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

APPELLEE'S APPLICATION FOR FURTHER REVIEW FROM THE DECISION OF THE COURT OF APPEALS DATED MARCH 30, 2022

Prepared and Submitted by:

Aaron A. Clark (IA Bar # AT0012098)
Ruth A. Horvatich (IA Bar # AT0010948)
McGrath North PC LLO
Suite 3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070 (Phone)
(402) 341-0216 (Fax)
aclark@mcgrathnorth.com
rhorvatich@mcgrathnorth.com

ATTORNEYS FOR DEFENDANTS-APPELLEES

QUESTIONS PRESENTED FOR FURTHER REVIEW

1. Whether evidence submitted by Plaintiff-Appellant is inadmissible because it is contradictory to Plaintiff-Appellant's deposition testimony, constitutes inadmissible hearsay, and is insufficient to draw a legitimate inference supporting Plaintiff-Appellant's age discrimination claim.

2. Whether comparator evidence submitted by Plaintiff-Appellant must be evidence of individuals similarly situated to Appellant?

3. Whether Iowa courts are permitted to sit in the business judgment of an employer's management decision absent evidence of discriminatory intent?

4. Does the *McDonnell Douglas* burden shifting framework or the motivating factor standard apply at the summary judgment stage of an age discrimination claim pursuant to the Iowa Civil Rights Act?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT SUPPORTING FURTHER REVIEW

Pursuant to Iowa Rule of Appellate Procedure 6.1103, Defendants-Appellees, Swift Pork Company, Troy Mulgrew, and Todd Carl (collectively "Swift Pork") request the Iowa Supreme Court grant their application for further review of the Iowa Court of Appeals Decision filed March 30, 2022.

The Court of Appeals erred in reversing the District Court's dismissal of Plaintiff-Appellant, David Feeback's age discrimination claim pursuant to Swift Pork's summary judgment motion. In its decision, the Court of Appeals heavily relied on affidavit testimony submitted by Feeback found to be inadmissible by the District Court. The District Court did not abuse its discretion by excluding this affidavit testimony because it is contrary to Feeback's deposition testimony, constitutes inadmissible hearsay, and is insufficient to draw a legitimate inference because it is based upon sheer suspicion, speculation, and conjecture. The Court of Appeal's disagreement with the District Court and consideration of such evidence is in conflict with *Estate of Gray ex rel. Gray v. Baldi*, 880 N.W.2d 451 (Iowa 2016), wherein this Court adopted the contrary affidavit rule. The Court of Appeal's consideration of such evidence is also in conflict with the legal propositions outlined in *Godfrey v. State*, 962 N.W.2d 84 (Iowa 2021) as to the admissibility of circumstantial evidence and is an error of law.

The Court of Appeals also erred in its analysis of comparator evidence submitted by Feeback purporting to show similarly situated employees that were treated differently. The test to determine whether employees are similarly situated pursuant to a claim under the Iowa Civil Rights Act (ICRA) is an important question of law that has not been, but should be, settled by this Court. Additionally, as the record in this matter lacks evidence of discriminatory intent, the Court of Appeals improperly sat in the judgment of Swift Pork's management decision in its analysis of Swift Pork's decision to terminate Feeback's employment, a conflict with this Court's precedence and an error of law. Finally, the applicable standard applied at the summary judgment stage of a claim under the ICRA is an important question of law that has not been, but should be, settled by this Court.

STATEMENT OF THE FACTS

Feeback filed this action asserting claims for age discrimination, harassment, and wrongful termination. (App. pgs. 18-25) (*See also* App. pgs. 31-39). The only claim at issue in this application is Feeback's age discrimination claim.

Feeback held the position of Cut Floor Superintendent at Swift Pork, a management and supervisory position. (App. p. 102; Feeback Depo. 19:2-6; App. p. 272). At the time of his termination, Feeback directly reported to

Todd Carl, Plant Manager for Swift Pork. (App. p. 278; App. p. 272; App. p. 103; Feeback Depo. 20:1-3). Carl directly reported to Troy 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. (*Id.*).

At the end of the year, on New Year's Eve, Feeback's department had not yet completed all of the required safety meetings for the calendar year. (App. p. 273). Feeback allowed his department to hold a safety meeting on that day despite the fact that employees were allowed to leave early. (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 did not feel it was appropriate for the meetings to be held on the holiday when employees were scheduled to leave early and called off the meetings. (App. pgs. 311-312; Mulgrew Depo. 64:2-65:25; App. p. 273). Mulgrew and Carl confronted Feeback about the meetings and also criticized Feeback's performance as a Superintendent. (App. pgs. 176-177; Feeback Depo. 91:18-92:23; 93:9-94:3).

Later that same evening, after being confronted about his performance by Mulgrew and Carl, Feeback texted Mulgrew, "FUCK You ! Believe who

and what you want." (App. p. 271). Feeback fully admits he sent this text. (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. (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. (*Id.*). As a result, Charboneau made the determination to terminate Feeback's employment. (*Id.*).

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY CONSIDERED EVIDENCE FOUND INADMISSIBLE BY THE DISTRICT COURT.

In its decision reversing the District Court's decision, the Court of Appeals improperly considered and relied upon inadmissible evidence submitted by Feeback. Iowa Rule of Civil Procedure 1.981(5) requires affidavits in opposition to summary judgment motions to 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." The allegations at issue in Feeback's deposition violate Rule 1.981(5) as Feeback does not have personal knowledge of the allegations and the allegations are not admissible in evidence.

In opposition to Swift Pork's motion for summary judgment, Feeback submitted circumstantial evidence consisting of allegations of adverse actions taken against other older employees of Swift Pork to support an inference that Feeback was terminated from his employment because of his age. (App. p. 404-405). The District Court correctly found this evidence to be inadmissible. District Court evidentiary rulings are reviewed for abuse of discretion. *Holmes v. Pmeroy*, 959 N.W.2d 387, 388 (Iowa 2021). The Court of Appeals failed to make any finding that the District Court abused its discretion in

excluding this evidence. Moreover, the District Court properly excluded this evidence as it is inadmissible for three reasons. First, Feeback's representation that he has personal knowledge of these allegations is contradictory to his deposition testimony. Second, this evidence constitutes inadmissible hearsay and no exceptions or exclusions apply. Third, this evidence is insufficient to allow a factfinder to draw a legitimate inference of age discrimination as the inference is based upon sheer suspicion, speculation, and conjecture.

A. Feeback's Representation that He Has Personal Knowledge of the Adverse Actions of the Other Older Employees is Contradictory to His Deposition Testimony.

Feeback's affidavit offered in support of his age claim contains inconsistent statements that contradict his prior deposition testimony. Specifically, Feeback alleged in his affidavit that Swift Pork takes adverse actions against other older individuals. (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 the circumstances of their alleged adverse actions and any representation that he has personal knowledge of the actions is directly contrary to his deposition testimony.

In its decision, rather than assessing the District Court's decision on the admissibility of this evidence under the abuse of discretion standard, the Court of Appeals flatly disagreed with the District Court's findings that this evidence is inadmissible and found that this testimony is "competent evidence even if it is not the strongest evidence." (Court of Appeals Opinion, p. 11). The Court of Appeals failed to make any finding that the District Court abused its discretion and failed to address or even consider Swift Pork's argument that Feeback's personal knowledge of such evidence is in direct contradiction to his deposition testimony.

In *Estate of Gray ex rel. Gray v. Baldi*, this Court adopted the "contradictory affidavit rule." 880 N.W.2d 451, 463 (Iowa 2016). Under that rule, 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.*

As Swift Pork argued to the District Court and the Court of Appeals, the inconsistencies in this matter between Feeback's deposition testimony and his affidavit are clear and unambiguous. (*See* App. pgs. 445-46). In his

deposition, Feeback admitted that he had no personal knowledge relating to the alleged adverse actions of other older employees, including most 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. 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). Feeback specifically testified in his deposition that he had no "firsthand knowledge" of the circumstances of the individuals' adverse employment actions. Because "personal knowledge" is defined as "knowledge gained through ***firsthand observation or experience***, as distinguished from a belief based on what someone else has said," Feeback's deposition testimony undeniably shows he testified he has no personal knowledge relating to the adverse actions of these employees and certainly no personal knowledge that the individuals were demoted, terminated or "forced out" because they were older. KNOWLEDGE, *Black's Law Dictionary* (11th ed. 2019) (emphasis added).

In his affidavit on the other hand, Feeback alleges that his testimony is based on his personal knowledge, including the same allegations he testified to in his deposition relating to the alleged adverse actions of other older employees. Specifically, Feeback claims in his affidavit that he has "seen Swift Pork Company demote, terminate, and/or force out many older employees" with a specific list of employees. (*See* App. pgs. 445-46). This list includes those employees he testified to in his deposition that he had no firsthand or personal knowledge relating to their alleged adverse actions. For the remaining employees in his list, there is no evidence that Feeback supervised these employees, that he was involved in decisions relating to their employment, that he discussed the decisions with the decision makers, or even who the decision maker was in the alleged adverse actions of these employees. 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 as to any support for Feeback's age discrimination claim and are inadmissible.

Feeback's affidavit testimony in this regard is clearly and unambiguously contrary to his deposition testimony wherein he fully acknowledged he had no personal knowledge relating to the alleged adverse actions of the named individuals. Accordingly, the contradictory affidavit

rule applies here and Feeback's affidavit testimony relating to these individuals should be rejected and not considered.

B. Feeback's Allegations of Alleged Adverse Employment Actions Against Other Employees Constitute Inadmissible Hearsay.

The Court of Appeals also failed to address or even consider the District Court's finding that Feeback's allegations of other alleged adverse employment actions against other older employees constitutes inadmissible hearsay. The Court of Appeals made no findings as to why this evidence does not constitute inadmissible hearsay.

This evidence undoubtedly constitutes inadmissible hearsay. *See* Iowa R. Evid. 5.801. These allegations were offered by Feeback for the truth of the matter asserted—that is that these individuals were subject to adverse employment actions by Swift Pork because of their age—and do not fall under any exceptions or exclusions to the hearsay rule. Additionally, as noted by the District Court, Feeback failed to offer affidavits from any of the employees or decision makers involved in the alleged adverse actions, failed to allege he was involved in the adverse employment actions, and plainly had no personal knowledge about any of the circumstances surrounding each of the employees' situations. (App. pgs. 647-648). As a result, these statements are inadmissible in evidence and the Court of Appeals improperly considered this

evidence in reversing the District Court's decision. *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).

C. The Inference Drawn From Feeback's Allegations of Alleged Adverse Employment Actions Against Other Employees is Based Upon Sheer Suspicion, Speculation, and Conjecture.

Finally, contrary to the Court of Appeals' determination, this evidence is inadmissible because it is based upon suspicion, speculation, and conjecture. The Court of Appeals' consideration of this evidence is an error of law and is in conflict with the legal precedent outlined in *Godfrey v. State*, 962 N.W.2d 84, 102-03 (Iowa 2021).

Feeback relies on the circumstantial evidence of the alleged adverse actions of other older employees to argue he was terminated because of his age. In *Godfrey*, this Court outlined the admissibility of circumstantial evidence. 962 N.W.2d at 102-03. There, this Court found "circumstantial evidence is sufficient to establish a fact only where the evidence has sufficient force to allow a factfinder to draw a legitimate inference from the evidence

presented." *Id.* at 102 (emphasis added). According to this Court, "[a] legitimate inference drawn from circumstantial evidence must be 'rational, reasonable, and otherwise permissible under the governing substantive law.'" *Id.* "An inference is not legitimate if it is based upon suspicion, speculation, conjecture, surmise, or fallacious reasoning." *Id.*

The inference attempted to be drawn from this evidence—that Feeback was terminated because of his age—necessarily requires the inference that the named individuals were also subjected to adverse actions because of their age—an inference that is pure speculation and conjecture. This is clearly evidenced by Feeback's deposition testimony wherein he admits he had no personal knowledge of the reasoning for the adverse actions of the majority of these employees and that it is his "only suspect," "opinion," or "belief," that their age had something to do with the adverse action. He undeniably has no personal knowledge of the actual reasoning. *See Godfrey*, 962 N.W.2d at 106 ("[Plaintiff's] personal, conclusory beliefs are insufficient as a matter of law to generate a fact question for the jury.").

Moreover, Feeback fails to connect the circumstances of any of these employees to his circumstances at Swift Pork. There is no evidence of who the decision maker was in the alleged adverse actions or that the decision maker was the same decision maker in Feeback's separation from

employment. This evidence simply provides no inference that Feeback's age had anything to do with his termination. Any such inference is pure speculation. "Speculation … is not evidence and a case should not be submitted to a jury for deliberation when no evidence has been presented." *Godfrey*, 962 N.W.2d at 104.

Furthermore, even if this evidence was admissible, Feeback's speculative and conclusory legal conclusions that other employees were subject to adverse employment actions due to their age is not sufficient to survive summary judgment. *McIntosh v. Country Club of Little Rock*, No. 4:17-cv-757, 2019 WL 2618145, at *1 (E.D. Ark. June 26, 2019) (finding allegations of other older employee terminations unpersuasive as there was no evidence employees were terminated due to age); *Prochaska v. Color-Box, LLC*, No. C04-1009-LRR, 2005 WL 1410846, at *12 (N.D. Iowa June 1, 2005) (finding pattern and practice allegations unpersuasive where plaintiff admitted in deposition he had no firsthand knowledge of the circumstances of the other employee adverse actions).

In summary, Feeback's allegations that these individuals were subjected to alleged unlawful activity are contradictory to his deposition testimony, inadmissible hearsay, insufficient to allow a factfinder to draw a legitimate inference as the inference is based upon sheer suspicion,

speculation, and conjecture, and even if admissible, insufficient evidence to survive summary judgment. Accordingly, it is an error of law for the Court of Appeals to rely upon this evidence in reversing the District Court's dismissal of Feeback's age discrimination claim.

II. THE COURT OF APPEALS ERRED IN CONSIDERING COMPARATOR EVIDENCE OF INDIVIDUALS NOT SIMILARLY SITUATED TO FEEBACK.

The Court of Appeals additionally erred in considering comparator evidence without demonstrating that these individuals were similarly situated to Feeback. The Court of Appeals erred in finding such evidence could be considered as "workplace culture evidence" absent a finding as to whether such evidence was of individuals similarly situated to Feeback. (*See* Court of Appeals Decision, pgs. 8-9; fn. 6). Indeed, there is no evidence in the record that there was a "workplace culture" of individuals in positions similarly situated to Feeback (i.e., Superintendents) texting their superior "FUCK You !" and avoiding discipline, much less termination.

This Court has not opined as to the test to determine whether the consideration of comparator evidence of other employees requires those employees to be similarly situated associated with a discrimination claim under the ICRA. This is an important question of law that should be settled by this Court.

The evidence of other younger employees cursing in front of or at supervisors submitted by Feeback is undoubtedly submitted in an attempt to show Feeback's disparate treatment as a result of his "FUCK You !" text message to the General Manager of Swift Pork. In order for such evidence to show such disparate treatment, under Eighth Circuit precedent, such evidence must be proven by Feeback to be of employees similarly situated to Feeback. *E.E.O.C. v. Prod. Fabricators, Inc.*, 763 F.3d 963, 970 (8th Cir. 2014).

Pursuant to Eighth Circuit precedent, whether employees are "similarly situated" is "a rigorous test because the employees used for comparison must be 'similarly situated in all relevant aspects.'" *Id.* 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.*

In multiple unpublished decisions, the Iowa Court of Appeals has adopted this Eighth Circuit standard. Specifically, in *Wyngarden v. State Judicial Branch*, the Court of Appeals stated "[o]ur test to determine whether individuals are similarly situated requires 'that the other employees be similarly situated in all relevant respects ***before*** the plaintiff can introduce evidence comparing [himself] to other employees.'" 856 N.W.2d 2 (Table), 2014 WL 4230192, at * 9 (Iowa Ct. App. 2014) (quoting *Bennett v. Nucor*

Corp., 656 F.3d 802, 819 (8th Cir. 2011)) (emphasis added). The Court of Appeals went on to state, "[t]o be similarly situated, the comparable employees 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 *Bennett*, 656 F.3d at 819).

Additionally, in a case decided just weeks prior to its decision in this case, the Court of Appeals applied the rigorous similarly situated standard to comparator evidence, finding the employees were not similarly situated because the employees had different positions, different responsibilities, and the circumstances of their misconduct differed. *Caldwell v. Casey's Gen. Stores, Inc.*, 2022 WL 610362, at *4 (Iowa Ct. App. Mar. 2, 2022). *See also Reed v. State*, 922 N.W.2d 105 (Table), 2018 WL 2471590, at *10 (Iowa Ct. App. 2018) ("At the pretext stage, 'the test for determining whether employees are similarly situated to a plaintiff is a rigorous one.' [The plaintiff] must show that she and the employees outside of her protected group were 'similarly situated in all relevant respects.' '[T]he individuals used for comparison 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.'") (quoting *Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149, 1163 (8th Cir. 2016)).

Here, Feeback failed to allege how the individuals he lists as cursing at their superiors are similarly situated to him. (*See* App. pgs. 406-409). In his list of employees, there is no evidence as to the position held by the employees or the superior to which they swore at or in front of. Additionally, the more specific allegations contained in his affidavit did not show curse words being directed to superiors, much less Mulgrew, and are not of comparable seriousness to Feeback's egregious text. (*See* App. pgs. 405-406). Accordingly, Feeback has failed to meet his burden to show such evidence is that of employees similarly situated to him and the Court of Appeals erred in considering such evidence.

III. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE COMPANY IN REVERSING THE DISTRICT COURT'S DISMISSAL OF FEEBACK'S AGE DISCRIMINATION CLAIM.

The Court of Appeals additionally erred in its holding that a jury could somehow reasonably find Swift Pork's reason for termination was pretextual. (Court of Appeals Opinion, p. 7). In so holding, the Court of Appeals probed into the wisdom of the Company's investigation in response to Feeback texting "FUCK You !" to his superior. (*Id.* at pp. 7-8). This is an error of law as it conflicts with this Court's clear statement regarding an employer's business judgement. That is, employment discrimination laws do not grant courts the power "'to sit as super-personnel departments reviewing the

wisdom or fairness of the business judgments made by employers'" in the absence of intentional discrimination. *Vroegh v. Iowa Dept. of Corrections*, __ N.W.2d __, 2022 WL 981824, *3 (Iowa 2022); *Gordon v. Wells Fargo Bank-National Assoc.*, 964 N.W.2d 783 (table), 2021 WL 2135187, *2 (Iowa Ct. App. 2021) (holding that it is insufficient for employee to disagree with the employer's decision to terminate him for his mistakes); *Watkins v. City of Des Moines*, 949 N.W.2d 28 (table), 2020 WL 2988546, *7 (Iowa Ct. App. 2020) (stating that it is not the court's job to "micromanage" the employer's decisions); *Charleston v. Polk Cnty. Civil Serv. Comm'n*, 938 N.W.2d 730 (table), 2019 WL 3330627, *4 (Iowa Ct. App. 2019) (acknowledging business judgment rule); *Valline v. Murken*, 669 N.W.2d 260 (table), *5 (Iowa. Ct. App. 2003) (stating that "[e]mployers have wide latitude to make business decisions").

According to the Court of Appeals, the Company did not sufficiently investigate whether Feeback actually *meant* to text Mulgrew "FUCK You !" or whether he had intended to text someone else. (Court of Appeals Opinion, pp. 7-8). The Court of Appeals therefore concluded that a reasonable jury may have credited Feeback's story that he *inadvertently* texted "FUCK You !" to his superior. (*Id.*). This conclusion by the Court of Appeals misses the point of the relevant inquiry under the law.

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 that he texted "FUCK You !" to his superior. Rather, 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); *see also Vroegh*, 2022 WL 981824, at *3 (stating that courts do not "'sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, *except* to the extent that those judgments involve intentional discrimination'").

Here, the undisputed evidence supports the Company's good faith belief that Feeback intentionally texted "FUCK You !" to his superior, the General Manager of Swift Pork. It is undisputed that Feeback sent the text and that Mulgrew believed the text message was meant for him. Upon receipt, Mulgrew sent a screenshot of the text to Charboneau and Carl. As the Human Resources Director, Charboneau investigated the incident by speaking with Feeback, Mulgrew, and Carl. Although Feeback advised Charboneau that he had unintentionally sent the text to Mulgrew, Feeback admitted that he had realized that he had sent the text, but did not try to rescind it or send a

follow-up message 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 investigation, Charboneau reasonably and in good faith concluded Feeback intentionally sent the text message to Mulgrew.

Texting "FUCK You !" to his superior is undoubtedly a legitimate reason to terminate Feeback's employment, regardless of whether he subjectively intended to text Mulgrew or someone else. The undisputed point remains that the Company conducted an investigation and determined that Feeback had engaged in disrespectful and inappropriate behavior towards his superior. Feeback was terminated for such conduct in accordance with the Company's business judgment, and courts may not disturb the Company's business judgment in the absence of intentional discrimination. *Vroegh*, 2022 WL 981824, at *3.

There is simply no evidence of intentional age discrimination in this case. As explained above, the comparator evidence proffered by Feeback is inadmissible for several reasons and cannot be considered as evidence of age discrimination. Beyond this, Feeback makes no allegations of any age-related comments to suggest that anyone harbored any age-related animus against

him. Furthermore, all of the management employees at issue in this case were well-within the age-protected class themselves and remain employed to date. Moreover, the employee who replaced Feeback in his position was 50 years old and likewise remains employed. Without some evidence of intentional discrimination, Feeback's age discrimination claim fails as a matter of law. *See Hausler v. Gen. Elec. Co.*, 134 Fed. App'x 890, 893 (6th Cir. 2005) (affirming summary judgment where employer was not obligated to perform an investigation prior to termination where 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 because employee's disagreement with decisionmaker's conclusion did not raise a reasonable inference that the termination was motivated by unlawful reasons); *Merrit v. Iowa Dept. of Transp.*, 682 N.W.2d 82, * 3 (Iowa Ct. App. 2009) ("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)).

For these reasons, the Court of Appeals' decision is in conflict with this Court's legal precedent regarding an employer's business judgment, and the

Court of Appeals erred in reversing the District Court's dismissal of Feeback's age discrimination claim.

IV. THIS COURT SHOULD RESOLVE THE AMBIGUITY OF THE APPROPRIATE STANDARD APPLIED AT THE SUMMARY JUDGMENT STAGE OF ICRA CASES.

Finally, the Court of Appeals held that the proper standard on summary judgment remains an open question. (*See* Court of Appeals Decision p. 6). Specifically, it is unsettled whether the *McDonnel Douglas* burden shifting framework or the motivating factor standard applies at the summary judgment stage of an age discrimination claim pursuant to the ICRA. *See Hedlund v. State*, 930 N.W.2d 707, 719 n.8 (Iowa 2019) (analyzing summary judgment under both standards); *Watkins*, 2020 WL 2988546, at *4 (analyzing summary judgment under both standards). This is an important question of law that should be settled by this Court.

While this Court has determined that it will no longer rely on the *McDonnell Douglas* burden-shifting analysis ***when instructing the jury***, *see Hawkins v. Grinnell Reg. Med. Ctr.*, 929 N.W.2d 261, 272 (Iowa 2019), this Court has explicitly stated that the *McDonnell Douglas* standard has not been disturbed as it applies to summary judgment. *See e.g.*, *Hedlund*, 930 N.W.2d at 719 n.8. Despite this statement, however, in *Hedlund*, this Court analyzed summary judgment under both standards, which has created an ambiguity in

the lower courts as to the appropriate standard to be applied at the summary judgment stage of a discrimination claim under ICRA. As this is an important question of law that should be settled by this Court, Swift Pork submits that this Court should explicitly identify the appropriate standard at the summary judgment stage of claims brought under ICRA to resolve any ambiguity as to the appropriate standard.

Swift Pork submits the appropriate standard at the summary judgment stage should remain the *McDonnell Douglas* burden-shifting analysis, which is consistent with Eighth Circuit precedent. The Manual of Eighth Circuit Model Jury Instructions is instructive. At the summary judgment stage, courts in the Eighth Circuit have historically analyzed Title VII disparate treatment cases pursuant to the burden-shifting analysis of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Title VII is analogous federal law to ICRA. At the trial stage, however, the Eighth Circuit Model Jury Instructions shift to the motivating factor standard and state that the inquiry should focus on the ultimate issue of intentional discrimination, not on any particular step in the *McDonnell Douglas* paradigm. The Committee Comments on Model Jury Instruction 5.40 further state that:

> It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas Corporation v. Gree*n, 411 U.S. 792 (1973). *See Weber v. Strippit, Inc.*, 186 F.3d 907, 917-18 (8th Cir. 1999); *Gilkerson v. Toastmaster, Inc.*, 770

> F.2d 133, 135 (8th Cir. 1985). Accordingly, this instruction is focused on the ultimate issue of whether the plaintiff's protected characteristic was a "motivating factor" in the defendant's employment decision.

Accordingly, as the standard has not been disturbed at the summary judgment stage, this Court should, similar to the Eighth Circuit, confirm the *McDonnell Douglas* burden-shifting analysis still applies at the summary judgment stage of ICRA claims. Without settled law, parties must guess which standard applies at the summary judgment stage and courts will continue to analyze cases under both standards.

In this case, regardless of the applicable standard, the Court of Appeals erred in reversing the District Court's decision and concluding that Swift Pork was not entitled to summary judgment on Feeback's age discrimination claim. The record in this matter shows that Swift Pork is entitled to summary judgment on Feeback's age discrimination claim under *both* standards. Feeback fails to submit evidence to withstand summary judgment showing he was terminated because of his age under either standard. There is simply insufficient evidence to allow a reasonable jury to infer Feeback was terminated because of his age. Rather, the evidence shows Feeback egregiously texted his superior "FUCK You !" and was terminated for that reason.

Dated this 28th day of April, 2022.

Respectfully submitted,

By: /s/ Ruth A. Horvatich

Aaron A. Clark (IA Bar # AT0012098)
Ruth A. Horvatich (IA Bar # AT0010948)
McGrath North Mullin & Kratz, PC LLO
First National Tower, Suite 3700
1601 Dodge Street
Omaha, Nebraska 68102
Telephone: (402) 341-3070
Facsimile: (402) 341-0216
aclark@mcgrathnorth.com
rhorvatich@mcgrathnorth.com

ATTORNEYS FOR DEFENDANTS-APPELLEES

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Times New Roman in 14 font and contains 5,451 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a) or

[ ] this application has been prepared in a monospaced typeface using [state name of typeface] in [state font size] and contains [state number of] lines of text, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Ruth A. Horvatich
Ruth A. Horvatich

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2022, the foregoing was filed electronically via Iowa Judicial Branch eFile, which sent notification of such filing to all parties of record.

/s/ Ruth A. Horvatich
Ruth A. Horvatich