitution, but his conduct also violated the ethical rules of attorneys. 344 N.W.2d 536, 540 (Wis Ct. App.1984). In this situation, with two competing public policies, the employer may be able to establish an overriding business reason for the termination. *See id.* at 540–41. As noted by Professor Perritt, in such a case, the employer admits the protected conduct caused the termination, but asserts another policy trumps the public policy asserted by the employee. *See* Perritt II § 7.08, at 7–100.1. No such claim, however, has been raised in this appeal."

Rivera, 865 N.W.2d at 899.

To be sure, the *jury* is entitled to accept Defendants' business justification at trial. However, the *Court* cannot do so as a matter of law. The fact is that the factfinder, not as a matter of law on summary judgment is the appropriate venue for this argument. Plaintiff must show a causal connection as stated in *Fitzgerald* and must show the determining factor was the public policy violation. Here, Plaintiff has facts to support this proposition. Carl and Mulgrew went after Plaintiff when he reported safety violations. (J.A. pp.403, 403, 136–41, 146, 149, 153–54, Feeback Tr. 53:17–58:23; 63:18–22; 66:14–

22; 70:19–71:3). Further, the decision to terminate was made prior to the investigation. The reason offered by the Defendants does not make sense for the second sentence and both Defendant Mulgrew and Mr. Charboneau concede this point. (J.A. p.428, Mulgrew Tr. 66:21–67:7; J.A. pp.422–23, Charboneau Tr. 71:25–72:18). The fact that an investigation was said to occur but did not occur.

The only "investigation" went as follows: Mr. Feeback provided Mr. Charboneau the name of the text messages' intended recipient. (J.A. p.421, Charboneau Tr. 58:10–12). Mr. Charboneau made no attempt to contact that individual or to show that person screenshots of the text message conversation. (J.A. p.421, Charboneau Tr. 58:13–20). Mr. Charboneau did not keep any notes of his conversations with Plaintiff or with Defendant Mulgrew. (J.A. p.421, Charboneau Tr. 58:24–59:1). Mr. Charboneau kept no notes of the termination meeting with Plaintiff. (J.A. p.421, Charboneau Tr. 59:12–14). Defendant Mulgrew, the plant General Manager, also kept no notes of his meeting with Mr. Charboneau. (J.A. p.427, Mulgrew Tr. 61:11–21). Finally, when asked if he did "[a]nything to figure out if [Plaintiff] was telling the truth," Mr. Charboneau admitted "[n]o I did not." (J.A. p.421, Charboneau Tr. 58:21–23).

On top of all of this, the record establishes that many other people have

sworn at the Swift Pork Plant, even at supervisors. (J.A. pp.405–09). Unlike Mr. Feeback, however, they were not fired, let alone fired immediately. (J.A. pp.405–09). This list even includes the Defendants themselves. (J.A. p.405, 155, 156–57, Feeback Tr. 72:1–10; 73:24–74:23).

In their Brief in Support of Summary Judgment, Defendants presented the District Court with a veiled invitation to weigh the evidence in this matter, and the Court all too readily accepted. In doing so, the District Court usurped the role of the fact finder and should be reversed.

CONCLUSION

The District Court Erred when granted Summary Judgment in favor of Defendants on Plaintiffs Age Discrimination, Harassment, and Wrongful Termination Claims. Plaintiff respectfully asks this Court to reverse the District Court's ruling and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,889 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

/s/ Bruce H. Stoltze, Jr.

CERTIFICATE OF SERVICE

I, Bruce H. Stoltze, Jr., member of the Bar of Iowa, hereby certify that on the 13th day of May, 2021, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a), this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/s/ Bruce H. Stoltze, Jr.

CERTIFICATE OF FILING

I hereby certify that on the 13th day of May, 2021, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a) this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/s/ Bruce H. Stoltze, Jr.

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Appellant's Final Brief and Request for Oral Argument was $0.00.

/s/ Bruce H. Stoltze, Jr.