IN THE SUPREME COURT OF IOWA

No. 20-1467

DAVID ALAN FEEBACK,
Plaintiff-Appellant

v.

SWIFT PORK COMPANY, TROY MULGREW, and TODD CARL,
Defendants-Appellees

On Appeal from the District Court of Marshall County, Iowa
Case No. LACL009957

Honorable Bethany Currie

APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

Defendants-Appellees Swift Pork Company, ("Swift Pork" or the "Company"), Troy Mulgrew, and Todd Carl (collectively "Defendants") submit that this case may be transferred to the Court of Appeals as this case presents issues that are appropriate for summary disposition. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves claims of discrimination, harassment, and wrongful termination wherein Plaintiff-Appellant, David Feeback ("Feeback"), improperly discounts his misconduct and egregious display of disrespect toward his superior that resulted in his termination. In 2018, after his termination from Swift Pork, Feeback filed a Petition alleging that he was subjected to age discrimination and harassment in violation of the Iowa Civil Rights Act (ICRA), as well as wrongful termination. (App. pgs. 18-25) (*See also* App. pgs. 31-39). Defendants Answered Feeback's Petition denying liability. (App. pgs. 40-45).

B. Relevant Proceedings and Disposition

On August 14, 2020, Defendants filed a Motion for Summary Judgment. (App. pgs. 46-47). Feeback filed a resistance and the Defendants filed a Reply. After hearing arguments of counsel on September 28, 2020, the

District Court entered summary judgment in favor of the Defendants, dismissing Plaintiff's claims. (App. pgs. 637-656). That Order is the subject of this appeal. (App. p. 1006).

The District Court's Summary Judgment Order declared that Feeback's claims failed as a matter of law. (App. pgs. 637-656). The Order declared his age discrimination claim failed as a matter of law because Feeback failed to present sufficient evidence from which a reasonable jury could infer that Swift Pork's legitimate, nondiscriminatory reason for termination was pretextual as Feeback did not have specific facts demonstrating his age had an influence on his termination. (App. pgs. 645-648). Additionally, the totality of the conduct by Feeback's supervisors were infrequent and could not be deemed as severe. (App. pgs. 648-652). Accordingly, the District Court also dismissed Feeback's harassment claim. (*Id.*). Lastly, the District Court determined that Feeback's reporting of safety concerns was not a "determining factor" in his termination. (App. pgs. 652-655). It is undisputed that Swift Pork never told Feeback not to voice safety concerns and in fact, actively started replacing trolleys in response to Feeback's concerns. (*Id.*). Therefore, the District Court determined that Feeback's wrongful termination claim also failed as a matter of law. (*Id.*).

STATEMENT OF FACTS

A. Background

Feeback filed this action against Swift Pork, Troy Mulgrew, and Todd Carl asserting claims for age discrimination, harassment, and wrongful termination. (App. pgs. 18-25) (*See also* App. pgs. 31-39). Swift Pork is a pork meat processing and distributing company that operates a facility in Marshalltown, Iowa. (App. p. 272). During the relevant time period, Feeback was an employee of Swift Pork. (App. p. 278). At the time of his termination from employment, Feeback held the position of Cut Floor Superintendent. (App. p. 102; Feeback Depo. 19:2-6; App. p. 272). Prior to his position of Cut Floor Superintendent, Feeback held the position of training supervisor, which was the result of a demotion. (App. pgs. 100-101; Feeback Depo. 17:25:18-23). Feeback was employed with Swift Pork as an at-will employee and did not have an employment contract. (App. p. 127; Feeback Depo. 44:13-19).

At the time of his termination, Feeback directly reported to Defendant-Appellee, Todd Carl ("Carl"), Plant Manager for Swift Pork. (App. p. 278; App. p. 272; App. p. 103; Feeback Depo. 20:1-3). Carl directly reported to Defendant-Appellee, Troy Mulgrew ("Mulgrew"), General Manager for Swift Pork. (App. p. 279; App. p. 272; App. p. 103; Feeback Depo. 20:4-13).

Mulgrew held one of the most senior positions at Swift Pork and was also considered Feeback's superior. (*Id.*).

Swift Pork maintains an anti-harassment and anti-discrimination policy that prohibits discrimination and harassment on the basis of age and other protected classes protected under applicable federal and state law. (App. p. 279; App. pgs. 288-289); (*See also* App. pgs. 228-229; App. pgs. 127-128; Feeback Depo. 44:23-45:9). Swift Pork's anti-harassment and anti-discrimination policy includes reporting procedures for employees who believe they have been or are currently being subjected to any form of harassment, including a hotline directly to Swift Pork Corporate Human Resources. (App. p. 279; App p. 289); (*See also* App. p. 229; App. p. 127-229; App. pgs. 127-128; Feeback Depo. 44:23-45:9). Specifically, that policy provides the following:

> An employee who believes that he or she has been or is currently being subjected to any form of harassment should bring the matter to his or her immediate supervisor, who will refer the matter to the local Human Resources Manager. If the supervisor is an involved party, or if the employee chooses, he or she may contact either the Human Resources department directly or the Corporate Human Resources Department, 1770 Promontory Circle, Greeley, CO 80634, telephone 1-888-203-9729.

(App. p. 279; App. p. 289); (*See also* App. p. 229; App. p. 127-128; Feeback Depo. 44:23-45:9). Swift Pork's anti-harassment and anti-discrimination policy further prohibits retaliation against any employees reporting any complaints of harassment. (*Id.*).

Feeback was aware of Swift Pork's anti-harassment and anti-discrimination policy. (App. p. 130; Feeback Depo. 47:2-4). He knew that he could bring complaints to his immediate supervisor and also directly to Swift Pork's Human Resources department. (App. p. 129-130; Feeback Depo. 46:21-47:1). Feeback was also aware that complaints may be made via a hotline that was available to all employees at Swift Pork. (App. p. 131; Feeback Depo. 48:1-5). Feeback never made any complaints under these policies. (App. p. 174; Feeback Depo. 91:4-17; App. p. 194; Feeback Depo. 111:11-21).

Swift Pork additionally maintains an Open Door Policy, which provides that "[a]ny employee may bring a problem or suggestion to his or her immediate supervisor and then to the Department General Supervisor." (App. p. 280; App. p. 288); (*See also* App. p. 228; App. p. 127-128; Feeback Depo. 44:23-45:19). The Open Door Policy further provides that if an employee believes the initial response is unsatisfactory, the problem or suggestion may be passed on to the Human Resources Manager. (*Id.*). The Open Door Policy

goes even further to provide that if an "employee is not satisfied with the manner in which the matter was resolved, he or she may submit the problem through the Human Resources Department, or call the Best Work Environment Hotline Number." (*Id.*). Although Feeback was aware of and understood Swift Pork's Open Door Policy, he never reported any mistreatment under this policy. (App. p. 128; Feeback Depo. 45:10-19; App. pgs. 129-130; Feeback Depo. 46:21-47:1; App. p. 131; Feeback Depo. 48:1-3; App. p. 174; Feeback Depo. 91:4-17; App. p. 194; Feeback Depo. 111:11-21).

B. Events Leading to Feeback's Termination

As a Cut Floor Superintendent, Feeback was required to make sure a certain number of safety meetings and trainings are done within his department throughout the year on an annual basis. (App. p. 273). At the end of the year, on December 31, 2015, Feeback's department had not yet completed all of the required safety meetings. (*Id.*). Feeback allowed his department to hold a safety meeting on December 31, 2015, New Year's Eve, despite the fact that employees were to leave early that day. (App. pgs. 174-175; Feeback Depo. 91:18-92:23; App. p. 273). No other managers attempted to hold any meetings on New Year's Eve. (App. p. 186; Feeback Depo. 103:8-13).

Mulgrew found out about the meetings and that multiple employees were upset about having to attend the meetings on New Year's Eve. (App. pgs. 311-312; Mulgrew Depo. 64:2-65:25; App. p. 273). Mulgrew did not feel it was appropriate for the meetings to be held on the holiday and called off the meetings so the employees could be home with their families for the holiday. (*Id.*).

Feeback told Mulgrew that he allowed the meetings to be held on New Year's Eve. (App. pgs. 174-175; Feeback Depo. 91:18-92:23). Mulgrew sent the supervisors home and had Feeback go into his office and also asked Feeback's supervisor, Carl, to join the meeting. (App. pgs. 174-176; Feeback Depo. 91:18-92:23; 93:9-14). In the meeting, Feeback claims that Mulgrew told him that his confidence level in Feeback was currently at about a five and commented that Feeback's department had the highest absenteeism rate. (App. pgs. 176-177; Feeback Depo. 93:19-94:3). Feeback claims that he responded that his turnover rates were the lowest in the Company and that Mulgrew responded by telling him that he should be sitting there with his mouth shut and his arms open. (*Id.*).

Feeback further claims that during that meeting, Mulgrew said that another employee had told Mulgrew that Feeback "told him that he was the worst supervisor [Feeback] had." (App. p. 177; Feeback Depo. 94:7-12).

Feeback also claims that in that meeting, Carl said that his confidence level in Feeback was at a two and commented on how Feeback had gone home and left work in the mornings. (App. p. 177; Feeback Depo. 94:7-18). Feeback did not say anything when the meeting was over. (App. pgs. 178-179; Feeback Depo. 95:22-96:1).

Later that same evening, on December 31, 2015, Feeback texted his superior, Mulgrew, "FUCK You ! Believe who and what you want." (App. p. 271).

> Q: Okay. And it looks like on December 31st, at 5:42 p.m., you texted Mr. Mulgrew, "F[UCK] you [!] Believe who and what you want." Is that accurate?
>
> **A: Yes, that's my text. I texted that.**

(App. pgs. 179-180; Feeback Depo. 96:22-97:1; App. p. 271); (*See also* App. p. 274; App. p. 277).

Shortly after receiving the inappropriate text message from Feeback, Mulgrew sent a screenshot of the text to Carl and Pete Charboneau, the Human Resources Director at the Marshalltown facility. (App. p. 274; App. p. 280). Mulgrew believed that Feeback's inappropriate text message was meant for him and was in reference to the issue relating to the safety meetings earlier in

the day. (App. pgs. 310-313; Mulgrew Depo. 63:20-66:16; App. p. 274). Feeback never rescinded his text and never texted anything to Mulgrew indicating that the text was not meant for Mulgrew. (App. p. 180; Feeback Depo. 97:6-17).

Feeback was suspended pending further investigation relating to his text message. (App. p. 280; App. p. 314; Charboneau Depo. 113:8-16). Charboneau investigated the text message by speaking with Feeback, Mulgrew, and Carl. (App. p. 280). Based upon his conversations with these individuals, Charboneau made the determination and had an honest good faith belief that Feeback purposefully sent the inappropriate text to Mulgrew because of the meeting Feeback had with Mulgrew prior to the text message being sent. (*Id.*). As a result, Charboneau made the determination to terminate Feeback's employment and Feeback's employment was terminated on January 4, 2016. (*Id.*).

At the time of his termination, Feeback was 60 years old. (App. p. 88; Feeback Depo. 5:11-12). Feeback was replaced by a long-term employee, Michael Harrison, who was 50 years old when he replaced Feeback. (App. p. 274). Harrison is still employed by Swift Pork in the superintendent position. (*Id.*). Mulgrew was 51 years old at the time of Feeback's termination and is still currently employed by Swift Pork. (*Id.*). Carl was 47 years old at the

time of Feeback's termination and is still currently employed by Swift Pork. (App. p. 315; Carl Depo. 5:9-11). Charboneau was 50 years old at the time of Feeback's termination and is still currently employed by Swift Pork. (App. p. 281). Swift Pork's Marshalltown facility currently employs over 100 individuals over the age of 60 years old. (App. p. 274).

C. Feeback's Allegations of Harassment and Protected Activity

In this matter, Feeback claims that he reported safety concerns to his supervisor Carl and that after his reports he did not have a good relationship with Carl. (App. p. 21). Addressing safety concerns was part of Feeback's job duties as a cut floor superintendent. (App. pgs. 123-124; Feeback Depo. 40:4-41:16; App. p. 273).

Feeback's alleged safety complaint related to a trolley or rail system that brings hog carcasses from the coolers to the cut floor. (App. pgs. 137-138; Feeback Depo. 54:14-55:5; 55:14-25). Feeback was concerned that some of the trolleys were worn out and could slip and could cause a hog carcass to fall off. (*Id.*). Feeback first communicated his concern to Carl in 2014. (App. pgs. 140-141; Feeback Depo. 57:14-58:3). He addressed his concern with Carl multiple times and the last time he told Carl about the trolleys was in the beginning of 2015, several months prior to his termination. (App. p. 141; Feeback Depo. 58:4-23). Feeback admits that this concern was

alleviated during his employment because Swift Pork was actively replacing old trolleys with new trolleys during Feeback's employment in 2015. (App. pgs. 142-143; Feeback Depo. 59:25-60:17).

Feeback claims that Carl got angry when he told Carl about his concern but admits that Carl got angry often for a variety of reasons and his anger was not limited to Feeback or his safety concerns. (App. pgs. 144-146; Feeback Depo. 61:18-63:3). Feeback was never told he should not be raising safety concerns and was never told he should not bring any more complaints to management's attention. (App. pgs. 146-147; Feeback Depo. 63:23-64:3). Charboneau had no knowledge that Feeback had ever complained about the trolleys. (App. p. 147; Feeback Depo. 64:4-11; App. p 281).

Also as part of his job duties as a cut floor superintendent, Feeback was responsible for and supervised several employees. (App. pgs. 117-118; 148; Feeback Depo. 34:21-35:7; 65:14-24; App. p. 273). Feeback's harassment claim is based upon criticism and scrutiny he received relating to his job performance as a superintendent. (App. p. 148; Feeback Depo. 65:8-24). Specifically, Feeback claims he was harassed because after employees he supervised engaged in misconduct, Feeback's supervisor Carl told Feeback that he was asleep at the wheel and that the cut floor was out of control. (App. pgs. 148-150; 153-154; Feeback Depo. 65:25-67:3; 70:19-71:8). Feeback

also alleges Carl reacted in an "aggressive manner" towards him relating to decisions Feeback made as a superintendent. (App. pgs. 263-265).

Although Feeback's allegations of harassment are merely criticisms of his job performance, Feeback boldly claims that this conduct was a "campaign" or "witch hunt" against him. (App. p. 194; Feeback Depo. 111:1-6). However, he did not report any of the alleged mistreatment or alleged conduct to Swift Pork. (App. p. 194; Feeback Depo. 111:1-21).

Q: And did you report any of the conduct that you associate with that witch hunt or campaign?

A: No, I did not.

Q: You didn't report it to Human Resources?

A: No.

Q: Didn't report it to corporate Human Resources?

A: No.

Q: And you didn't report it anywhere else?

A: No.

(App. p. 194; Feeback Depo. 111:11-21).

Although not alleged in his Iowa Civil Rights Commission charge, Petition, or sworn Answers to Interrogatories, Plaintiff also alleges two incidents relating to Mulgrew wherein he alleges Mulgrew told him he was "F'ing around" in the bathroom in late 2015 and that Plaintiff should "F" a girl on a pheasant hunting trip in 2014 or 2015. (App. pgs. 154-157; Feeback Depo. 71:24-72:10; 73:22-74:25). Despite his knowledge relating to Swift Pork's anti-harassment and reporting policies, Plaintiff did not report any of the alleged mistreatment or alleged conduct to Swift Pork:

Q: Okay. Coming back from the break, we, I believe, covered – aside from New Year's Eve, which we're going to cover here in a minute – all of your allegations of harassment against Mr. Carl and Mr. Mulgrew. Is that correct?

A: Yes.

Q: Did you report any of that conduct to anyone?

A: No.

Q: You didn't report it to Human Resources?

A: No.

Q: And you didn't report it to corporate Human Resources?

A: No.

(App. p. 174; Feeback Depo. 91:4-17).

STANDARD OF REVIEW

A District Court's ruling on a summary judgment motion is reviewed for correction of errors at law. *Keokuk Junction Ry. v. IES Indus., Inc.*, 618 N.W.2d 352, 355 (Iowa 2000). When there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, a District Court is justified in granting summary judgment and its order should be upheld on appeal. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001); *see also* Iowa R. Civ. P. 1.981.

Although an appellate court must review the grant of summary judgment in a light most favorable to the non-movant and all legitimate inferences reasonably deduced from the record must also be given to that party, a factual issue is only "material" when it might affect the outcome of the suit. *Phillips*, 625 N.W.2d at 717. Likewise, when the party moving for summary judgment has properly supported its motion, it is the burden of the nonmovant to respond with specific facts - not just the allegations or denials

in the pleadings - showing a genuine issue for trial. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012); *see also* Iowa R. Civ. P. 1.981(5).

The Iowa Supreme Court is clear that "the court should only consider 'such facts as would be admissible in evidence' when considering the affidavits supporting and opposing summary judgment." *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012) (quoting Iowa R. Civ. P. 1.981(5)). Furthermore, it is "well established that '[s]peculation is not sufficient to generate a genuine issue of fact'" in opposition to a summary judgment motion. *Matter of Estate of Franken*, 944 N.W.2d 853, 858 (Iowa 2020) (quoting *Nelson v. Lindaman*, 867 N.W.2d 1, 7 (Iowa 2015)).

Additionally, inadmissible hearsay evidence cannot be used to defeat summary judgment. *See Pitts*, 818 N.W.2d at 96 (stating that court should only consider admissible evidence in evaluating summary judgment); *Brooks v. Tri-Systems, Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005) ("When an affidavit contains an out-of-court statement offered to prove the truth of the statement that is inadmissible hearsay, the statement may not be used to support or defeat a motion for summary judgment."); Iowa R. Evid. 5.801. Moreover, conclusory statements and legal conclusions may not be relied upon in opposition to summary judgment. *See Schulte v. Mauer*, 2019 N.W.2d 496, 500 (Iowa 1974) (stating it is well-settled that "a party must plead ultimate

facts [by affidavits or otherwise] and cannot rely upon conclusions themselves" in resisting summary judgment); *see also Hudson v. Williams, Blackburn & Maharry, P.L.C.*, No. 08-0577, 2009 WL 139501, at *4 (Iowa Ct. App. Jan. 22, 2009) ("The bare conclusory statements contained in [Plaintiff's] resistance and statement of disputed facts are not sufficient to defeat the motion for summary judgment."); *Met-Coil Systems Corp. v. Columbia Cas. Co.*, 524 N.W.2d 650, 659 (Iowa 1994) (finding conclusory legal conclusions insufficient to prevent summary judgment) (citing *Byker v. Rice*, 360 N.W.2d 572, 574 (Iowa Ct. App. 1984)). *See also Bradshaw v. Wakonda Club*, 476 N.W.2d 743, 745 (Iowa Ct. App. 1991) ("The resisting party may not rely solely on legal conclusions to show there is a genuine issue of material fact justifying denial of summary judgment."). If the only issue presented is the legal consequences flowing from undisputed facts, summary judgment is appropriate. *Peak v. Adams*, 799 N.W.2d 535, 542 (Iowa 2011).

ARGUMENT

The District Court correctly held that the Defendants-Appellees were entitled to summary judgment on Feeback's claims of discrimination, harassment, and wrongful termination. The facts and legal principles of this case are straightforward. Feeback was terminated from his employment with Swift Pork after an egregious display of disrespect toward his superior when

he sent a text message to his superior telling him "FUCK you !" The evidence shows that the District Court correctly found that Feeback was terminated for a legitimate, non-discriminatory reason and Feeback cannot prove that age played any role in the decision to terminate his employment. Feeback's harassment claim also fails because he cannot show that any alleged harassment was based on his age or that the alleged harassment was sufficiently severe or pervasive to amount to actionable harassment. Even if Feeback could satisfy these elements, Defendants are entitled to the *Faragher-Ellerth* affirmative defense. Feeback's wrongful termination claim also fails because Feeback cannot show his alleged complaints were the determining factor for his termination, and Swift Pork undoubtedly had an overriding business justification to terminate Feeback. Accordingly, the District Court correctly found that Feeback's claims failed as a matter of law.

I. The District Court Correctly Concluded that Feeback's Age Discrimination Claim Fails as a Matter of Law.

A. The District Court Properly Applied the Correct Causation Standard in its Analysis of Feeback's Age Discrimination Claim.

The District Court analyzed Feeback's age discrimination claim under the ICRA utilizing the *McDonnell Douglas* burden-shifting analysis because Feeback failed to offer direct evidence of discrimination. (Summary Judgment Order). This is the correct analysis as it applies to summary

judgment under applicable Iowa law. *See Hedlund v. State*, 930 N.W.2d 707, 719 n.8 (Iowa 2019) (unequivocally stating although the analysis has been changed for purposes of trial, the Court "did not disturb [its] prior law as it applies to summary judgment.").

In his brief, Feeback argues that the Iowa Supreme Court has abandoned the *McDonnel Douglas* burden-shifting analysis for ICRA discrimination claims as it applies to summary judgment. This is incorrect. While the Iowa Supreme Court has determined that it will no longer rely on the *McDonnell Douglas* burden-shifting analysis and determining-factor standard when instructing the jury, *see Hawkins v. Grinnell Reg. Med. Ctr.*, 929 N.W.2d 261, 272 (Iowa 2019), the Court has explicitly stated that this analysis has not been disturbed as it applies to summary judgment. *Hedlund*, 930 N.W.2d at 719 n.8. Indeed, in *Hedlund*, the Iowa Supreme Court affirmed the District Court's determination utilizing the *McDonnell Douglas* burden-shifting framework and finding that the plaintiff in that case "failed to present sufficient evidence from which a reasonable jury could infer that defendants' legitimate, nondiscriminatory reason for termination was pretextual and that age discrimination was the real reason for his termination." *Id.* at 720-23.

The Eighth Circuit has specifically recognized that the *McDonnell Douglas* analysis still applies for purposes of summary judgment under the

ICRA. In *Couch v. American Bottling Company*, the Eighth Circuit recognized that while Iowa courts no longer use *McDonnell Douglas* at *trial* in mixed-motive cases, the Iowa Supreme Court has clarified that its prior law on summary judgment has not been disturbed. 955 F.3d 1106, 1110 (8th Cir. 2020) (citing *Hedlund*, 930 N.W.2d at 719 n.8). In this regard, the Eighth Circuit further stated "[w]e trust that the Iowa Supreme Court meant what it said." *Couch*, 955 F.3d at 1110.

Iowa federal district courts have also continued to rely upon the *McDonnell Douglas* analysis for ICRA claims. *See, e.g., Montgomery v. General Atomics Int'l. Servs. Corp.*, No. 3:18-cv-90-JAJ-SBJ, 2019 WL 6771753, at *8 (S.D. Iowa Nov. 27, 2019) (finding defendant employer was entitled to summary judgment on age discrimination claim under the ICRA pursuant to the *McDonnell Douglas* burden-shifting framework); *Brandes v. City of Waterloo, Iowa*, No. 18-CV-2089-KEM, 2020 WL 4209055, at *17 (N.D. Iowa July 22, 2020) (finding defendant employer was entitled to summary judgment as the plaintiff could not establish an age discrimination claim under the ICRA pursuant to the *McDonnell Douglas* burden-shifting framework); *Gearhart v. Mediacom Communications Corp.*, No. 19-CV-56-LRR, 2020 WL 4728817, at *8 (N.D. Iowa Aug. 13, 2020) (finding defendant employer was entitled to summary judgment on claims of sexual orientation

discrimination under the ICRA utilizing the *McDonnell Douglas* burden-shifting framework).

The Iowa Court of Appeals has also recognized that the *McDonnell Douglas* framework should be analyzed when determining a motion for summary judgment. *See Randall v. Roquette Am. Inc.*, No. 19-2111, 2021 WL 210951, at *4 (Iowa Ct. App. Jan. 21, 2021) (describing the *McDonnell Douglas* standard for determining motion for summary judgment on discrimination claim under the ICRA); *Deters v. Int'l. Union, Security, Police and Fire Professionals of Am., Local Union #249*, No. 20-0262, 2020 WL 6157816, at *3 n.4 (Iowa Ct. App. Oct. 21, 2020) ("When plaintiffs rely on indirect evidence of discriminatory motive, they invoke the burden-shifting framework from *McDonnell Douglas"*); *Watkins v. City of Des Moines*, No. 19-1511, 2020 WL 2988546, at *4 (Iowa Ct. App. June 3, 2020) (analyzing claim of race discrimination under the ICRA pursuant to the *McDonnell Douglas* burden-shifting framework).

Notwithstanding, as explained thoroughly below, regardless of the applicable standard, the record supports the District Court's decision that Defendants are entitled to summary judgment on Feeback's age discrimination claim under both standards. *See Hedlund*, 930 N.W.2d at 720 (analyzing summary judgment under both standards); *Watkins*, 2020 WL

2988546, at *4 (analyzing summary judgment under both standards). It is undisputed that Feeback has no direct evidence of discrimination. Under the *McDonnell Douglas* burden-shifting standard, the admissible evidence in the record shows there is not sufficient evidence from which a reasonable jury could infer that Defendants' legitimate, nondiscriminatory reason for Feeback's termination was pretextual and that age discrimination was the real reason for his termination. There is also insufficient evidence for Feeback to withstand summary judgment outside of the *McDonnell Douglas* framework as there is no evidence to show that Feeback's age was a motivating factor in his termination.

B. The District Court Correctly Determined that Feeback's Age Discrimination Claim Fails as a Matter of Law Under the *McDonnell Douglas* Burden-Shifting Framework.

The District Court correctly determined that Feeback's age discrimination claim fails as a matter of law because Feeback was terminated for a legitimate, non-discriminatory reason, and there is no evidence of pretext to suggest that he was fired for any reason relating to his age. Feeback was terminated for sending a text message to his superior, stating "FUCK you !" It is difficult to imagine a more egregious display of disrespect toward a superior. For the reasons explained below, the District Court properly determined that Feeback's age discrimination claim fails as a matter of law.

The ICRA prohibits employers from discharging any employee because of age. Iowa Code § 216.6(1)(a) "The legislature's purpose in banning employment discrimination based on [age] was to prohibit conduct which, had the victim [not been a member of the protected class,] would not have otherwise occurred." *Wyngarden v. State Judicial Branch*, No. 13-0863, 2014 WL 4230192, at *8 (Iowa Ct. App. Aug. 27, 2014) (citing *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 6 (Iowa 2009)) (alteration in original). Here, Feeback would have been terminated regardless of his age based upon his misconduct.

It is uncontested that there is no direct evidence of discriminatory intent on the part of Defendants in this matter. Accordingly, in order for Feeback to establish his age discrimination claim, he must do so under the *McDonnell Douglas* burden-shifting framework. *Hedlund*, 930 N.W.2d at 719. "Under the familiar *McDonnell Douglas* burden-shifting framework, [the employee] must carry the initial burden of establishing a prima facie case of age discrimination." *Id.* at 719. In order to prove a prima facie case, Feeback must establish that (1) he is a member of a protected class; (2) he performed his work satisfactorily; and (3) he had an adverse employment action taken against him. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996).

Assuming Feeback can establish a prima facie case, the burden then shifts to Defendants to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Hedlund*, 930 N.W.2d at 720. Thereafter, the burden shifts back to Feeback to prove that "the proffered reason is a mere pretext for age discrimination." *Id.* Importantly, Feeback at all times retains the ultimate burden to prove that unlawful discrimination was the real reason for his termination. *Id.* Stated otherwise, Feeback must prove that his age "was the real reason for the termination." *Id.* (quoting *DeBoom*, 772 N.W2d at 6-7).

i. Feeback was Terminated for a Legitimate, Non-Discriminatory Reason.

Assuming Feeback could establish his prima facie case, the evidence shows that Feeback was undoubtedly terminated for a legitimate, non-discriminatory reason. As set forth above, on the evening of December 31, 2015, Feeback sent an inappropriate and disrespectful text message to his superior, Troy Mulgrew. Specifically, the text message stated, "FUCK You ! Believe who and what you want." (App. pgs. 179-180; Feeback Depo. 96:22-97:1). Feeback fully admits that he sent this text message to Mulgrew and did not rescind the message. (*Id.*). Feeback sent this text message to Mulgrew after their interaction that occurred earlier that day with regard to Feeback allowing employees' training meetings to be held on the New Year's Eve

holiday. Upon receiving this text, Mulgrew fully believed that Feeback intended to send him that message in reference to the issue relating to the training meetings. (App. p. 274). Upon receipt, Mulgrew sent a screenshot of the inappropriate and disrespectful text message to Feeback's direct supervisor, Todd Carl, as well as to Peter Charboneau, Human Resources Director. (*Id.*). Early the next morning, Charboneau suspended Feeback. (App. pgs. 181-182; Feeback Depo. 98:14-99:19). Shortly thereafter, Charboneau made the decision to terminate Feeback's employment based upon his egregious display of disrespect toward a member of management. (App. p. 280).

Feeback texting his superior "FUCK You !" certainly constitutes a legitimate, non-discriminatory reason for termination. *See Hedlund*, 930 N.W.2d at 720 (granting summary judgment and holding that "negative and disrespectful" messages about Company's leadership team constitutes a legitimate, non-discriminatory reason for termination); *Grutz v. U.S. Bank Nat'l Ass'n*, 695 N.W.2d 505, *2, 2005 WL 291592 (Iowa Ct. App. Feb. 9, 2005) (granting summary judgment and holding that employee's "open display of disrespect" toward management constitutes a legitimate, non-discriminatory reason for termination). Accordingly,

Defendants have met their burden to articulate a legitimate, non-discriminatory reason Feeback's termination.

ii. Feeback Cannot Prove Defendants' Legitimate Reason Pretext for Age Discrimination.

The District Court correctly determined that there is insufficient evidence that Defendants' legitimate reason for termination is a pretext for age discrimination. In order to prove pretext, Feeback must prove that he was not actually terminated for texting "FUCK You !" to his superior but, rather, that his termination was, in fact, motivated by his protected class, i.e. his age. *Merrit v. Iowa Dept. of Transp.*, 2004 WL 434143, at *3 (Iowa Ct. App. 2004) ("A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by [the protected class]."); *Grutz*, 2005 WL 291592, at *3 ("[T]he plaintiff's age must have 'actually played a role in [the employer's decision making] process and had a determinative influence on the outcome.'") (quoting *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 141, 120 S. Ct. 2097, 2105, 147 L.Ed.2d 105, 116 (2000)).

Feeback's primary argument with regard to pretext appears to be that he was allegedly treated differently than younger employees who were not

terminated for swearing in the workplace.[1] This argument is unavailing for several reasons, and the evidence is plainly insufficient to establish pretext. First, Feeback must prove that comparator employees are "similarly-situated." *E.E.O.C. v. Prod. Fabricators, Inc.*, 763 F.3d 963, 970 (8th Cir. 2014). "Whether the employees are 'similarly situated' is a rigorous test because the employees used for comparison must be 'similarly situated in all relevant aspects.'" *Id.* (quoting *Evance v. Trumann Health Servs., LLC*, 719 F.3d 673, 678 (8th Cir. 2013)). Specifically, the comparators "'must have dealt with the same supervisor, have been subject to the same standards and engaged in the same conduct without any mitigating or distinguishing circumstances.'" *Id.* (quoting *Evance*, 719 F.3d at 678). Importantly, it is Feeback's burden to prove the other employees were similarly situated. *Wyngarden v. State*, No. 16-1945, 2018 WL 3471849, at *8 (Iowa Ct. App. July 18, 2018) ("[Plaintiff] had the burden to prove the other employees were similarly situated."); *see also Philip v. Ford Motor Corp.*, 413 F.3d 766, 768 (8th Cir. 2005) (stating that the plaintiff "bears the burden to proffer specific, tangible evidence that

[1] As argued to the District Court, this evidence submitted by Feeback is inadmissible on numerous grounds and, as such, should not have been considered by the District Court on summary judgment. However, even considering this evidence, the District Court correctly found insufficient evidence of pretext.

employees who were similarly situated in all aspects to him received different treatment").

In his brief and supporting affidavit, Feeback summarily sets forth some instances of younger employees swearing in the workplace; however, the record is completely devoid of any evidence establishing that these employees are similarly situated to Feeback. (App. pgs. 405-406). Notably, none of the alleged instances involved employees swearing at Troy Mulgrew, the General Manager to whom Feeback directed his "FUCK You !" text message. Mulgrew testified that "[t]here is some swearing, but when they direct it at you, like this is, that becomes something more than just a casual lingo." (App. 428; Mulgrew Depo. 67:15-17). Mulgrew further testified that he had never had any employee use such language toward him personally before. (App. p. 428; Mulgrew Depo. 67:22-24). Moreover, none of the instances alleged by Feeback are similar because they do not involve an employee directing expletives at or toward a superior, as was the case with Feeback. For example, Feeback alleges that *Superintendent*, Ron Landt, cussed at a *supervisor*, stating things like, "What the fuck are you doing?" and "What the fuck is wrong with you?" (App. pgs. 405-406). Although this language is arguably crude, it is an entirely different circumstance than Feeback's "Fuck You !" text message to his superior, Mulgrew, because a superintendent does not

report to a supervisor; rather, a supervisor reports to a superintendent. (App. pgs. 117-118; Feeback Depo. 34:21-35:7). In short, none of the instances alleged by Feeback constitute similar circumstances because none of them entail a subordinate directing obscenities at or toward their superior, let alone to Mulgrew. (App. pgs. 405-406); *see Haggerty v. St. Vincent Carmel Hosp.*, No. 1:17-cv-04454, 2019 WL 2476682, at *4 (S.D. Ind. June 13, 2019) (holding that similarly situated employees must have dealt with the same supervisor because "[d]ifferent decisionmakers may rely on different factors when deciding whether, and how severely, to discipline an employee" (quoting *Ellis v. UPS, Inc.*, 523 F.3d 823, 826 (7th Cir. 2008))). As such, Feeback cannot establish that any of the younger employees who allegedly swore in the workplace were similarly situated to him because there is no evidence that they dealt with the same supervisor (Troy Mulgrew) or engaged in the same conduct as Feeback without any mitigating or distinguishing circumstances. That is, they did not swear <u>at</u> their superior which, as explained by Mulgrew, is far more egregious than simply swearing in the workplace. (App. p. 428; Mulgrew Depo. 67:15-17); *see also Hausler v. Gen. Elec. Co.*, 134 Fed. App'x 890, 893 (6th Cir. 2005) (granting summary judgment on the pretext issue and holding that "rampant use of profanity in

the workplace" by other employees was not of comparable seriousness to the plaintiff, who stated, "Fuck you. That's bullshit," directly to his supervisor).

Feeback also points to 73 younger employees and makes a conclusionary statement that he "heard" them swear "at or in front of superiors." (App. pgs. 406-409). However, Feeback utterly fails to meet his burden of proffering specific, tangible evidence to prove that these employees were similarly situated to him in all relevant aspects. Feeback's conclusory and self-serving allegations in this regard are devoid of any specific factual allegations and, as such, cannot withstand summary judgment. *Allen v. Entergy Corp.*, 181 F.3d 902, 906 (8th Cir. 1999). For example, there is absolutely no evidence to indicate when these employees allegedly swore "at or in front of" a superior. Moreover, there is no evidence with respect to what job titles these individuals held, i.e. whether they were also superintendents like Feeback. Furthermore, there is no evidence regarding what obscenities these employees allegedly used, and there is no way to discern which employees allegedly swore <u>at</u> their superior versus which employees simply swore in front of their superior. There are no specifics with regard to the circumstances of these employees' alleged use of swear words. Finally, and perhaps most importantly, the record is completely devoid of evidence to demonstrate the superior at or in front of whom these employees allegedly

swore. Again, there is absolutely no evidence proffered by Feeback to suggest that these employees swore "at or in front of" Mulgrew. As discussed above, Feeback engaged in an egregious act of insubordination by sending the "FUCK You !" text message directly to his superior, Mulgrew. *See Hausler*, 134 Fed. App'x at 893 (granting summary judgment on pretext issue because plaintiff failed to show that co-workers' use of profanity in the workplace was of comparable seriousness to him stating, "Fuck you. That's bullshit," directly to his supervisor). Accordingly, Feeback cannot create a genuine issue of material fact on the pretext issue by vaguely asserting other employees' names and merely stating that they swore at work.

Finally, Feeback attempts to prove pretext by contending that the Company's reason for his termination is unworthy of credence. Feeback contends that, because he advised Pete Charboneau that the "FUCK You !" text message was not intended for Mulgrew, the Company did not in good faith conclude that he had, in fact, intended to text Mulgrew. This argument by Feeback completely ignores the evidence in this case as well as the case law on this issue. The evidence demonstrates that Defendants reasonably and in good faith concluded that Feeback texted "FUCK You !" directly to his superior and, accordingly, was terminated for that conduct.

Upon receiving the inappropriate and disrespectful text message, Mulgrew sent a screenshot to Carl and Charboneau. (App. p. 274). As the Human Resources Director, Charboneau spoke to both Mulgrew and Carl about the incident. (App. p. 280). Charboneau also spoke to Feeback about the incident. (*Id.*). Although Feeback advised Charboneau that he had unintentionally sent the text to Mulgrew, Feeback admitted to Charboneau that he had indeed realized that he had sent the text, but did not try to rescind it or send a follow-up message to Mulgrew to explain or apologize for the mistake. (App. pgs. 180-182; Feeback Depo. 97:6-99:11). Feeback also admitted that he never sent the text message to its alleged intended recipient. (App. pgs. 180-182; Feeback Depo. 97:18-98:2). Based upon his conversations with Mulgrew, Carl and Feeback, Charboneau believed and concluded that the text message from Feeback was in reference to and based on the disagreement that had occurred earlier in the day between Mulgrew and Feeback with regard to Feeback holding the safety training meeting on New Year's Eve. (App. p. 421; Charboneau Depo. 57:5-58:2). The totality of the evidence and the circumstances certainly demonstrate that it was reasonable and in good faith for Charboneau to conclude that Feeback directly texted Mulgrew, "FUCK You ! Believe who and what you want."

The case law on this issue is clear that it is insufficient as a matter of law for Feeback to simply disagree with the Company's termination decision and to allege that the Company was mistaken in its conclusion. The "critical inquiry in discrimination cases like this one is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge." *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1002 (8th Cir. 2012). It is insufficient as a matter of law for Feeback to simply claim that the Company made a mistaken or unreasonable decision to terminate him. *See id.* at 1003. Charboneau had no obligation to do anything more than make a reasonable conclusion based upon his conversations with Mulgrew, Carl, and Feeback, and that is exactly what he did. Feeback has proffered no evidence to the contrary other than his own subjective statement that he did not intend to send the text to Mulgrew. *See Hausler*, 134 Fed. App'x at 893 (affirming summary judgment on the pretext issue and holding that employer was not obligated to perform a typical investigation prior to termination where the employee stated, "Fuck you. That's bullshit," directly to his supervisor); *see also McCullough v. Univ. of Ark. for Med. Sciences*, 559 F.3d 855, 861-62 (8th Cir. 2009) (granting summary judgment and holding that employee's disagreement with a decisionmaker's conclusion on

the credibility of the employee's story did not raise a reasonable inference that the termination was motivated by unlawful reasons); *Merrit*, 682 N.W.2d 82, at *3 ("A plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reasons, at least not where . . . the reason is one that might motivate a reasonable employer." (ellipses in original)). As discussed, Feeback texting "FUCK You !" directly to his superior is undoubtedly a reasonable and legitimate motivation to terminate his employment.

For these reasons, Plaintiff plainly fails to satisfy his burden to prove that his termination was a mere pretext for age discrimination. There is simply no evidence of age discrimination in this case. Feeback does not allege that anyone ever made age-related comments to him to suggest that anyone harbored any age-related animus against him. In addition, all of the management employees at issue in this case were well-within the age-protected class themselves. Mulgrew was 51 years old at the time of Feeback's termination, (App. p 274); Carl was 47 years old at the time of Feeback's termination, (App. p. 315; Carl Depo. 5:11); and Charboneau was 50 years old at the time of Feeback's termination, (App. p. 281). All of these management employees remain employed with the Company to date. Moreover, the employee who replaced Feeback in the Superintendent role was

50 years old at the time, and he likewise remains employed in that role to date. (App. p. 274). Additionally, the Company currently employs over 100 individuals who are over the age of 60 years old at the Marshalltown plant. (*Id.*). Again, there is simply no evidence that Feeback's age played any role in his termination, and his age discrimination claim fails as a matter of law.

C. Feeback's Age Discrimination Claim Fails as a Matter of Law Under the Motivating Factor Analysis.

For similar reasons to Defendants' pretext argument above, there is insufficient evidence for Feeback to withstand summary judgment outside of the *McDonnell Douglas* framework. Feeback points to no age-related comments showing animus toward age. Rather, the evidence undoubtedly shows that Feeback egregiously texted his superior "FUCK YOU !" and was terminated for that reason. Although Feeback alleges other employees used profanity, the record is completely devoid of evidence of any other employees, including those outside of Feeback's protected class, using profanity of comparable seriousness to Feeback's text to Mulgrew. Furthermore, there is absolutely no evidence proffered by Feeback to suggest that these employees swore "at or in front of" Mulgrew. There is simply not enough evidence to allow a reasonable jury to infer Feeback was terminated "because of" his age.

Similar facts to this matter have been previously considered by a court wherein the court determined that the plaintiff failed to prove age

discrimination under both the *McDonnell Douglas* framework and the mixed-motive analysis. In *Hausler v. General Electric Company*, the plaintiff employee was terminated after telling his superior, "Fuck you. That's bullshit." *Hausler v. Gen. Elec. Co.*, No. C2-02-754, 2003 WL 25734285, at *8 (S.D. Ohio Nov. 20, 2003), *aff'd*, 134 Fed. App'x 890 (6th Cir. 2005). The employee alleged that he was terminated because of his age and argued that profanity was rampant throughout the workplace. *Id.* He alleged that other employees younger than him had used profanity in the workplace and had not been terminated, including the use of the cuss words "fuck" and "bullshit." *Id.* However, like Feeback in this case, the plaintiff failed to present any evidence of any other employees directly telling a superior "fuck you" or the use of any profanity of comparable seriousness to the plaintiff telling his superior, "Fuck you. That's bullshit." *Id.* The plaintiff in *Hausler* additionally alleged that his superiors made comments showing age-based animus—evidence that is completely devoid from this case as Feeback has no allegations of age-related comments. *Id.* The court analyzed the case under both the *McDonnell Douglas* framework and the mixed-motive or motivating factor analysis and found the employer was entitled to summary judgment under either analysis. *Id.* The court concluded that the plaintiff "failed to produce any evidence from which a juror could reasonably find that [the

employee's] age was a motivating factor in his termination." *Id.* at *15. The Sixth Circuit affirmed the district court's decision. *Hausler*, 134 Fed. App'x at 893.

As with the plaintiff in *Hausler*, Feeback has failed to produce any evidence from which a juror could reasonably find that his age was a motivating factor in his termination. Moreover, the evidence undeniably shows that Feeback would have been terminated for his actions regardless of his age.[2] As a result, Feeback's age discrimination claim also fails under the motivating-factor analysis.

Drawing all inferences in Feeback's favor, the record is clear that Feeback has failed to present sufficient evidence from which a reasonable jury could infer that his age played any role in his termination. In order to survive summary judgment, Feeback "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5). Feeback fails to present such specific facts beyond his unsupported generalities. *See Hedlund*, 930

[2] In his brief, Feeback claims that Defendants failed to allege the "same decision" affirmative defense. This allegation is irrelevant to this appeal. Defendants did not argue the "same decision" defense on their motion for summary judgment because, as explained in Section IA of this Brief, pursuant to *Hedlund*, 930 N.W.2d at 719 n.8, *McDonnell Douglas* is the standard to be applied by the District Court. Regardless, Feeback's age discrimination claim fails under either analysis as the evidence shows that Feeback cannot prove age was a motiving factor in his termination.

N.W.2d at 723 ("Summary judgment is not a dress rehearsal or practice run; 'it is the put up or shut up moment in a lawsuit ….'") (quoting *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 808 (Iowa 2019)). Accordingly, Feeback's age discrimination claim fails as a matter of law.

D. The District Court Correctly Concluded Evidence Submitted by Feeback to be Inadmissible.

The District Court correctly found that evidence submitted by Feeback should not be considered as it is inadmissible evidence. In opposition to the Defendants' motion for summary judgment, Feeback submitted an affidavit that contained numerous allegations that failed to comply with Iowa Rule of Civil Procedure 1.981(5), which requires that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Feeback's affidavit contains numerous allegations that would be inadmissible in evidence, as those allegations are based upon speculation, lack foundation, constitute inadmissible hearsay, are conclusory, and/or are legal conclusions.

The Iowa Supreme Court is clear that "the court should only consider 'such facts as would be admissible in evidence' when considering the affidavits supporting and opposing summary judgment." *Pitts*, 818 N.W.2d

at 96 (quoting Iowa R. Civ. P. 1.981(5)). Furthermore, it is "well established that '[s]peculation is not sufficient to generate a genuine issue of fact'" in opposition to a summary judgment motion. *Matter of Estate of Franken*, 944 N.W.2d at 858 (quoting *Nelson*, 867 N.W.2d at 7). Additionally, inadmissible hearsay evidence cannot be used to defeat summary judgment. *See Pitts*, 818 N.W.2d at 96 (stating that court should only consider admissible evidence in evaluating summary judgment); Iowa R. Evid. 5.801. Moreover, conclusory statements and legal conclusions may not be relied upon in opposition to summary judgment. *See Schulte*, 2019 N.W.2d at 500 (stating it is well-settled that "a party must plead ultimate facts [by affidavits or otherwise] and cannot rely upon conclusions themselves" in resisting summary judgment); *see also Hudson*, 2009 WL 139501, at *4 ("The bare conclusory statements contained in [Plaintiff's] resistance and statement of disputed facts are not sufficient to defeat the motion for summary judgment."); *Met-Coil Systems Corp. v. Columbia Cas. Co.*, 524 N.W.2d 650, 659 (Iowa 1994) (finding conclusory legal conclusions insufficient to prevent summary judgment) (citing *Byker v. Rice*, 360 N.W.2d 572, 574 (Iowa Ct. App. 1984)). *See also Bradshaw v. Wakonda Club*, 476 N.W.2d 743, 745 (Iowa Ct. App. 1991) ("The resisting party may not rely solely on legal conclusions to show there is a genuine issue of material fact justifying denial of summary judgment.").

The District Court determined that Feeback's allegations of older employees' treatment and separations from employment were inadmissible as the allegations constituted inadmissible hearsay and because Feeback lacked personal knowledge of such evidence. This is a correct conclusion. Feeback specifically alleged that Swift Pork takes adverse actions against older individuals by attempting to submit allegations that constitute inadmissible hearsay, are speculative, conclusory, lack foundation, and constitute legal conclusions. (App. pgs. 404-405). While Feeback attempted to provide specific names of individuals to support his conclusory allegation that Swift Pork takes adverse actions against older employees, he failed to provide any foundation as to his personal knowledge of these individuals or specific circumstances of their alleged adverse actions. Moreover, Feeback's claims in his affidavit are directly contrary to his deposition testimony and accordingly are not admissible as evidence.

The Iowa Supreme Court has adopted the "contradictory affidavit rule" wherein the Court will "reject an affidavit that directly contradicts prior testimony unless the affiant provides a reasonable explanation for the apparent contradiction." *Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 339 (Iowa 2020). "To invoke the contradictory affidavit rule, 'the inconsistency between a party's deposition testimony and subsequent

affidavit must be clear and unambiguous.'" *Id.* (quoting *Estate of Gray ex rel. Gray v. Baldi*, 880 N.W.2d 451, 464 (Iowa 2016)).

The inconsistencies in this matter between Feeback's deposition testimony and his affidavit are clear and unambiguous. In his deposition, Feeback admitted that he had no personal knowledge relating to the alleged adverse actions of other employees, including those individuals named in the subsections of Paragraph 19 of his Affidavit. (*See* App. pgs. 187-188; Feeback Depo., 104:13-105:14 (Vern Casselman); App. pgs. 188-189; Feeback Depo. 105:15-106:19 (Charlie Freese); App. pgs. 189-190; Feeback Depo. 106:23-107:21 (Elmer Freese); App. pgs. 190-192; Feeback Depo. 107:23-109:6 (Dean Welton); App. p. 192; Feeback Depo. 109:8-18 (Anna Welton); App. pgs. 192-193; Feeback Depo. 109:19-110:10 (Al Graun); App. pgs. 170-172; Feeback Depo. 87:20-89:2 (Doug Ridout); App. p. 172; Feeback Depo. 89:3-25 (Cheryl Hughlette)). At the time of his deposition, he could not remember any additional individuals. (App. p. 193; Feeback Depo. 110:11-12). However, in his affidavit he claims that the allegations contained therein are based on his personal knowledge. This is directly contrary to his deposition testimony wherein he fully acknowledged he had no personal knowledge relating to the separation of employment of the named individuals.

Accordingly, the contradictory affidavit rule applies here and Feeback's affidavit should not be considered.

Furthermore, although Feeback argues that he was a "supervisor" and would have personal knowledge of management decisions, there is no evidence to support this argument. (Appellant's Proof Brief p. 46). There is no evidence that Feeback supervised any of these employees. No evidence that he was involved in decisions relating to their employment. No evidence he discussed the decisions to end their employment with the decision makers. No evidence of who the decision maker was in the adverse actions of these employees. Moreover, as noted above, Feeback admitted in his deposition that he had no personal knowledge relating to the separation of employment of these individuals. (*See* App. pgs. 187-188; Feeback Depo., 104:13-105:14 (Vern Casselman); App. pgs. 188-189; Feeback Depo. 105:15-106:19 (Charlie Freese); App. pgs. 189-190; Feeback Depo. 106:23-107:21 (Elmer Freese); App. pgs. 190-192; Feeback Depo. 107:23-109:6 (Dean Welton); App. p. 192; Feeback Depo. 109:8-18 (Anna Welton); App. pgs. 192-193; Feeback Depo. 109:19-110:10 (Al Graun); App. pgs. 170-172; Feeback Depo. 87:20-89:2 (Doug Ridout); App. p. 172; Feeback Depo. 89:3-25 (Cheryl Hughlette)). Feeback plainly failed to provide any foundation in his affidavit

as to his personal knowledge of such actions. With no evidence of personal knowledge, these allegations are sheer speculation.

Moreover, his allegations undoubtedly constitute inadmissible hearsay. *See* Iowa R. Evid. 5.801. These allegations were offered by Feeback for the truth of the matter asserted, that these individuals were unlawfully discriminated against because of their age, and do not fall under any exceptions or exclusions to the hearsay rule. As a result, these statements are inadmissible in evidence and the District Court correctly determined that they may not be considered when determining Defendants' motion for summary judgment. *See, e.g., Wusk v. Evangelical Retirement Homes, Inc.*, No. 15-0166, 876 N.W.2d 814, 2015 WL 9450914, at *4 (Iowa Ct. App. Dec. 23, 2015) (affirming district court's dismissal of evidence and finding such evidence could not be considered at summary judgment because it was not supported with affidavits of witnesses or otherwise outside of the plaintiff's own testimony and constituted inadmissible hearsay); *Ashley v. Southern Tool Inc.*, 201 F. Supp. 2d 1158, 1163-64 (N.D. Ala. 2002) (excluding hearsay evidence in an age discrimination case of an alleged conversation wherein another employee told the plaintiff that there is a list of names of people targeted for termination as a result of older age) (citing *Macuba v. Deboer*, 193 F.3d 1316, 1322-23 (11th Cir. 1999)); *Harrison v. McDonald's Corp.*,

411 F. Supp. 2d 862, 865-67 (S.D. Ohio 2005) (excluding as inadmissible hearsay evidence affidavit allegations that other employees had complained about pay shortages rejecting Plaintiff's argument that it should be admissible because the complaints were personally observed by the plaintiff stating "[t]he mere fact that he was present when the complaints were made does not make the statements admissible. This reasoning, carried to its logical conclusion, would completely swallow the hearsay rule.").

Accordingly, Feeback's allegations that these individuals were subjected to alleged unlawful activity are inadmissible hearsay, sheer speculation, conclusory, and constitute legal conclusions. Therefore, because these allegations are inadmissible in evidence, the District Court correctly concluded that they may not be considered for purposes of summary judgment. Moreover, Feeback's affidavit is contrary to his deposition testimony and accordingly should not be considered.

II. The District Court Correctly Determined that Feeback's Harassment Claim Fails as a Matter of Law as Feeback Failed to Show that the Alleged Harassment was Based on his Age and Failed to Show a Hostile Work Environment.

A. Feeback Cannot Establish that He was Subjected to Harassment Based on His Age.

The District Court correctly found that Feeback failed to show that the alleged harassment were motivated by his age. Indeed, in this case, Feeback

does not allege a single instance of allegedly harassing conduct that even remotely has anything to do with his age. To survive summary judgment and pursue this action under the ICRA, Feeback must prove that the harassment was motivated by his age. *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 745 (2003). The District Court correctly found that Feeback cannot do so.

For purposes of Feeback's harassment claim, the allegedly harassing conduct and statements that were not based on Feeback's age should not be considered. *Rickard v. Swedish Match North Am., Inc.*, 2013 WL 12099414, *5 (E.D. Ark. 2013) (refusing to conduct hostile work environment analysis with respect to allegedly harassing statements that were not based on plaintiff's age); *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 654 (5th Cir. 2012) (granting summary judgment on harassment claim and refusing to "consider the various incidents of harassment not based on race"); *Dexter v. Amedisys Home Health, Inc. of Alabama*, 956 F. Supp. 2d 1280, 1289 (N.D. Ala. 2013) (refusing to consider allegedly harassing conduct and statements unrelated to age because only conduct based on a protected category may be considered in the hostile work environment analysis); *Wells v. Gates*, 336 Fed App'x 378, 387 (4th Cir. 2009) (holding that there was no genuine issue of material fact regarding whether age was a factor in the alleged harassment

because there was no evidence of age-related comments or any similarly-situated younger employees who were treated more favorably). As stated, there is not a single allegation of any age-related statements at issue in this case. Therefore, none of the allegedly harassing conduct or statements should be considered and, accordingly, Feeback cannot maintain his harassment claim under § 216.6.

It is Feeback's burden to prove some link between the alleged harassment and his age in order to maintain his claim. *Rickard*, 2013 WL 12099414 at *5. Feeback fully admits that the only reason that he thought the alleged harassment was based on his age was because it was his opinion that the Company had a history of discriminating against other, older employees. (App. pgs. 194-195; Feeback Depo. 111:22-112:11). As set forth fully above, Feeback's allegations relating to these "campaigns of harassment" against other, older employees are inadmissible for numerous reasons and, therefore, should not be considered by the Court. Because Feeback himself admits that this inadmissible evidence provides the only link between the alleged harassment and his age, Feeback's harassment claim fails as a matter of law because it is not based on a protected characteristic as required by § 216.6.

Finally, even if the Court were to consider Feeback's allegations with regard to the "campaigns of harassment" against other, older employees, this

evidence is still insufficient to establish that Feeback was subjected to allegedly harassing conduct based on his age. That is, Feeback alleges only his subjective opinion that these older employees were subjected to "campaigns of harassment" and terminated or demoted with no further details or specifics. Feeback's own belief, without more, is insufficient to survive summary judgment. *Rickard*, 2013 WL 12099414, at *5 (citing *Moody v. St. Charles Cnty.*, 23 F.3d 1410, 1412 (8th Cir. 1994) (requiring more than plaintiff's own "naked assertions" and stating that plaintiff "must substantiate his allegations with sufficient probative evidence" based on "more than mere speculation [and] conjecture")); *Allen*, 181 F.3d at 906 (holding that plaintiff cannot rely upon allegations made in conclusory affidavit devoid of any specific factual allegations). In fact, Feeback admitted during his deposition that he does not have any personal knowledge regarding the circumstances of these employees' alleged harassment or their terminations/demotions. (App. pgs. 169-173; Feeback Depo. 86:22-90:16). In sum, there is simply no evidence regarding why these employees were terminated/demoted and certainly no evidence that it had anything to do with their age as opposed to some other legitimate, non-discriminatory reasons. *See Rickard*, 2013 WL 12099414, at *6 (rejecting plaintiff's arguments with regard to other, older employees being "forced out" because there was no factual evidence to

support the belief that the company targeted employees based on age as opposed to, for example, job performance). Furthermore, even if there were sufficient evidence to show that the Company had a history of discriminating against other, older employees, there is no evidence that Feeback himself was targeted based on his age as opposed to other legitimate motivations. *See id.* (granting summary judgment and stating that plaintiff failed to produce evidence that the company adhered to a practice of "forcing out" older employees specifically with respect to the plaintiff). As stated numerous times over, there is absolutely zero evidence of age-related harassment in this case and, therefore, Feeback's claim under § 216.6 fails as a matter of law.

B. Feeback Cannot Establish that the Alleged Harassment was Sufficiently Severe or Pervasive to Amount to Actionable Harassment.

The District Court also correctly found that the evidence is insufficient as a matter of law to constitute actionable harassment. Feeback alleges very few instances of allegedly harassing conduct. First, Feeback alleges that he was "harassed" because Carl blamed him on two occasions for the blatant misconduct of Feeback's direct reports. (App. p. 148; Feeback Depo. 65:8-24). He contends that—in late 2015—Carl blamed him for his direct report who was sexually harassing a female employee on the production floor. (App. pgs. 148-150; Feeback Depo. 65:25-67:25). According to Feeback, Carl

blamed him by telling him that Plaintiff was "asleep at the wheel" and that "the cut floor was out of control." (App. pgs. 149-150; Feeback Depo. 66:14-67:3). Prior to Carl bringing it to his attention, Feeback was unaware of the fact that his direct report was sexually harassing a female employee at work. (App. p. 150; Feeback Depo. 67:4-12). This employee was disciplined for sexual harassment. (App. p. 152; Feeback Depo. 69:18-23). The only other instance of misconduct for which Feeback was blamed in late 2015 was with respect to his direct report drinking on site during working hours. (App. p. 151; Feeback Depo. 68:1-19). Feeback again had no knowledge that this conduct was occurring until it was brought to his attention after the fact. (App. pgs. 151-152; Feeback Depo. 68:20-69:6). This employee was disciplined for drinking on the job and, subsequently, was terminated for the same conduct. (App. pgs. 152-153; Feeback Depo. 69:24-70:18). According to Feeback, Carl blamed him for this incident because he again told Feeback that he was "asleep at the wheel" and that "the cut floor was out of control." (App. pgs. 153-154; Feeback Depo. 70:19-71:8). These are the only two instances of misconduct for which Feeback was blamed. (App. p. 154; Feeback Depo. 71:6-8). Feeback fully admits that in these instances Carl was merely criticizing his management skills. (App. p. 150; Feeback Depo. 67:16-25).

"Blaming" Feeback and criticizing him of his management skills relating to the blatant misconduct of his direct reports cannot possibly constitute actionable harassment as it is simply related to Feeback failing to do his job.[3] In fact, the Iowa Supreme Court has clarified that criticism and scrutiny related to an employee's job performance is not the type of conduct that is actionable via a hostile work environment claim. *Farmland Foods, Inc.*, 672 N.W.2d at 745 ("[O]ccasional criticism of an employee's work performance by a supervisor, absent references or another nexus to [a protected class], does not amount to [discriminatory] harassment." (citing *Freeman v. Kansas*, 128 F. Supp. 2d 1311, 1320 (D. Kan 2001) (a supervisor may scold and yell at an employee without violating Title VII))); *Rickard*, 2013 WL12099414, at * 6 (distinguishing between age-related conduct and unactionable "personally belittling" reprimands and criticism "that were more closely tied to 'performance difficulties'" (quoting *Casey v. City of St. Louis*, 212 F.3d 385, 385 (8th Cir. 2000))).

Feeback alleges only one additional instance of "harassment" by Carl who on one occasion hung up the phone on Feeback when they were discussing a business decision. (App. pgs. 160-163; Feeback Depo. 77:12-

[3] As set forth above, these instances have absolutely nothing to do with Feeback's age and, therefore, should not even be considered by the Court in analyzing Feeback's harassment claim.

80:4). Feeback believed that Carl hung up on him because Carl and the product manager had a difference of opinion and disagreed with one another regarding the best business decision to make under the circumstances. (App. pgs. 161-162; Feeback Depo. 78:19-79:3). Carl thought that the issue should be handled differently from how Feeback communicated. (*Id.*). Although Feeback somehow characterizes being hung up on as "harassment," he admits that Carl subjected at least one other employee—Mike Briney—to similar conduct, i.e. getting angry and reversing their business decisions. (App. pgs. 163-165; Feeback Depo. 80:5-82:7). Notably, according to Feeback, Briney is only 29 years old and yet was subjected to this same conduct by Carl. (App. p. 406). As such, Carl hanging up on Feeback cannot constitute harassment based on age and should not be considered by the Court.

Next, Feeback alleges that he was "harassed" by Mulgrew on three occasions. The first was in late 2015 when Mulgrew stated to Feeback in the bathroom, "You're in here F'ing around." (App. pgs. 154-155; Feeback Depo. 71:12-72:10). Feeback alleges nothing further in this regard, and it is difficult to discern how this comment could possibly be considered harassing, much less with any correlation to Feeback's age. The second instance of alleged harassment by Mulgrew was on a pheasant hunting trip where Mulgrew apparently encouraged Feeback to "F" a woman who was also on

the trip. (App. pgs. 156-157; Feeback Depo. 73:22-74:25). Finally, Feeback contends that Mulgrew "harassed" him in early 2008 when Mulgrew was giving a gentleman a tour of the facility.[4] (App. pgs. 159-160; Feeback Depo. 76:8-77:11). Mulgrew introduced the man to Feeback and allegedly told Feeback that the man was taking Feeback's place. (*Id.*). Feeback fully admits that he has "no idea" what Mulgrew meant by this comment. (*Id.*). Moreover, the only reason that Feeback thought the comment was harassing was because it never happened; that is, the gentleman was hired into the maintenance department and did not take Feeback's place. (*Id.*).

Not only should all of Feeback's allegations of harassment be disregarded by the Court because they clearly have nothing to do with age, but these are precisely the types of comments that do not constitute severe or pervasive harassment as a matter of law. Although some of the comments may have been "vulgar, inappropriate, and unprofessional," there is no evidence that they were motivated by age, and they are far more akin to "'simple teasing, offhand comments, and isolated incidents' than severe and pervasive harassment." *Rickard*, 2013 WL 12099414, * 7 (citing *Moody*, 23

[4] Defendants submit that the Court should not consider this allegation of harassment as it allegedly took place in 2008, approximately 7 years prior to the remainder of Feeback's allegations and well outside of the statutory time period.

F.3d at 1412) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)).

As Feeback acknowledges in his brief, courts consider the following factors in analyzing whether the conduct was severe or pervasive: (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 unreasonably interfered with the employee's job performance. *Farmland Foods, Inc.*, 672 N.W.2d at 744-45. None of these factors suggest that Feeback was subjected to severe or pervasive harassment in this case. Feeback alleges only the foregoing weak incidents of "harassment" that were neither physically threatening nor humiliating, and there is certainly no evidence that these isolated statements interfered with Feeback's ability to do his job or affected the terms and conditions of his employment. *See, e.g.*, *Rickard*, 2013 WL 12099414, at *7 (citing *Casey*, 212 F.3d at 385 ("finding insufficient evidence where manager engaged in 'constant, personally belittling criticism,' accompanied by occasional reference to 'old lady'")); *Farmland Foods, Inc.*, 672 N.W.2d at 745-46 (finding insufficient evidence where supervisors overly criticized and

closely supervised employee's work activities).[5] Consequently, the District Court correctly concluded that Feeback cannot establish that he suffered actionable harassment based on his age.

C. Defendants Can Establish the Faragher-Ellerth Defense and Avoid Liability.

Even if the Court concludes that Feeback can somehow prove that he suffered actionable harassment, Defendants are entitled to assert the *Faragher-Ellerth* defense. *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 571 (Iowa 2017).[6] When the alleged harassment is

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[5] Defendants note that the case cited by Feeback—*Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446 (Iowa 2017)—is not a summary judgment case; rather, it is a review of a damages award by the Dubuque Human Rights Commission, which requires a different standard of review than summary judgment. In any event, the evidence in *Simon Seeding* is far more severe than at issue in this case. In *Simon Seeding*, there was evidence that the employee's supervisor called him racial epithets two to three times per week over the course of a two month period. *Id.* at 470. In this case, there is zero evidence of any comments based upon Feeback's protected class, i.e. his age.

[6] Before the District Court, Feeback contended that the *Faragher Ellerth* affirmative defense is not available because he suffered an adverse employment action (i.e. termination). However, the record clearly shows that Feeback's termination was not at all linked to the alleged harassment (i.e., he was terminated after he texted his superior "FUCK YOU !") and, therefore, does not prevent Defendants from asserting the affirmative defense. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884 (8th Cir. 1998) (noting that no affirmative defense is available when the supervisor's *harassment culminates* in a tangible employment action). In order to bar the affirmative defense, the supervisor's harassment must precipitate the tangible employment action. *See Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 332-33 (4th Cir. 2012) (noting that there must be a nexus between the harassment and the tangible

perpetrated by a supervisory employee, the employer may avoid liability by asserting the *Faragher-Ellerth* affirmative defense by showing that (1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer or to otherwise avoid harm. *Haskenhoff*, 897 N.W.2d at 571.

Here, Defendants clearly took reasonable care to prevent any harassing behavior. Feeback fully admits that the Company maintains an anti-harassment and anti-discrimination policy that prohibits discrimination and harassment based on age and other characteristics protected by federal and state law. The Company's policy specifically includes reporting procedures for employees who believe that they have been subjected to discrimination or harassment. Feeback fully admits that he was aware of these reporting procedures and knew that he could have reported the alleged harassment through various avenues, including to Human Resources or through the hotline. *Weger v. City of Ladue*, 500 F.3d 710, 719-20 (8th Cir. 2007) (clarifying that an employer exercises reasonable care to prevent harassment where the anti-harassment policy is distributed to employees, and the

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employment action) (citing *Lissau v. Southern Food Servs.*, 159 F.3d 177, 182 (4th Cir. 1998) ("Tangible employment actions, if not taken for discriminatory reasons, do not vitiate the affirmative defense.")).

complaint procedure identifies various company officials to whom to report harassment). Notwithstanding the fact that Feeback was fully aware of the Company's written policy and reporting procedures, he readily admits that he never reported the alleged harassing conduct to Human Resources or anyone else. Feeback's failure to report the complained-of conduct is fatal to his hostile work environment claim. *See id.* at 724 (holding that employee's failure to use the complaint procedure provided by employer is generally sufficient to satisfy company's burden to assert the *Faragher-Ellerth* defense); *Crawford v. BNSF Ry. Co.*, 665 F.3d 978, 984 (8th Cir. 2012) (acknowledging that employee has an obligation to invoke reporting procedures outlined by employer); *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002) (holding that a reasonable employee has an obligation to give the employer a chance to work problems out).

Moreover, "an employee's subjective fears of confrontation, unpleasantness, or retaliation do not alleviate" the employee's obligation to report the alleged harassment. *Weger*, 500 F.3d at 725. Instead, the employee must present a "truly credible threat of retaliation." *Id.* Here, any argument by Feeback that he believed he would have been subjected to retaliation is insufficient as a matter of law to alleviate his duty to report. Consequently, the Company has satisfied its burden to prove its entitlement to the *Faragher-*

Ellerth defense and, therefore, Feeback's harassment claim fails as a matter of law.

Under Iowa law, the employee may alternatively establish employer liability by showing that the employer "knew or should have known of the harassment and failed to take proper remedial action." *Id.* at 571, 575. For reasons similar to those stated above with regard to the Company's *Faragher-Ellerth* defense, Feeback cannot establish that the Company knew or should have known about the alleged harassment. Again, Feeback fully admits that he never reported any allegedly harassing conduct to anyone at the Company. Accordingly, there is simply no evidence that the Company knew or should have known of the alleged harassment and failed to take proper remedial action. Feeback's harassment claim fails as a matter of law

III. The District Court Correctly Determined that Defendants are Entitled to Summary Judgment on Feeback's Wrongful Termination Claim.

The District Court correctly concluded that "[t]here is no temporal connection between Mr. Feeback's safety complaints (the last of which was made seven months prior to discharge) and his termination from employment." (App. p. 655). Defendants argued to the District Court that Feeback's alleged activity does not amount to a defined and well-recognized public policy and that Carl and Mulgrew cannot be held individually liable for

wrongful termination. Defendants maintain these arguments but agree with the District Court that the Court need not reach the determination of whether Mulgrew and Carl are individually liable under the tort of wrongful discharge or even if Feeback's comments are clearly defined and well-recognized public policy because Feeback simply cannot show that his comments about the trolleys were the reason for his discharge. *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 110 (Iowa 2011) (concluding that an at-will employee must show that his engagement in protected activity "was the reason the employer discharged the employee"). The causation requirement in a wrongful termination in violation of public policy claim "is a heightened determining factor standard rather than a lower motivating factor standard ordinarily utilized in civil rights claims." *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 893 (Iowa 2015). This causation standard is "high." *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 301 (Iowa 1998).

First, the lack of temporal proximity destroys Feeback's claim that his comments were the reason he was terminated. The District Court correctly noted that there is no dispute that Feeback made safety complaints to Carl *several* (at least seven) months prior to his termination. (App. pgs. 654-655; App. p. 141; Feeback Depo. 58:4-23; App. p. 403). *See Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 203 (Iowa 1997) (concluding one month

between grievance and subsequent termination could not establish a jury question); *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002) (concluding two months between the complaint and plaintiff's termination "so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in favor on the matter of causal link"); *Tyler v. Univ. of Ark. Bd. of Trustees*, 628 F.3d 980, 986 (8th Cir. 2011); *Kuchenreuther v. Advanced Drainage Sys., Inc.*, No. C 12-3088-MWB, 2014 WL 414294, at *5 (N.D. Iowa Feb. 4, 2014) (stating termination was over nine months from complaint and temporal proximity provides no inference of retaliatory intent); *Horn v. Airway Servs.*, Inc., No. 18-CV-3053 CJW-MAR, 2020 WL 420834, at *14 (N.D. Iowa Jan. 27, 2020) (concluding causation could not be inferred in Iowa wrongful termination claim from seven weeks); *Hulme v. Barrett*, 480 N.W.2d 40, 43 (Iowa 1992); *Newkirk v. State*, 669 N.W.2d 262, 2003 WL 21459704, at *3 (Iowa Ct. App. June 25, 2003) . Feeback simply cannot show that there is sufficient temporal proximity between his trolley comments and his termination to create an inference of causation.

The other undisputed facts show there is no causation. First, Swift Pork was actively replacing the trolleys and that was alleviating Feeback's concerns. (App. p. 141; Feeback Depo. 58:4-23). Although the District Court

noted that Feeback claimed that after his reports to Carl they did not have a good relationship, Carl got angry and made negative comments concerning the cost of alleviating Feeback's safety concerns, and Carl hung up the phone on Feeback once, without more, these are mere generalities. *Wusk*, No. 15-0166, 2015 WL 9450914, at *4 ("[M]ere generalities [*e.g.*, difference in work atmosphere] of a negative change in the way an employee was treated after are insufficient to prove that the [protected activity] was a determining factor in a subsequent adverse employment action."); *McMahon v. Mid-Am. Constr. Co. of Iowa*, No. 99-1741, 2000 WL 1587952, at *4 (Iowa Ct. App. Oct. 25, 2000) ; *Horn*, No. 18-CV-3053 CJW-MAR, 2020 WL 420834, at *16-17 (concluding that claiming to be "criticized" by site manager after requesting possible safety materials was a mere generality of a negative change in the way employee was treated and safety complaints, remote in time from plaintiff's termination, were not determining factor in termination). Further, Feeback admitted that Carl got angry often for a variety of reasons and his anger was not limited to Feeback or his safety concerns. (App. pgs. 144-146; Feeback Depo. 61:18-63:3). It is also undisputed that Defendants never told Feeback not to voice safety concerns. (App. pgs. 146-147; Feeback Depo. 63:23-64:3). Thus, viewing the evidence in the light most favorable to Feeback, the District Court correctly determined that the lack of temporal

proximity, the fact that Feeback's safety complaints were being alleviated, and the general allegations regarding Carl's demeanor was not enough evidence to show Feeback's safety complaints were a determining factor in his termination.

Finally, Charboneau, the decision-maker, had no knowledge that Feeback had ever complained about the trolleys. (App. p. 147; Feeback Depo. 64:4-11; App. p. 281). *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 289 (Iowa 2000) ("[I]f the employer has no knowledge the employee engaged in the protected activity, causation cannot be established."); *Teachout*, 584 N.W.2d at 301. Feeback relies on Mulgrew's short text to Carl that "Feeback not allowed to work" and Carl's one-word response of "Amen" to claim that Mulgrew and Carl were the decision makers and terminated Feeback for his months-old complaint to Carl. First, Feeback admitted that he did not make any safety complaints to Mulgrew, (App. pgs. 140-142; 147; Feeback Depo. 57:14-16; 58:24-59:2; 64:4-11), nor has he brought forth any other evidence to suggest Mulgrew knew of Plaintiff's safety concerns. Feeback also attacks Charboneau's credibility by pointing to Carl and Mulgrew's texts and Charboneau's investigation as inferences that Charboneau knew about Feeback's months-old complaint to Carl and terminated him because of these complaints. This is a weak attempt to create a material fact issue. For these

reasons, the District Court also correctly concluded that Feeback failed to show causation.

The record is also clear that Swift Pork had an overriding business justification for terminating Feeback's employment—his egregiously disrespectful and insubordinate text message to his superior. Even if, as Feeback contends, that an overriding business justification is not an element that he must prove it is still relevant for summary judgment purposes that no reasonable jury could find that there was not an overriding business justification. As stated earlier, the investigation was more than sufficient to provide Swift Pork with a good faith belief that Feeback had intentionally sent the text message to Mulgrew. *Hoffman v. Americold Logistics, LLC*, No. 13-CV-75-LRR, 2014 WL 1253886, at *13 (N.D. Iowa Mar. 26, 2014) (concluding for Iowa wrongful termination that "the determinative factor in [employer's] decision to terminate [plaintiff's] employment—and the overriding business justification for doing so—was because, based on [employer's] investigation" plaintiff had violated work rules policies). *See also Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429, 432 (Iowa 2019); *Munoz v. Adventure Lands of Am., Inc.*, No. 19-2097, 2021 WL 377441, at *6 (Iowa Ct. App. Feb. 3, 2021); *Ruby v. Cent. Cmty. Hosp.*, 955 N.W.2d 234 (Iowa Ct. App. 2020); *Hedlund*, 930 N.W.2d at 751 n.21, *as amended* (Sept.

10, 2019) (concurrence in part). Contrary to Feeback's baseless assertion throughout his brief that the decision to terminate Feeback was made prior to the investigation, it was not. Feeback was instead *suspended* pending an investigation prior to his termination, and Mulgrew's text to Carl was clearly a reference to Feeback's suspension pending the investigation. (App. pgs. 432-433; Mulgrew Depo. 96:23-98:18). The record instead establishes that Charboneau, the decision maker, suspended (not terminated) Feeback pending his investigation into the text message, (App. p. 280), Charboneau then commenced an investigation regarding the text and interviewed Feeback, Mulgrew, and Carl, (App. p. 280; App. p. 314; Charboneau Depo. 113:8-16), Charboneau determined and had a good faith belief that the text message was intentionally sent to Mulgrew, (App. p. 280), and Charboneau terminated Feeback's employment on January 4, 2016, because of the text message and not because of alleged safety concerns (App. pgs. 280-281). Feeback even admits that he never rescinded his test message or texted anything to Mulgrew indicating that the text was not meant for Mulgrew. (App. p. 180; Feeback Depo. 97:6-17). Feeback also admitted that he never sent the text message to its alleged intended recipient. (App. pgs. 180-181; Feeback Depo. 97:20-98:2). It was thus clearly reasonable for Charboneau to conclude that the text was intentionally sent to Mulgrew, and Feeback's disagreement with the result

of the investigation is not enough to raise a reasonable inference that his termination was the result of his months-old safety concerns. *See Pulczinski*, 691 F.3d at 1002; *McCullough*, 559 F.3d at 861-62. Regardless, even if the decision had already been made prior to any investigation, an investigation was not even required because texting "FUCK You !" to a supervisor is a reasonable motivation to terminate employment. *See Merrit,* 682 N.W.2d 82, at *3; *Hausler*, 134 Fed. App'x at 893. Finally, as previously argued at length, Feeback has further failed to carry his burden to provide evidence that similarly situated employees were treated differently than him. Instead, Swift Pork clearly had an overriding business justification to terminate Feeback for his egregious and disrespectful text message to Mulgrew.

CONCLUSION

The District Court properly found that Feeback's claims of age discrimination and harassment and wrongful termination failed as a matter of law. The District Court properly applied the correct causation standard in its analysis of Feeback's age discrimination claim. Regardless, under either the *McDonnell Douglas* standard or the motivating factor standard, the record clearly shows that Feeback's age discrimination claim fails as a matter of law. Additionally, the District Court properly dismissed Feeback's harassment claim as his claims of harassment are not based on any protected characteristic

and do not constitute actionable harassment. Finally, the District Court properly dismissed Feeback's wrongful termination claim as there is no evidence that Feeback's alleged protected activity was the reason he was terminated. Rather, as extensively outlined above, Feeback was terminated for his egregious conduct of texting his superior "FUCK YOU !" Accordingly, the District Court's grant of summary judgment in favor of Defendants-Appellees should be affirmed.

Dated this 13th day of May, 2021.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellees respectfully request to be heard in oral argument.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 13th day of May, 2021, the foregoing Appellees' Final Brief was filed electronically via Iowa Judicial Branch eFile, which sent notification of such filing to the following:

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