IN THE SUPREME COURT OF IOWA

CASE NO. 11-1857

Webster County No. LACV315104

MELISSA NELSON,
Plaintiff/Appellant

vs.

JAMES H. KNIGHT DDS, P.C. and JAMES KNIGHT
Defendants/Appellees

APPEAL FROM THE DISTRICT COURT
FOR WEBSTER COUNTY

APPELLANT'S SECOND PETITION FOR REHEARING

Paige Fiedler AT0002496
paige@employmentlawiowa.com
FIEDLER & TIMMER, P.L.L.C.
2900-100th St., Suite 209
Urbandale, Iowa 50322
Telephone: (515) 254-1999
Facsimile: (515) 254-9923

ATTORNEY FOR PLAINTIFF/APPELLANT

This Court erred in viewing the facts of this case in the light most favorable to Defendants and engaging in the fact finding necessary to ignore all the evidence that Plaintiff had no "consensual personal relationship" with her boss. Defendants admitted that Melissa's gender and Dr. Knight's sexual attraction toward her were motivating factors in her termination; therefore, judgment in their favor on her claim of sex discrimination should be reversed.

STATEMENT OF THE CASE

Plaintiff/Appellant Melissa Nelson seeks rehearing of the Court's decision of July 21, 2013, in accordance with Iowa Rule of Appellate Procedure 6.1205.

ARGUMENT

The Court decided that, even though the law supported Plaintiff's claims, no reasonable jury could find that Melissa's sex was among the reasons she was fired. After all, "legal claims must . . . be supported by facts." *Nelson v. Knight*, 2013 WL 3483805 at *13 (Cady, J., concurring).

Yet, Dr. Knight admitted that Melissa's sex was part of the reason she was fired. (James Knight Dep. 88, 143) (App. 112, 114). *He confessed.* Along with Knight's disrespectful gender-based behavior toward Melissa, his confession is excellent evidence that her sex really was "a motivating

factor" in her termination. *See State v. Polly*, 657 N.W.2d 462, 466 (Iowa 2003) (finding that a confession, along with some supporting evidence, can support a criminal conviction beyond a reasonable doubt).

The Court declared: "It is abundantly clear that a woman does not lose the protection of our laws prohibiting sex discrimination just because her employer becomes sexually attracted to her." *Nelson* at *12 (Cady, J., concurring). Dr. Knight told Melissa's husband Steve that this was the reason he fired her. (Steve Nelson Aff. ¶¶ 5, 8) (App. 134-135). This second admission is also excellent evidence that Melissa's sex was a motivating factor in her termination.

The Court engaged in inappropriate factfinding when it decided to disbelieve Defendants' admissions and instead wholly swallow Defendants' attorney's theory of the case. Doing so required the Court to ignore Plaintiff's evidence that, except for his sexually inappropriate remarks, Melissa had a very ordinary boss/subordinate relationship with Knight.

The Court went to great lengths to interpret the facts in the light most favorable to Knight. For instance, it pointedly referred to their relationship as "consensual." *Nelson* at *13 (Cady, J., concurring). That word is dripping with sexual innendo.

The Court discussed Nelson's off-hand comment that Knight was the

only reason she did not quit her job as if it had been tenderly cooed rather than made as an innocent statement of professional appreciation. *Id.*

Contrary to the Court's finding, Melissa did not ever say that another "employee was jealous of the *close relationship* she enjoyed with Dr. Knight." *See id.* (emphasis added). She testified that the coworker was jealous that she and Dr. Knight "got along." (Nelson Dep. 52-53) (App. 46). While this may be a small difference, the Court's nefarious inference is not possible when Melissa's testimony is quoted accurately.

Most disturbingly, the Court described grossly inappropriate, sexually harassing comments as "banter" that the parties both "enjoyed."[1] *Id.* In reality, there was zero evidence remotely suggesting that Knight's sexually offensive comments were "consenual," "enjoyable," or "banter." This suggestion is itself inappropriate and sexually offensive. Contrary to the Court's implication, simply because she did not separately sue him for sexual harassment[2] does transform Melissa into a willing participant in Dr. Knight's proclivities, nor does it make her responsible for controlling them.

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[1] It adds insult to injury to use Defendants' sexually harassing conduct toward Melissa as evidence that her termination had nothing to do with her sex. Under firmly established law concerning summary judgment, this evidence must be viewed as strongly *supporting* her claims of sex discrimination. Plaintiff respectfully requests that the Court give heartfelt consideration to the possibility that its view of the facts of this particular case may be influenced by its own implict biases regarding women.

[2] Plaintiff argued her Petition was broad enough to include a claim of sexual harassment (Plaintiff's Resistance to Defendants' Motion to Compel Discovery 5/2/11), but the district court refused to permit her to make the claim. (Order 6/24/11).

The Court went on to make the astounding declaration that "Nelson made no legal or factual claim that a relationship with Dr. Knight was submissive, objectionable, or harassing in any way." *Id.* at 14 (Cady, J., concurring). Actually, Plaintiff repeatedly testified that Dr. Knight's sexual remarks made her uncomfortable. *See* Pl. Brief 4; Nelson Dep. 72-73 (App. 129). When he said he had personal feelings toward her that were affecting his home life, she "was completely shocked and began to sob." *See* Pl. Brief 5; Nelson Dep. 46 (App. 125). Melissa testified at length about remarks Knight made that she found to be sexually inappropriate. (Nelson Dep. 28-29, 36-37, 72-73) (App. 40, 46, 133). Plaintiff told the Court: "A reasonable jury could certainly find that Melissa discouraged Dr. Knight's sexually provocative conduct as much as she could without getting herself fired." (Pl. Reply Brief 8).

In sum, the Court's eagerness to draw stereotypical conclusions impugning the sexual morality of Melissa Nelson in the face of contrary evidence is disturbing.

Relationships between human beings, romantic or platonic, are filled with grey areas. Human motivations are complex and multi-faceted. "[A] personal relationship between an employer and subordinate can give rise to

subtle issues of power and control that may make the line betwee consenual and submissive relationships difficult to draw." *Nelson* at *14 (Cady, J., concurring). These are exactly the sort of matters juries are required to unravel. It is fundamentally unfair for judges to make conclusions about the true nature of these parties' association without having anyone ever having watched Melissa's face or heard Dr. Knight's tone of voice as they describe it.

Under these facts and under the law the Court purports to embrace, a reasonable jury could easily find that Melissa had no unusual relationship with Dr. Knight. A reasonable jury could also find that, even if the relationship was closer than he had with other employees, she never would have been fired because of it, but for her physical attractiveness and/or Dr. Knight's sexual attraction to her. The Court reasoned that because Dr. Knight and Melissa's friendship was closer than most boss/subordinates, a jury would be required to find that negative stereotypes about attractive women in the workplace were not part of the reason she was fired. *See Nelson* at *12 n. 11(Cady, J., concurring). But even if the jury were to find against Melissa on this factual issue and believe that she and Dr. Knight had a close relationship, it does not follow that the jury would be required to find negative stereotypes about attractive women in the workplace were not part

of the reason she was fired.

Contrary to the Court's belief, there is really no "inherent difficulty" in defining sex discrimination. *Nelson* at *10 (Cady, J., concurring). The Iowa Legislature said workplace discrimination "because of . . . sex" is illegal. IOWA CODE § 216.6(1)(a). The difficulty seems to lie in the Court's struggle to evade the plain dictates of the statute because it does not like the result.

CONCLUSION

Judicial activism undermines the Court's integrity. Plaintiff respectfully requests that it withdraw its July 12 Opinion and issue a new decision reversing the district court and allowing a trial.

FIEDLER & TIMMER, P.L.L.C.

Paige Fiedler AT 0002496
paige@employmentlawiowa.com
2900-100th St., Suite 209
Urbandale, Iowa 50322
Telephone: (515) 254-1999
Facsimile: (515) 254-9923
ATTORNEY FOR
PLAINTIFF/APPELLANT

ATTORNEY'S COST CERTIFICATE

I, Paige Fiedler, certify that the actual cost of reproducing the necessary copies of the following Petition for Rehearing consisting of a total of 162 pages was $24.20, and that the amount actually has been paid in full by the undersigned firm.

CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.1205 and Iowa R. App. P. 6.903(1)(g):

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FIEDLER & TIMMER, P.L.L.C.

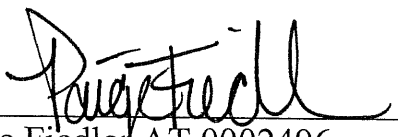
Paige Fiedler AT 0002496
paige@employmentlawiowa.com
2900-100th St., Suite 209
Urbandale, Iowa 50322
Telephone: (515) 254-1999
Facsimile: (515) 254-9923
ATTORNEY FOR
PLAINTIFF/APPELLANT

CERTIFICATE OF SERVICE

I, Paige Fiedler, hereby certify that on this 16th day of July, 2013, I served the attached Appellant's Petition for Rehearing by mailing two (2) copies thereof to the following attorneys for the Appellees:

Stuart J. Cochrane
James L. Kramer
JOHNSON, KRAMER, GOOD, MULLHOLLAND,
COCHRANE & DRISCOLL, P.L.C.
809 Central Avenue, Suite 600
Fort Dodge, IA 50501
ATTORNEYS FOR DEFENDANTS/APPELLEES

FIEDLER & TIMMER, P.L.L.C.



Paige Fiedler AT 0002496
paige@emplbymentlawiowa.com
2900-100th St., Suite 209
Urbandale, Iowa 50322
Telephone: (515) 254-1999
Facsimile: (515) 254-9923
ATTORNEY FOR
PLAINTIFF/APPELLANT

CERTIFICATE OF FILING

I, Paige Fiedler, hereby certify that I have filed the attached Appellant's Petition for Rehearing by depositing eighteen (18) copies thereof with the Clerk of the Iowa Supreme Court, , Iowa Judicial Branch Building , 1111 East Court Avenue, Des Moines, Iowa 50319, on the 16th day of July, 2013.

FIEDLER & TIMMER, P.L.L.C.

Paige Fiedler AT 0002496
paige@employmentlawiowa.com
2900-100th St., Suite 209
Urbandale, Iowa 50322
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ATTORNEYS FOR
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