IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-0558
WOODBURY COUNTY NO. LACV159726

JOANNE COTE,
Plaintiff-Appellee,

vs.

DERBY INSURANCE AGENCY, INC., an Iowa Corporation,
and KEVIN DORN, Individually,
Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE JEFFREY L. POULSON, JUDGE

APPELLEE'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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None.

ROUTING STATEMENT

Plaintiff-Appellee does not object to Defendants-Appellants' Routing Statement to the extent that it states that it would be appropriate for the Iowa Supreme Court to retain the case. Plaintiff-Appellee objects to the negative commentary regarding the trial court's ruling in the Routing Statement, however.

STATEMENT OF THE CASE

Plaintiff-Appellee does not object to Defendants-Appellants' Statement of the Case.

STATEMENT OF FACTS

Plaintiff-Appellee Joanne Cote (hereinafter "Cote") started working for Derby Insurance Agency, Inc. ("Agency") as a Customer Service Representative on May 6, 1998. (MSJ Resistance Exhibit A - Cote Affidavit ¶3; App. 105.) In addition to working as a Customer Service Representative for Agency, Cote also served them in a variety of roles, including but not limited to, reconciling their bank statements, ordered supplies, and trained new employees. (MSJ Resistance Exhibit A - Cote Affidavit ¶4; App. 105.)

Patricia Georgesen was the individual who hired Cote. She was the owner of Agency when Cote was hired. She was dating Kevin Dorn at the time, and later married him, so her name is now Patty Dorn. (MSJ

Resistance Exhibit A - Cote Affidavit ¶5; App. 105.) (See also MSJ Resistance Exhibit C - Anderson Affidavit ¶10; App. 157.)

Kevin Dorn also interviewed Cote for the position. Patricia was the primary owner of Agency, and Kevin helped her run the business as a manager and supervisor. Cote considered both of them to be her bosses. (MSJ Resistance Exhibit A - Cote Affidavit ¶6; App. 106.) (See also MSJ Resistance Exhibit B - Kittler Affidavit ¶3; App. 154.) Cote was made an office manager in approximately 2003. (MSJ Resistance Exhibit A - Cote Affidavit ¶7; App. 106.)

In approximately 2005, while in the office, Kevin exposed his genitals to one of the agents, Sandy Dobson (later Sandy Hospers) in her private office. (MSJ Resistance Exhibit A - Cote Affidavit ¶8; App. 106.) (See also MSJ Resistance Exhibit B - Kittler Affidavit ¶¶4 & 5; App. 154-155; and MSJ Resistance Exhibit C - Anderson Affidavit ¶5; App. 156.) Sandy came right away and reported this incident to Cote when she was sitting out at the front counter. Sandy was quite upset, and Cote was shocked by his behavior. (MSJ Resistance Exhibit A - Cote Affidavit ¶9; App. 106.) (See also MSJ Resistance Exhibit C - Anderson Affidavit ¶¶ 8 & 9; App. 157.)

Shortly after that incident. Kevin again exposed himself to Sandy in her office. Sandy again came to Cote and reported this incident. Both were

shocked by his behavior, and Cote suggested that she start documenting his actions. (MSJ Resistance Exhibit A - Cote Affidavit ¶10; App. 106.) (See also MSJ Resistance Exhibit C - Anderson Affidavit ¶12; App. 157.)

Approximately 1-2 years later, Kevin exposed himself to Stephanie Ptak, who was a customer service representative who worked with Cote. This occurred out in the front area while he was standing at the fax machine. (MSJ Resistance Exhibit A - Cote Affidavit ¶11; App. 106.)

Cote was at lunch when this incident happened, and Stephanie reported it to her as soon as she got back to the office. (MSJ Resistance Exhibit A - Cote Affidavit ¶12; App. 106.)

After that, Cote went into Sharon Kittler's office to report to her what was going on (Cote had mentioned the previous incidents involving Sandy to her as well). Sharon was another agent. Both were astounded and disgusted by Kevin's continuing behavior. (MSJ Resistance Exhibit A - Cote Affidavit ¶13; App. 106.) (See also MSJ Resistance Exhibit B - Kittler Affidavit ¶5; App. 154-155.)

After Sandy and Stephanie quit, Kevin started harassing Cote. The first time Kevin sexually harassed Cote was in 2007. Cote was working up front in the customer service area, and no one else was present because it was early in morning, and she was generally the only person who showed up

for work on time before 8:30 a.m. Since Cote was the only one there, this would be the time when Kevin would harass her. (MSJ Resistance Exhibit A - Cote Affidavit ¶14; App. 106-107.)

The first time Kevin harassed Cote, he came around her desk with an obvious erection in his pants. Cote was sitting down, and he was standing up only approximately three feet away from her, so his erection was obvious and close to her face. It was obvious he wanted her to see his erection because of the way he was standing next to her, he had no reason why he had to come into her work area at that specific time (as opposed to later after the erection had gone down). This lasted a few minutes, and he had no reason to stand there that long. Also, it was a part of his pattern of exposing himself to employees. Cote didn't want to believe that he was sexually harassing her at first because she was older than Sandy and Stephanie, but as he kept doing it, it was obvious. (MSJ Resistance Exhibit A - Cote Affidavit ¶14; App. 106-107.)

For the next several years, Kevin did the same thing several times per year. He would always come into Cote's area early in the morning when no one else was present, would have an obvious erection, and would stand within a few feet of her for several minutes. Each time, it was obvious that he wanted her to see him because he had no reason to stand there for that

long, and his groin would be in close proximity to her face, and would ask her a question so she would have to stop what she was doing, and have to look in his direction. (MSJ Resistance Exhibit A - Cote Affidavit ¶15; App. 107.)

During one of those incidents, he came right beside her chair less than a foot away from her face, looked at her and asked a question. He was again noticeably erect, so his erection would have been only a few inches from her face. He stood there for several minutes again. Cote was so nervous that she started fidgeting and reached for papers on the desk, and her hand brushed his erection. He had to have felt it, and still he did not move. (MSJ Resistance Exhibit A - Cote Affidavit ¶16; App. 107.)

On another occasion, Kevin picked Cote up to take her to work because it was a snowy day. On snowy days, Kevin and Patty normally picked her up when she would ask them to, so she did not have to drive on bad roads. However, on this occasion, Kevin was by himself when he picked her up. On the way in to the office, he had his left hand on the steering wheel, and he groped his crotch in front of her the whole time. It was about a ten minute drive from Cote's house to the office. (MSJ Resistance Exhibit A - Cote Affidavit ¶17; App. 107-108.)

In April 2011, again during the early morning when no one else is there, Kevin walked into Cote's working area and was asking her questions. She did not look at him, and he walked away – he went to the fax machine a few feet away, and asked her a question so she had to look in his direction. His pants were unzipped and gaping open and could see skin. (MSJ Resistance Exhibit A - Cote Affidavit ¶18; App. 108.)

On February 9, 2012, again during the early morning when no one else was there, he was standing by the fax machine and his pants were gaping open. Cote tried to not look at him, but he was asking her questions, so she had to look in his general direction, and as with before, she could see skin. (MSJ Resistance Exhibit A - Cote Affidavit ¶19; App. 108.)

Again on March 12, 2012, he again came within a few feet of Cote in her working area with an obvious erection. Again the erection was within a few feet of her face, and he stood there for several minutes when he did not have to do so. (MSJ Resistance Exhibit A - Cote Affidavit ¶20; App. 108.)

Kevin continued to come into Cote's working area during the summer months, through the beginning of August, 2012, on several occasions during the early morning when no one else was there. He would wander in her work area, sometimes to ask her something, or sometimes not saying anything at all. Because we were alone, and Cote was afraid of him due to

his long pattern of sexually offense behavior in front of her, she would immediately tense up and try to not to look at him. She would look away and pretend she was on her phone. (MSJ Resistance Exhibit A - Cote Affidavit ¶21; App. 108-109.)

Cote knew he was trying to get her to look at him and his private parts because of his pattern of behavior and the only times when he would walk into her area during the early morning hour when no one else was there was when he had an erection. It was obvious from his demeanor that he was there to harass her. Cote knew he would be leaving the Sioux City office soon, so she tried to avoid him as much as possible, but he kept coming in to her area anyway for no apparent reason other than to harass her. (MSJ Resistance Exhibit A - Cote Affidavit ¶21; App. 108-109.)

Kevin and Patty were looking to sell the business at that time, and they moved to Omaha in August. The business was sold in October, 2012, and the business was renamed Derby Insurance ("Services"), but Kevin and Patty still worked for the agency, and worked at an office in Omaha for Services. (MSJ Resistance Exhibit A - Cote Affidavit ¶22; App. 109.)

While at Derby Insurance Agency, Kevin Dorn had the right to fire employees. For example, he fired Karen Worrell, who was an agent. Patty was not even in the office that day – he brought Karen in to his office and

fired her. (MSJ Resistance Exhibit A - Cote Affidavit ¶24; App. 109.) (See also MSJ Resistance Exhibit B - Kittler Affidavit ¶3; App. 154.) Moreover, during the periods of time when Patty was not in the office, Kevin was the leader of office. When Patty's mother was ill, Patty would be out of the office for months, and Kevin ran the office by himself during that time. (MSJ Resistance Exhibit A - Cote Affidavit ¶25; App. 109.)

Even when Patty was in the office, he was still the boss. He led all of their meetings. Cote was not aware of any decisions that Patty made where Kevin was not a part of it. (MSJ Resistance Exhibit A - Cote Affidavit ¶26; App. 109.) (See also MSJ Resistance Exhibit C - Anderson Affidavit ¶10; App. 157.)

Other evidence established Kevin's status as an owner/manager of Agency. The sign in front of Derby Insurance Agency said: "Kevin & Patty Dorn". (MSJ Resistance Exhibit A - Cote Affidavit ¶27; App. 109.) Furthermore, a Derby Insurance Services, Inc. Facebook post on March 27, 2013 which states in part: "Patty Dorn (sister to Jeanne Derby) and her husband Kevin Dorn are the current owners of Derby Insurance Agency." (MSJ Resistance Exhibit A - Cote Affidavit ¶28; App. 110.)

Cote was afraid to complain to Patty because she was afraid she would retaliate against her and she would lose her job. Patty has sent Cote

threatening text messages in August, 2015. Also, Defendants did not have a sexual harassment policy in place, so Cote had no one to complain to, and there was no policy to protect her from retaliation. (MSJ Resistance Exhibit A - Cote Affidavit ¶29; App. 110.) (See also MSJ Resistance Exhibit B - Kittler Affidavit ¶6; App. 155.)

Due to Kevin's actions, Cote has suffered both physically and mentally since it occurred. She frequently feels stressed out, has tension and worries about whether she could be subjected to harassment from other employers. During the several years of harassment, she frequently had tension headaches, sick feelings in her stomach, and she almost fainted due to feeling queasy. (MSJ Resistance Exhibit A - Cote Affidavit ¶30; App. 110.)

Cote could not sleep through the night on several occasions while the harassment was going on when she knew Patty was not going to be in the office the next day, because she was afraid that Kevin would do it again. Cote felt degraded, humiliated, ashamed, depressed, and angry during the several years that he did those things to her, and she still feel that way at times when she is reminded of what happened. (MSJ Resistance Exhibit A - Cote Affidavit ¶30; App. 110.)

The Iowa Civil Rights Commission found that there was probable cause to pursue Cote's complaints against Defendants. Said findings included the finding that the ICRC had jurisdiction over the case because Agency had a sufficient number of employees to be covered by Iowa Code Chapter 216, and that there was probable cause to believe that actionable discrimination had occurred. (MSJ Resistance Exhibit D; App. 159-167.)

Further facts will be set forth below as needed.

ARGUMENT

I. STANDARD OF REVIEW AND PRESERVATION OF ERROR.

A. STANDARD OF REVIEW.

Cote agrees that the standard of review generally applicable to appeals regarding summary judgment motions are for correction of errors at law. Summary judgment is appropriate only where there is no genuine issue of material fact in dispute. *Sweeney v. City of Bettendorf,* 762 N.W.2d 873, 877 (Iowa 2009). If reasonable minds can differ on how a material factual issue should be resolved, summary judgment should not be granted. *Id.*

Courts review motions for summary judgment in the light most favorable to the non-moving party, and so the record must be viewed in the light most favorable to Cote. *See Keokuk Junction Ry. Co. v. IES Indus., Inc.,* 618 N.W.2d 352, 355 (Iowa 2000). Courts are also required to indulge

every legitimate inference that the evidence will bear to determine whether a question of fact exists. *Crippen v. City of Cedar Rapids,* 618 N.W.2d 562, 565 (Iowa 2000). An inference is legitimate if it is "rational, reasonable, and otherwise permissible under the governing substantive law." *McIlravy v. North River Ins. Co.,* 653 N.W.2d 323, 328 (Iowa 2002). An inference is not legitimate if it is based on speculation or conjecture. *Id.* If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *Id.* When the evidentiary matter tendered in support of the motion does not affirmatively establish uncontroverted facts that sustain the moving party's right to judgment, summary judgment must be denied, even if no opposing evidentiary matter is presented. *Griglione v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994).

B. PRESERVATION OF ERROR.

Cote acknowledges that Defendants filed a Motion for Summary Judgment which generally raised the issues set forth on appeal. However, Cote questions whether error has been preserved at this stage on several issues. First, the arguments made in their Brief under the subsections "Consonant with ICA § 216.18(1) the Appellate Court should interpret 'members of the employer's family' broadly to effectuate the purposes behind the exception that the Legislature gave small employers in section

216.6(6)(a)" and "Employing Jasmine Derby during the summer months in 2012 did not make her a "regular' employee for purposes of applying Iowa Code § 216.6(6)(a)" were not directly addressed in the trial court's ruling. To be reviewed on appeal, issues must ordinarily be both raised and decided by the district court. *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002). Once the district court found that family member status was irrelevant due to its findings that the corporate status of Agency made the family member exception inapplicable, it did not proceed to address Defendants' arguments regarding the scope of the family and the meaning of "regular" employment. Defendants did nothing to address this situation, so error has not been preserved as to those issues. *See State v. Krogmann,* 804 N.W.2d 518, 524 (Iowa 2011) ("when a court fails to rule on a matter, a party must request a ruling by some means"); *Fennelly v. A-1 Mach. & Tool Co.,* 728 N.W.2d 181, 187 (Iowa 2007) (finding a claim that was not addressed in the district court's summary judgment order and not subsequently brought to the court's attention had not been preserved for appeal).

Moreover, the Application for Interlocutory Appeal filed by the Defendants primarily dealt with their jurisdictional argument that Agency lacked the requisite number of employees to be covered by the Iowa Civil Rights Act, and only addressed the other issues raised on appeal in cursory

fashion. For an interlocutory appeal to be properly granted, there must be a finding that the issues raised in the interlocutory appeal meet the relevant standard:

> In order to grant the application we must find: (1) that the court's order involves substantial rights; (2) the order will materially affect the final decision; and (3) that a determination of the order's correctness before trial on the merits will better serve the interests of justice.

In re Marriage of Denly, 590 N.W.2d 48, 51 (Iowa 1999).

No such finding would have been made regarding the issues not raised adequately in the Application for Interlocutory Appeal, so Cote submits that appellate review of those issues is not proper at this time.

II. THE ICRC AND THE TRIAL COURT CORRECTLY FOUND THAT COTE'S DISCRIMINATION CLAIM IS COVERED BY THE IOWA CIVIL RIGHTS ACT, IOWA CODE CHAPTER 216.

The first argument made by the Defendants is that Iowa Code Chapter 216 does not cover these claims made by Cote because they are too small. Section 216.6(6)(a) indicates that the Iowa Civil Rights Act does not apply to employers who regularly employ less than four individuals, and "individuals who are members of the employer's family shall not be counted as employees". Defendants admitted that they regularly employed five individuals at any given time. (Defendants' MSJ Brief p. 7; App. 45). Therefore, they attempt to avoid liability by claiming that the exception for

family members applies, reducing the number of regularly employed individuals down to less than four. At the trial court level, Cote claimed that Defendants' argument fails for at least two reasons: (1) Derby Services Agency is an S Corporation. S Corporations do not have family members, and the trial court agreed. (2) The Defendants' arguments regarding the scope of the family and whether those alleged family members were regularly employed should be rejected. The alleged family members do not qualify as "members of the employer's family" for the purposes of Section 216.6(6)(a). The trial court did not address this issue.

A. THE TRIAL COURT CORRECTLY INTERPRETED IOWA CODE SECTION 216.6(6)(a) WITH REGARD TO CORPORATE EMPLOYERS.

Defendants admit that the employer in question, Agency, is a S Corporation. Therefore, the question for the Court on review is whether Agency can have family members. At the trial court level, Cote submitted that the answer to that question is "no" – corporations do not have family members, and so the exception does not apply. The trial court found in Cote's favor on this issue, and she submits that the Defendants' argument on appeal that they are not covered by the ICRA must fail.

The trial court properly began by applying the pertinent principles of statutory construction. The trial court found that the statute was ambiguous,

citing *Iowa Inst. v. Core Grp. Of Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015)("A statute is ambiguous if reasonable minds could differ or be uncertain as the meaning of the statute")(MSJ Ruling pp. 7-8). When interpreting such a statute, "the court will read the statute as a whole and give it its plain and obvious meaning a sensible and logical construction, which does not create an impractical or absurd result." *In re Det. of Geltz*, 840 N.W.2d 273, 275 (Iowa 2013).

The trial court began by looking at the language of Iowa Code Chapter 216:

> First, this construction is consistent with the definitions of "employer" and "person" in section 216.2 (which) defines "employer" as including "persons," Iowa Code § 216.2(7), and defines "person" in part as including "one or more…. Corporations," *id.*§ 216.2(12). Thus, it is the corporations, themselves – and not their board or shareholders – that are considered to be the "employers" under chapter 216. Although section 216.2(12) does also state that "individuals" may be considered "persons" (and thus "employers"), *id,*. this subsection nowhere states that a corporation's board or shareholders are to be considered the true employer of an employee.

(MSJ Ruling p. 9). The trial court's logical construction of the statute should not be disturbed on appeal[1].

[1] In their Brief, Defendants claim: "Even the ICRC, which kept jurisdiction over Cote's case, clearly understood that the family member exception applied to entities as well as individuals". (Proof Brief p. 15). The ICRC did not analyze this issue, as they found that they had jurisdiction based on the number of employees, regardless of whether the family member exception applies to corporations or not.

The trial court proceeded to find that applying the family member exception to corporations would create further ambiguities which would require the courts to substitute their judgment for that of the legislature. (MSJ Ruling p. 9). Corporations are fictitious entities. *Kerrigan v. Errett*, 256 N.W.2d 394, 396 (Iowa 1977). Fictitious entities obviously cannot have family members. The Fourth Circuit Court of Appeals has noted how corporations are distinct entities, set apart legally from their shareholders:

> "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson,* 538 U.S. 468, 474, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). The idea of a "[s]eparate legal personality has been described as an almost indispensible aspect of the public corporation." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 625, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (internal quotation marks omitted).

Yousuf v. Samantar, 552 F.3d 371, 380 (4th Cir. 2009) *aff'd and remanded*, 560 U.S. 305, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010). As the trial court noted, neither Iowa Code 216.2 or 216.6 indicates that family members of shareholders or corporate directors may be counted when determining whether the family exception applies. (Ruling p. 9). It is not the role of the courts to add that language in order for the statute to make sense.

In attempting to argue that Iowa public policy supports their position, they argue that the trial court's ruling creates a "Hobson's choice". To the contrary, Defendants are essentially trying to get the best of both worlds. As

a corporation, the individuals involved are insulated from liability for corporate acts as well as liability based on contracts. *Haupt v. Miller*, 514 N.W.2d 905, 909 (Iowa 1994)[2]. At the same time, however, they are now also claiming that they are exempt from liability based on Chapter 216 because of alleged familial relations. Defendants cannot have it both ways. In deciding to receive the benefits of incorporating, Defendants should not also be able to claim the benefit of being a business with alleged family members as employees.

The Iowa Supreme Court recently noted:

> Iowa Code section 216.6 exempts employers employing fewer than four individuals from the state employment discrimination laws, while the exemption found in federal law exempts employers employing fewer than fifteen individuals. *Compare* 42 U.S.C. §§ 2000e(b), 2000e–2(a) (2012), *with* Iowa Code § 216.6(6)(*a*). The purpose of the federal exemption "is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc.,* 166 F.3d 937, 940 (7th Cir.1999); *see also Clackamas Gastroenterology Assocs., P.C. v. Wells,* 538 U.S. 440, 447, 123 S.Ct. 1673, 1678, 155 L.Ed.2d 615, 624–25 (2003) ("[T]he congressional decision to limit the coverage of the legislation to firms with 15 or more employees has its own justification that must be respected—namely, easing entry into the market and preserving the competitive position of smaller firms.").

[2] As noted in the opinion however, an individual involved in a corporation is not immune from liability based on tortious acts committed by that individual. Similarly, under *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999), individuals committing acts of discrimination can also be held liable.

Baker v. City of Iowa City, 867 N.W.2d 44, 52–53 (Iowa), *reh'g denied* (June 12, 2015), *cert. denied sub nom. Baker v. City of Iowa City, Iowa*, 136 S. Ct. 487, 193 L. Ed. 2d 350 (2015). The public policy reasons articulated in that passage are applicable to small, unincorporated businesses, but not businesses which are sophisticated enough to incorporate and to insulate individuals from personal liability. In any event, as noted by the trial court, its ruling does not mean that the less-than-four employee exception does not apply to corporations – it simply held that the "family member" clause does not apply. (MSJ Ruling p. 10). Accordingly, the trial court's ruling as to this issue should be upheld.

B. THE TRIAL COURT CORRECTLY FOUND THAT DEFENDANTS EMPLOYED AT LEAST FOUR REGULAR EMPLOYEES AT THE TIMES RELEVANT TO PLAINTIFF'S CASE.

First, as noted above, Cote submits that error has not been preserved as to the Defendants' arguments made regarding the trial court's interpretation of the phrases "members of the employer's family" and "regularly employs". (pages 20-29 of their Proof Brief). The district court did not directly address these arguments in its Ruling, and the Defendants did not seek to get a ruling on the issue before filing the Application for Interlocutory Appeal.

Defendants' argument that certain employees are family members

under Section 216.6(6)(a) should be rejected. To get below four employees, the Defendants attempt to define certain employees, who were a part of the extended family, and who did not live with Kevin and Patty, as family members under this section. Defendants raised this same argument before the Iowa Civil Rights Commission. In thorough fashion, the ICRC rejected the Defendants' position in their Screening Analysis, at pages 3-6 (Exhibit D to Plaintiff's Statement of Facts; App. 161-164). Specifically, the ICRC found that Patricia Strawn and Jasmine Derby were regularly employed, and were not to be considered "family members". The ICRC's analysis should be adopted by the Court, in the event that the Court reaches this issue.

Defendants cite extraneous matters such as the Internal Revenue Code in order to back their position that the phrase "family member" should be interpreted broadly enough to include extended members of the family. The Internal Revenue Code's definition of "family" bears no relevance to the Iowa Civil Rights Act. Iowa Code Section 216.18(1) indicates that the ICRA should be construed broadly to effectuate its purposes. If the word "family" is interpreted as broadly as the Defendants suggest, the purposes of the ICRA would be thwarted because fewer employers would be covered.

Moreover, in analyzing this issue, the ICRC utilized a law review article by University of Iowa College of Law Professor Arthur Bonfield,

which has also been cited with authority by the Iowa Supreme Court:

> The exclusion of small employers from employment discrimination prohibitions was enacted as part of revisions made to Iowa's civil rights statute in 1965. *See* 1965 Iowa Acts ch. 121, § 7. Those revisions, including the small-employer exemption, were substantially based on changes advocated in a 1964 law review article. *See U.S. Jaycees v. Iowa Civil Rights Comm'n,* 427 N.W.2d 450, 454 (Iowa 1988) (citing Arthur Bonfield, *State Civil Rights Statutes: Some Proposals,* 49 Iowa L.Rev. 1067 (1964) [hereinafter "Bonfield Article"]). In *United States Jaycees,* this court relied on statements in this law review article as an expression of the rationale underlying the legislature's adoption of the suggested revisions, *id.,* and we do so again here.
>
> In the article, the author urged enactment of an employment discrimination statute that included a small-employer exemption. Bonfield Article, 49 Iowa L.Rev. at 1108. In advocating for the adoption of this exemption, the author explained:
>
> Almost all fair employment practices acts exempt small employers, which are defined as employers with less than a specified number of employees. The general consensus seems to be that notions of freedom of association should preponderate over concepts of equal opportunity in these situations because the smallness of the employer's staff is usually likely to mean for him a rather close, intimate, personal, and constant association with his employees.
>
> *Id.* at 1109 (footnotes omitted); *see also Thibodeau v. Design Group One Architects, LLC,* 260 Conn. 691, 802 A.2d 731, 741 (2002) (stating one reason for small-employer exemption was legislature's desire to protect the " 'intimate and personal relations existing in small businesses' " (quoting *Tomka v. Seiler Corp.,* 66 F.3d 1295, 1314 (2d Cir.1995)). The exemption suggested in this article was subsequently adopted nearly verbatim by the Iowa legislature.

Baker v. City of Iowa City, 750 N.W.2d 93, 101 (Iowa 2008).

"Close, intimate, personal, and constant association" applies to immediate family members, but not extended family members such as Patricia Strawn and Jasmine Derby. Therefore, the Defendants' interpretation of the definition of "family member" should be rejected.

As to Defendants' arguments that Jasmine Derby should not be included because she was not "regularly" employed, the Defendants correctly note that the term "regularly" is not defined, nor has it been directly interpreted with regard to the Iowa Civil Rights Act. First of all, Cote would again note that Iowa Code Section 216.18(1) indicates that the ICRA should be construed broadly to effectuate its purposes – meaning that the interpretation should favor coverage of employers, and not exclusion of them.

The Iowa Court of Appeals analyzed the word "regularly" in the following passage:

> The term "regularly" is not defined by statute. The commissioner defined the term as "conforming to a fixed procedure, usual or customary." The commissioner reasoned:
>
> The only part of this subsection that deals with where work is performed is the requirement that the employee regularly work in this state. If the legislature had intended for an objective standard such as a majority or plurality of the work to be performed in Iowa it could have easily done so. Instead, it chose the subjective word "regularly." Something is either regular or irregular. The term does not refer to quantity. It means conforming to a fixed procedure, usual or customary.

> Neither the commissioner nor the parties cite Iowa precedent adopting this definition of "regularly." However, the commissioner's use of this definition is consistent with our well-established principle of statutory construction that, in the absence of a legislative definition, we will apply the ordinary meaning of the term. *Lange v. Iowa Dep't of Revenue,* 710 N.W.2d 242, 247 (Iowa 2006). The definition used by the commissioner is a standard dictionary definition. *Harrington v. Univ. of N. Iowa,* 726 N.W.2d 363, 368 (Iowa 2007); New World Dictionary 1196 (2d ed.1974).

Annett Holdings, Inc. v. Allen, 738 N.W.2d 647, 649–50 (Iowa Ct. App. 2007). Defendants' interpretation of this passage is faulty. First, it was noted therein that "quantity" is irrelevant, so the number of hours worked, and the fact that her job did not end up being a permanent job, does not detract from the regularity of Jasmine's employment at Agency. She worked at least some amount of time each week in the same job (filing clerk). That is sufficient to constitute regular employment.

Accordingly, Cote respectfully requests that the Court reject the Defendants' arguments as to these issue, and find that there is subject matter jurisdiction of Cote's claims under Chapter 216.

III. DEFENDANTS' PRE-EMPTION ARGUMENT.

As to Defendants' claims that Cote's common law claims are pre-empted by the Iowa Civil Rights Act, error has not been preserved. The trial court did not rule on their pre-emption arguments, nor did they attempt to have the trial court amend its ruling to address the argument. *Meier v.*

Senecaut, 641 N.W.2d 532, 537 (Iowa 2002); *State v. Krogmann,* 804 N.W.2d 518, 524 (Iowa 2011); *Fennelly v. A-1 Mach. & Tool Co.,* 728 N.W.2d 181, 187 (Iowa 2007).

IV. DEFENDANTS' ARGUMENTS REGARDING THE STATUTE OF LIMITATIONS SHOULD BE REJECTED.

First, as set forth above, Cote questions whether these issues were sufficiently raised in Defendants' Application for Interlocutory Appeal. Therefore, the Court should decline to decide the statute of limitations issues raised by Defendants on an interlocutory basis. As indicated by the trial court's ruling, these issues are heavily fact based, so they should be decided on appeal following a final judgment, and not on an interlocutory basis.

A. DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENT REGARDING PLAINTIFF'S ICRC CLAIMS.

The Defendants argue that Cote's ICRC complaint, submitted on April 10, 2013, was untimely, as they allege that no acts of sexual harassment took place within the previous 300 days. The trial court properly denied this argument, viewing the facts in the light most favorable to Cote.

There only needs to be one incident in furtherance of the hostile environment that occurred within the 300 day time frame – as long as that one incident exists, the fact finder can consider all incidents, whether within

or outside of the 300 day claim, when evaluating a hostile environment claim. This has been the law of the State of Iowa for some time:

> We also cannot agree with the City's reasoning that if a specific incident of sexual harassment occurred prior to November 21, 1984, then the court lacked authority to consider it as evidence in Lynch's case. When the plaintiff's claim is that her employer maintained a sexually hostile work environment, the alleged discriminatory practice must be viewed as a so-called "continuing violation" of chapter 601A. As long as the discriminatory practice continued within the limitations period, the claim is timely and may be proven, at least in part, by evidence of specific incidents of sexual harassment which occurred outside the limitations period. *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n,* 453 N.W.2d 512, 527 (Iowa 1990); 161 Iowa Admin. Code 3.3.
>
> This rule has much to recommend it in cases where the alleged sex discrimination takes the form of maintenance of a sexually hostile work environment. Unlike a charge of discriminatory discharge or failure to hire, for example, the essence of a sexually hostile work environment claim clearly is that of a pattern of harassment, a violation over time; we doubt that a sexually hostile work environment could be shown by proving only one incident of sexual harassment.[3] Were we to hold that the court cannot consider incidents of sexual harassment which occurred outside the limitations period in sexually hostile work environment cases, a plaintiff would be forced to endure the hostile environment until sufficient incidents had occurred to show that the environment existed, but then might be precluded from proving a case because some incidents occurred outside the limitations period.

Lynch v. City of Des Moines, 454 N.W.2d 827, 832 (Iowa 1990). *See also Jenkins v. Wal-Mart Stores, Inc.,* 910 F.Supp. 1399, 1413-14 (N.D. Iowa 1995) (a plaintiff making a Title VII claim of discrimination may challenge incidents which happened outside the statutory time limitation if there is a

continuing pattern of discrimination, and at least one instance of discrimination occurred within the filing period). As Judge Bennett noted in *Inglis v. Buena Vista University*, 235 F.Supp.2d 1009 (N.D. Iowa 2002), sexually hostile work environments do not occur in a single day:

> Specifically, hostile environment claims do not take place in a single day; rather they unfold over a period of time because "[s]uch claims are based on the cumulative affect [sic] of individual acts." *See id.* Therefore, "'[t]he unlawful employment practice'. . . . cannot be said to occur on any particular day. It occurs over a series of days and perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.*

Id. Therefore, as long as one instance occurred after June 14, 2012, summary judgment is inappropriate as to this issue.

The gist of the Defendants' argument is that the events alleged by Cote that occurred within the 300 day time frame (after June 14, 2012) are not a part of the pattern of sexual harassment. Cote's version of the events (which must be accepted given the summary judgment standard of viewing the facts in the light most favorable to her) establishes several things which preclude summary judgment, however.

First, Dorn had a history of exposing himself to other women in the office. Since Cote knew of these occurrences, it is admissible to prove Dorn's pattern and practice, and that a hostile work environment existed. It is not hearsay:

> To determine whether a hostile work environment existed, evidence concerning "all circumstances" of the complainant's employment must be considered. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 22–24, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). "[E]vidence of a hostile environment must not be compartmentalized, but must instead be based on the totality of the circumstances of the entire hostile work environment." *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.,* 130 F.3d 349, 355 (8th Cir.1997) (citations omitted). Here, Madison introduced evidence that other women and African American employees were also discriminated against and harassed. This evidence was relevant as to whether IBP maintained a hostile work environment, whether it intended to harass and discriminate against women and African Americans, and whether IBP's justifications for its refusal to discipline Madison's harassers or to promote her were pretextual. *See Jackson v. Quanex Corp.,* 191 F.3d 647, 661 (6th Cir.1999) (racist conduct directed at other employees probative since "[w]hat may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents") (citations omitted). Moreover, IBP made such evidence relevant by claiming that it maintained effective corporate policies prohibiting racial and sexual harassment. Madison was entitled to present evidence showing that IBP had consistently failed to prevent illegal conduct and to correct it promptly. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). This evidence supported Madison's contention that IBP failed to discipline harassers and to ensure that the civil rights of its employees were not violated.

Madison v. IBP, Inc., 257 F.3d 780, 793-94 (8th Cir. 2001) *cert. granted, judgment vacated*, 536 U.S. 919, 122 S. Ct. 2583, 153 L. Ed. 2d 773 (2002) *abrogated by Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004)(on other grounds).

Second, Cote's evidence shows that she was personally a victim of Dorn's harassment over a lengthy period of time. Numerous times over the

course of several years, Dorn came into her work area, when there was no one else in the office, to stand right next to her with an obvious erection in his pants. As with the other women, there was also an occasion where he had his pants unzipped to expose himself in front of her, and he also groped himself in front of her on one occasion. This is not a case of mere occasional jokes or comments, but a longstanding practice of extremely offensive behavior.

Finally, in the summer of 2012, within the 300 day period, Dorn came into Cote's work area several times when they were alone in the office, consistent with the other times that Dorn sexually harassed her by standing immediately next to her with a visible erection. Cote's ICRC complaint (App. 6-12) and her Affidavit submitted in response to the summary judgment motion (App. 105-110) note that it was obvious from the context of his coming into her work area alone, for no apparent reason, with the same demeanor as to the times when he would harass her, that these acts were in continuance of the hostile work environment. Considering his history with other women as well as Cote, it was obvious that he went to her work area, stood next to her, trying to harass her again.

Even if the Court concludes that these were not overtly sexual actions in the summer of 2012, in *Carter v. Chrysler Corp.*, 173 F.3d 693 (8th Cir.

1999), the Eighth Circuit held that not all acts in support of a hostile environment claim need to be stamped with an overtly discriminatory character, as long as they are part of a course of conduct which is tied to a discriminatory animus. Cote's affidavit and version of events establishes that the events of the summer of 2012 were a part of the overall hostile environment.

B. DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENT REGARDING PLAINTIFF'S TORT CLAIMS.

Next, Defendants argue that the statute of limitations bars her tort claims. Defendants' arguments should be rejected.

Defendants argue that there is insufficient evidence as a matter of law that conduct giving rise to the intentional infliction of emotional distress claim occurred within the statute of limitations period. The elements of a claim for intentional infliction of emotional distress are: (1) outrageous conduct by the defendant; (2) the defendant's intentional causing, or reckless disregard of the probability of causing emotional distress; (3) the plaintiff has suffered severe or extreme emotional distress; and (4) actual proximate causation by the defendant's outrageous conduct. *Taggart v. Drake University*, 549 N.W.2d 796, 802 (Iowa 1996). *Vinson v. Linn Mar Comm. School District*, 316 N.W.2d 108 (1984) stated that for conduct to be

outrageous, it must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.* at 118. It has been noted that unwelcome sexual conduct may reasonably be regarded as extreme and outrageous conduct for the purposes of an intentional infliction of emotional distress claim. *Watson v. Las Vegas Valley Water Dist.*, 378 F.Supp.2d 1269, 1278-79 (D. Nev. 2005). Given his longstanding pattern of exposing himself and standing next to her with an erection, a jury could conclude that those actions continued to occur in the summer of 2012, and that those actions were outrageous.

> As to the tort of assault, the elements are as follows:
>
> a. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> b. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

Iowa Code § 708.1. When a male in a position of power stands within a few feet of a female subordinate's face, consistent with his pattern of standing with an obvious erection and/or exposing himself next to her, a reasonable jury could find that he has committed this tort.

Cote has testified that the pattern of behavior from Dorn continued well into the summer of 2012, rendering these counts timely. Contrary to the trial court's conclusion, Cote also believes that the pre-statute of limitations conduct should be considered as a part of a continuous tort. Case law suggests that conduct outside the statute of limitations can be considered since it is deemed to be a continuous tort. *See Cabaness v. Thomas*, 232 P.2d 486, 497 (Utah 2010) (citing various cases indicating when ongoing actions are alleged, recovery is permitted on the theory that all violations are part of one continuing act). Therefore, Cote submits that the pre April, 2012 acts are also a part of her intentional infliction of emotional distress and assault claims.

The trial court's ruling correctly interpreted the evidence in the light most favorable to Cote, and found that the claims should be submitted to the jury notwithstanding the Defendants' statute of limitations arguments. (MSJ Ruling pp. 15-18, App. 190-193). Therefore, Defendants' appeal should be denied.

V. CONCLUSION.

For all the foregoing reasons, Cote requests that the Court affirm the decision of the trial court, and remand the case for trial.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee requests to be heard orally upon submission of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

On the 20th day of September, 2016, the undersigned hereby certifies that Plaintiff-Appellee's Final Brief and Request for Oral Argument was filed with the Iowa Supreme Court by electronic filing via EDMS. Additionally, the undersigned certifies that on the 20th day of September, 2016, this document was served upon all parties to this appeal by electronic filing via EDMS:

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