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IN THE SUPREME COURT OF IOWA

Supreme Court No. 23-0628

DARRELL JEFFREY MCCLURE,

Appellant/Plaintiff,

vs.

CORTEVA AGRISCIENCE LLC,

Appellee/Defendant.

APPEAL FROM THE KEOKUK COUNTY DISTRICT COURT
District Court Judge Crystal S. Cronk

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ATTORNEYS FOR APPELLANT-PLAINTIFF

TABLE OF CONTENTS

Page

Table of Contents 2

Table of Authorities 4

Statement of Issues 7

Routing Statement 9

Statement of Case 9

Statement of Facts 10

Argument 38

I. THE DISTRICT COURT ERRED BY FAILING TO VIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO MCCLURE, THE NONMOVING PARTY……………….........................38

A. Standard of Review…………………………………………..38

B. Reviewing the Evidence in the Light Most Favorable to Corteva, the District Court Dismissed McClure's Age Discrimination Claim on the Sole Basis that McClure, as A Matter of Law, Did Not "Perform His Work Satisfactorily"……………………………39

C. Reviewing the Facts in Corteva's Favor, the District Court Dismissed McClure's Retaliation Claim As Lacking "Causation"………………………………………...55

D. The District Court's Dismissal of McClure's Harassment Claim Usurped the Jury's Role…………………...…………………...…59

E. The District Court's Dismissal of McClure's Disability Claims Again Relied Upon Corteva's Facts and Ignored Disputed,

Material Facts, Especially as to McClure's Perceived Disability Claim 60

Conclusion 62

Notice of Request of Oral Argument 64

Cost Certificate 65

Certificate of Compliance 65

Certificate of Filing 66

Certificate of Service 67

TABLE OF AUTHORITIES

CASES **Page**

Iowa Supreme Court

Beeck v. S.R. Smith Co., 359 N.W.2d 482 (Iowa 1984)………………….39

Boelman v. Manson State Bank, 522 N.W.2d 73 (Iowa 1994)…………...60

Boyle v. Alum-Line, Inc., 710 N.W.2d 741 (Iowa 2006)…………………56

DeBoom v Raining Rose, Inc., 772 N.W.2d 1 (Iowa 2009)……….….52, 57

Feeback v. Swift Pork Company, 988 N.W.2d 340 (Iowa 2023)………39-45

Fennelly v. A-1 Mach. & Tool Co., 728 N.W.2d 181 (Iowa 2007)……..…39

Goodpaster v. Schwan's Home Serv., Inc., 849 N.W.2d 1 (Iowa 2014).60-61

Hamer v. Iowa Civil Rights Comm'n, 472 N.W.2d 259 (Iowa 1991)…….55

Haskenhoff v. Homeland Energy Solutions, LLC, 897 N.W.2d 553 (Iowa 2017)……………………………………………………………….56

Hedlund v. State, 930 N.W.2d 707 (Iowa 2019)…………………………..56

Schlitzer v. Univ. of Iowa Hosp. & Clinics, 641 N.W.2d 525 (Iowa 2002).60

Smidt v. Porter, 695 N.W.2d 9 (Iowa 2005)………………………………41

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009)…39

Iowa Court of Appeals

Johnson v. Mental Health Institute, 912 N.W.2d 855, 2018 WL 351601 (Iowa Ct. App. Jan. 10, 2018)………………………………………41, 45-46

Salami v. Von Maur, Inc., No. 12-0639, 2013 WL 3864537 (Iowa Ct. App. Jul. 24, 2013)……………………………………………………………55

United States Courts of Appeals

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988)……………55

Lake v. Yellow Transp., Inc., 596 F.3d 871 (8th Cir. 2010)……………44-45

Madison v. IBP, 257 F.3d 780 (8th Cir. 2000)……………………………..55

McGinnis v. Union Pac. R.R., 496 F.3d 868 (8th Cir. 2007)………………43

Riley v. Lance, 518 F.3d 996 (8th Cir. 2008)…………………………..42-43

Sandoval v. Am. Build. Maint. Indus., Inc., 578 F.3d 787 (8th Cir. 2009)..54

White v. Honeywell, Inc., 141 F.3d 127 (8th Cir. 1998)…………………..54

Young v. Warner-Jenkinson Co., 152 F.3d 1018 (8th Cir. 1998)…………41

United States District Courts

Cox v. Infomax Office Systems, Inc., No. 4:07-cv-0457-JAJ, 2009 WL 124700 (S.D. Iowa Jan. 16, 2009)…………………………………........42

Galambos v. Fairbanks Scales, 144 F. Supp.2d 1112 (E.D. Mo. 2000)……62

Garang. v. Smithfield Farmland Corp., 439 F. Supp.3d 1073 (N.D. Iowa 2020)…………………………………………………………………..44

Peterson v. Martin Marietta Materials, Inc., 2016 U.S. Dist. LEXIS 64469, (N.D. Iowa May 17, 2016)……………………………………..…42, 58

Roberts v. USCC Payroll Corp., 635 F. Supp.2d 948 (N.D. Iowa 2009) ….43

STATUTES

Iowa Code § 216.6(1)(a)…………………………………………………...61

Iowa Code § 216.11(2)……………………………………………………..55

Iowa Code § 216.18(1)……………………………………………………..61

ADMINISTRATIVE REGULATIONS

Iowa Admin. Code r. 161—8.26(1)……………………………………...61

RULES

Iowa R. Civ. P. 1.981 .... …..39

Iowa R. App. P. 6.907 39

Iowa R. App. P. 6.1101 9

STATEMENT OF ISSUES
PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED BY FAILING TO VIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO MCCLURE, THE NONMOVING PARTY

CASES

Beeck v. S.R. Smith Co., 359 N.W.2d 482 (Iowa 1984)
Boelman v. Manson State Bank, 522 N.W.2d 73 (Iowa 1994)
Boyle v. Alum-Line, Inc., 710 N.W.2d 741 (Iowa 2006)
Cox v. Infomax Office Systems, Inc., No. 4:07-cv-0457-JAJ, 2009 WL 124700 (S.D. Iowa Jan. 16, 2009)
DeBoom v Raining Rose, Inc., 772 N.W.2d 1 (Iowa 2009)
Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988)
Feeback v. Swift Pork Company, 988 N.W.2d 340 (Iowa 2023)
Fennelly v. A-1 Mach. & Tool Co., 728 N.W.2d 181 (Iowa 2007)
Galambos v. Fairbanks Scales, 144 F. Supp.2d 1112 (E.D. Mo. 2000)
Garang. v. Smithfield Farmland Corp., 439 F. Supp.3d 1073 (N.D. Iowa 2020)
Goodpaster v. Schwan's Home Serv., Inc., 849 N.W.2d 1 (Iowa 2014)
Hamer v. Iowa Civil Rights Comm'n, 472 N.W.2d 259 (Iowa 1991)
Haskenhoff v. Homeland Energy Solutions, LLC, 897 N.W.2d 553 (Iowa 2017)
Hedlund v. State, 930 N.W.2d 707 (Iowa 2019)
Johnson v. Mental Health Institute, 912 N.W.2d 855, 2018 WL 351601 (Iowa Ct. App. Jan. 10, 2018)
Lake v. Yellow Transp., Inc., 596 F.3d 871 (8th Cir. 2010)
Madison v. IBP, 257 F.3d 780 (8th Cir. 2000)
McGinnis v. Union Pac. R.R., 496 F.3d 868 (8th Cir. 2007)
Peterson v. Martin Marietta Materials, Inc., 2016 U.S. Dist. LEXIS 64469, (N.D. Iowa May 17, 2016)
Riley v. Lance, 518 F.3d 996 (8th Cir. 2008)
Roberts v. USCC Payroll Corp., 635 F. Supp.2d 948 (N.D. Iowa 2009)
Salami v. Von Maur, Inc., No. 12-0639, 2013 WL 3864537 (Iowa Ct. App. Jul. 24, 2013)
Sandoval v. Am. Build. Maint. Indus., Inc., 578 F.3d 787 (8th Cir. 2009)
Schlitzer v. Univ. of Iowa Hosp. & Clinics, 641 N.W.2d 525 (Iowa 2002)
Smidt v. Porter, 695 N.W.2d 9 (Iowa 2005)

White v. Honeywell, Inc., 141 F.3d 127 (8th Cir. 1998)
Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009)…39
Young v. Warner-Jenkinson Co., 152 F.3d 1018 (8th Cir. 1998)

STATUTES

Iowa Code § 216.6(1)(a)……………………………………………...60
Iowa Code § 216.11(2)…………………………………………………..55
Iowa Code § 216.18(1)…………………………………………………..61

ADMINISTRATIVE REGULATIONS

Iowa Admin. Code r. 161—8.26(1)……………………………………...60

RULES

Iowa R. Civ. P. 1.981
Iowa R. App. P. 6.907
Iowa R. App. P. 6.1101

Routing Statement

Under the provisions of Iowa Rule of Appellate Procedure 6.1101, Appellant respectfully represents that this case, at the Court's discretion, could be transferred to the Court of Appeals based on the standards set forth in Rule 6.1101(2)-(3). This Appeal can be resolved by application of existing legal principles.

Statement of the Case

This is a civil employment case brought by former Pioneer/Corteva employee and forklift driver Darrell Jeffrey "Jeff" McClure against the company now known as Corteva Agriscience ("Corteva") with whom McClure worked for more than 39 years before being terminated in the summer of 2020. McClure filed his petition on August 24, 2021 against named Defendant E.I. Du Pont De Nemours and Company d/b/a Corteva Agriscience and individuals Dan Dehrkoop, Steven Brooks, Chad Langstraat, William Ritter, Josey Hubanks, and Jake [Mittag]. (APP. v. I p.7, Pet., p. 1). By agreement of counsel, Plaintiff dismissed the individual defendants on December 15, 2021, and later amended the Petition, on March 11, 2022, to name entity "Corteva Agriscience LLC." (APP. v. I pp. 43-57 , Am. Pet.). Plaintiff's lawsuit alleged disability discrimination and harassment/hostile work environment in violation of the Iowa Civil Rights

Act (Count I); age discrimination and harassment/hostile work environment harassment in violation of the Iowa Civil Rights Act (Count II); and retaliation (Count III). (APP. v. I pp. 43-56, Am. Pet., p. 1-14). Defendant Corteva denied all of Plaintiff's claims. Defendants filed a motion for summary judgement on January 11, 2023, which was heard on February 24, 2023, and granted in full on March 29, 2023, dismissing all of McClure's claims. Plaintiff's notice of appeal was timely filed on April 18, 2023.

Statement of Facts

Plaintiff Darrell Jeffrey McClure worked for the company now known as Corteva (then Pioneer) beginning in 1982, and for more than 39 years, and until his employment was terminated on July 10, 2020. (APP. v. III p. 190, McClure Dep. 42:14-42:16; APP. v. III pp. 100-102, McClure Termination Notice). At the time he was terminated, McClure was 58 years old. (APP. v. I p.52, First Am. Pet.¶ 82, APP. v. I p. 82 Def. SOF #4). For the majority of the time that he worked for Corteva he worked as a production technician, moving boxes of seed with the forklift, among other duties. (APP. v. I p. 82, Def. SOF #5). McClure most recently worked at the Hedrick, Iowa location of Corteva. (APP. vol. I p. 81, Def. SOF # 2). During his employment, McClure received generally positive job feedback, and regular raises. (APP. v. III p. 257, McClure Dec. ¶ 2); APP. v. III p.

199, McClure Dep. 98:19-99:17; *see also* APP. v. III pp. 24-46, 2016-2019 performance appraisals). For most of his employment, and until he suffered his first heart attack and requested accommodations, McClure worked the night shift at Corteva. (APP. v. I p. 83, Def. SOF # 15).

1. McClure's first heart attack and day shift accommodation

In early February, 2014, McClure suffered his first heart attack. (APP. v. III p. 105; Iowa Heart Record). When he returned to work after his heart attack, McClure provided Corteva with his doctor's note which advised that he not work the night shift anymore. The note read: "Because of previous myocardial infarction pt. should not be on night shift and remain on day shift." (APP. v. III p. 47, 8/22/14 Iowa Heart Ctr. Note). Corteva accommodated Plaintiff, based on his doctor's advice, and placed him on day shifts only. (APP. v. I p. 88, Def. SOF #43-44).

2. New management takes over at Corteva

In approximately 2017, Dan Dehrkoop became the new manager of the Hedrick, Iowa plant. (APP. v. III p. 196, McClure Dep. 84:19-84:23). At the time, Dehrkoop was approximately 34 years old. (APP. vol. III p. 131, Dehrkoop Dep. 38:17-38:18). All within a few years surrounding 2017, new shift supervisors and a new safety supervisor were installed to work alongside Dehrkoop. Jake Mittag, who was 35 years old at the time, became

a production planning manager in approximately February or March of 2018. (APP. v. III, pp. 229-230, Mittag Dep. [5]:17-6:5; APP. v. III p. 229, Mittag Dep. 4:15-4:16). Steve Brooks became a production supervisor at approximately 33 years old. (APP. v. III, p.115-116, Brooks Dep. 5:14-6:24). Chad Langstraat became a production supervisor in approximately 2017, and at the time was approximately 44 years old. (APP. v. III p. 173, Langstraat Dep. 4:6-5:20). Will Ritter became a shift supervisor in approximately 2018 when he was approximately 27 years old. (APP. v. III p. 238-239, Ritter Dep. 5:4-6:18; APP. v. III p. 239, Ritter Dep. 8:13-8:14). Josey Hubanks became safety supervisor in approximately 2014 when he was approximately 34 years old. (APP. v. III pp. 159-160, Hubanks Dep. 4:14-4:15, 5:11-6:10).

3. McClure's day shift accommodation is scrutinized

In approximately early to mid-September, 2017, McClure was told by production supervisor Chad Langstraat that the supervisors were putting out a new schedule and that he was probably going to be working overnights. (APP. v. II p. 115, Langstraat Dep. 55:13-57:4). McClure told Langstraat that he had a medical restriction and that he could not work nights. (APP. v. II p. 115, Langstraat Dep. 56:10-56:16). Langstraat claimed he did not know anything about McClure's note and therefore he went to Dehrkoop.

(APP. v. II p. 115, Langstraat Dep. 56:17-56:22). Dehrkoop told Langstraat that McClure did not have a medical note. (*Id.*). After that, Dehrkoop took over the conversation regarding McClure's restrictions. (*Id.*).

4. Within days of management questioning his accommodations, McClure receives unjustified discipline

Meanwhile, and while his newly needed request for accommodation to work the day shift was pending, and on September 26, 2017, McClure was called into the office by Brooks and Langstraat who issued Plaintiff a Progressive Discipline Warning. (APP. v. III pp. 48-49, 2017 Warning). McClure believed that if he did not sign the warning he would be fired. (APP. v. III p. 201, McClure Dep. 113:4-113:11). While he signed it, he disagreed with the facts in the warning. (APP. v. III p. 206-209, McClure Dep. 131:21-143:24). One of the issues that was listed, and that involved moving boxes four at a time, had occurred on August 8, 2016, more than one year prior to McClure's receipt of the warning, and involved another older, disabled worker, Jeff Winn, and, when McClure and Winn confronted Hubanks about the applicable policy, Hubanks admitted that company policy had been changed. Both McClure and Winn had not been notified of the policy change. (APP. v. III pp. 48-49, 2017 Warning); (APP. v. III pp. 206-207, McClure Dep. 132:5-134:13). McClure believed that this warning, which contained inaccurate and old performance feedback, was a means by

which plant management was targeting him and other older or disabled workers like him, including Jeff Winn. (APP. v. III p. 209, McClure Dep. 145:01-145:25).

On September 27, 2017, the day after this warning was delivered to McClure, and at 12:15PM, Dehrkoop sent an email to Hannah Boone, human resources employee, with no text—only the subject line: **"Jeff McClure Old Restrictions."** (APP. v. III p. 51, 9.27.17 Dehrkoop Email). The email chain continued, looped in other members of Corteva's human resources group, and culminated in Dehrkoop writing an email to Boone which questioned McClure's entitlement to the night shift accommodation. (APP. v. III p. 50, 9.28.19 Dehrkoop Email).

After discussions with Langstraat, McClure provided Dehrkoop with a doctor's note regarding his restriction to work the day shift. (APP. v. III p. 213, McClure Dep. 167:3-169:20); (APP. v. III p. 52, 10.2.19 Doctor's Note (1st)). Dehrkoop asked for clarification three separate times from McClure and his doctor, and ultimately required McClure to obtain four separate doctor's notes—all ostensibly to specify the meaning of "night shift"/ "day shift" and the concept discussed by McClure's cardiologist that McClure should not be required to work a "prolonged night shift." (APP. v. III p. 52, 10.2.19 Doctor's Note (1st); APP. v. III p. 53,10.2.19 Doctor's Note (2nd);

APP. v. III p. 65, 10.30.19 Doctor's Note (3rd); APP. v. III p. 69, 1.1[1].[18] Letter referencing a 4th Doctor's Note dated 12.8.17); (*see also* APP. v. III pp. 213-214, McClure Dep. 167:20-172:14). Though the process began in October, McClure's accommodation request was not granted until January 11, 2018. (APP. v. III p. 69, 2018 Letter).

5. McClure complains to human resources: "I feel like [I] have a target on my back because of my age, my years of service, or my medical condition, I worry about what dreamed up excuse management staff at this location create on a daily basis"

On October 22, 2017, while still being asked to provide additional doctor's notes, and approximately one month after receiving a written warning he perceived as unjustified, McClure submitted a written complaint to Corteva's online hotline complaint system. (APP. v. III pp. 54-64, McClure Complaint). The complaint provided many examples of the employee mistreatment Plaintiff had witnessed and experienced and stated that "I feel like [I] have a target on my back because of my age, my years of service, or my medical condition, I worry about what dreamed up excuse management staff at this location create on a daily basis." (APP. v. III p. 55, McClure Complaint). McClure, in the complaint, identified a fear for not only himself but other employees based on management's treatment of them, and expressed his fear of retaliation for complaining. (*Id.*).

On October 30, 2017, McClure filed an update to his October 22, 2017 complaint, and specifically addressed his pending request for accommodations, and the fact that Dehrkoop had again (as of October 25, 2017), asked him for a new note. McClure wrote of the stress he was experiencing as a result of being asked to obtain another doctor's note, and described how Dehrkoop kept McClure in suspense until the very last moment regarding whether he could remain on day shift. (APP. v. III p. 63-64, McClure Complaint Update; APP. v. III p. 257, McClure Dec. ¶ 3).

6. Corteva HR concludes nothing is wrong at the plant and that "the whole thing was a misunderstanding"

The complaint asked for help for both McClure and his coworkers. Corteva's human resources employees investigated Plaintiff's complaint along with at least one other complaint that had been submitted by another employee, also to the same hotline, and at approximately the same time that McClure's complaint was submitted. Ultimately, and after performing employee interviews, Corteva corporate human resources determined both complaints "unfounded." (APP. v. III p. 244, Witt Dep. 15:18-16:2); (APP. v. III p. 257, McClure Dec. ¶ 4); (APP. v. III p. 260-267, Investigation Report); (APP. v. I p. 93, Def. SOF # 79). Human resources personnel informed McClure that "the whole situation was a misunderstanding on both parties' part and it would be addressed through coaching sessions with

human resources and the leadership team, but that no further action would be taken" on his complaint. (APP. v. III p. 257, McClure Dec. ¶ 4).

7. Dehrkoop finds out about McClure's HR complaint against him.

Dehrkoop saw Plaintiff's complaint to human resources around the time McClure complained and knew Plaintiff complained to HR about him. (APP. v. III pp. 126-127, Dehrkoop Dep. 16:19-19:10; APP. v. III p. 282, Unemployment Appeal Hearing Transcript 35:9-37:13; APP. v. III p. 182, Langstraat Dep. 42:20-45:19). After McClure's complaint, management continued to keep notes on McClure and approach him about any perceived infractions. Notes written by Langstraat indicate that McClure was told, on January 19, 2018, that "I stated that he has a written warning and with the written warning you are not meeting expectations." (APP. v. II p. 461, Def. App. 451). This was contrary to McClure's later 2018 annual performance review. (APP. v. II p. 462-463, McClure 2018 Annual Perf. Review). Management continued to document McClure into the summer of 2018. (*Id.*).

8. McClure experiences another heart attack and Dehrkoop raises questions about his time off while McClure is still on leave recuperating, and questions his restrictions when he returns

In April, 2019, McClure suffered another heart attack. (APP. v. III p. 103; Iowa Heart Center Record) and was off work through late July, 2019. Before McClure even returned to work after his second heart attack, Dehrkoop began questioning his medical leave. On June 17, 2019, Dehrkoop sent Boone in human resources an email questioning whether McClure had the right to remain out on disability given that Dehrkoop had received information that McClure had been out in the community in various capacities—allegedly working at a nursing home fire, allegedly working dirt track races, and speaking at a Bloomfield City Council meeting. (APP. v. III p. 74, 6.17.19 Dehrkoop Email). Dehrkoop's email attached a photograph of McClure dressed in fire gear outside the nursing home. (APP. v. III p. 75, Photo). Boone forwarded Dehrkoop's email up the chain with the result that Corteva put an alert on McClure's chart so that Corteva would be notified if his return to work date extended beyond 7/22/19. (APP. v. III p. 72, 7.3.19 Berghofer Email).

In reality, and if Dehrkoop had asked him, McClure would have told him that the nursing home call was not a fire as Dehrkoop's email stated, but a water main break. The only physical duties he performed were to hold the

door open and assist with radio traffic giving directions. Otherwise, McClure merely supplied knowledge of how to conduct a mass evacuation. The City Council meeting also required no physical activity of any kind. With regard to the dirt track races, McClure appeared only in a parental role. He had ridden with his son to the races and had sat with him in the truck to give directions on how to handle car accidents when they happened on the race track. It was his son's first year doing some of the hands-on work so he needed guidance on how to handle the process. McClure did not actually participate himself until he was cleared by the doctor to go back to work. (APP. v. III pp. 257-258, McClure Dec.¶¶ 5-8).

Emails between Dehrkoop and human resources regarding McClure's return to work and his night shift restrictions continued into summer and fall of 2019. (APP. v. III pp. 77-79, Various emails between Dehrkoop and HR).

9. Bill Leach, another older employee, resigns after 28 years with the company, citing a "hostile environment"

On September 9, 2019, after 28 years of employment with Corteva, corn scheduling coordinator William ("Bill") Leach resigned. In a letter of resignation delivered overnight after a meeting in which he was given a written warning by Hedrick management that he did not agree with, and addressed directly to Dehrkoop, Leach wrote in relevant part:

> This letter serves as my formal resignation from Corteva Agriscience as the Corn Scheduling Coordinator effective September 10, 2019. This was not an easy decision as I have been a loyal employee for the past 28 years.
>
> I am resigning from the job due to the lack of training and support provided to me with the new systems brought on and I have expressed this concern with you and with my immediate supervisor and feel it was ignored. I have asked on multiple occasions for a job description defining my roles and responsibilities and have never been given one. I feel the lack of knowledge my immediate supervisor has of the process, has hindered my abilities to perform my job tasks to the level requiring to stay on task and ahead of production.
>
> I feel during my coaching sessions I was not given the proper tools or resources for me to effectively communicate with certain employees and have not been offered an alternative way to provide instruction to these individuals. I feel that I am working in a hostile environment and feel I am being targeted. I have been told I have excellent communication skills in all of my evaluations up until this point.

(APP. v. III p. 80, Excerpt of Leach Resignation Letter); (App. v. III p. 234, Mittag Dep. 46:20-48:03) (APP. v. III p. 225, McClure Dep. 251:19-251:25).

10. McClure receives a final written warning after self-reporting a safety issue

McClure returned to work again after his second heart attack at the end of July, 2019. (APP. v. III p. 78, Boone Email). On or about April 6, 2020, McClure received a final written warning alleging he had committed a safety violation. (APP. v. III pp. 83-84, Final Written Warning). Ironically, the safety violation was an incident McClure had self-reported as a safety

issue with Corteva's equipment, and in particular with dock #4. McClure described the events that day as follows:

> So we were loading trucks. The policy is to—once the truck driver comes in, he'll hang the—hand the key off to the warehouse person, and they'll hang it on a dock that's inside the warehouse office, one, two, three, or four. Then, we will go out, lock the truck in, check the lights, make sure everything is good to go, unload the truck.
>
> In this particular instance, we followed all the practices. We were having trouble with this particular dock, Dock Number 4. It wasn't locking into place and giving false readings. Maintenance had been notified of this a couple times prior to this happening.
>
> So I unloaded the truck, went over and told the truck driver, "I'm getting ready to unhook you." For whatever reason, Ron gave him his keys. So I went out there, I put the pallet jack on. When I rolled into the dock, my light facing the dock is green.
>
> So if this is your dock plate (indicating), you're going into the truck, the truck driver gets in. He sees this light is red, so he knows he can't leave. My light's green. When my light switches red, his switches green. He knows he's unlocked and he may leave.
>
> So I went in there, went to put the pallet jack in. This particular dock has flaps on the side that cover the side so the wind can't get in. I pulled the dock thing back. It was red. Mine was green. I put the dock in—or put the conveyor in. And for whatever reason, the driver said his was green, and he took off with me in the back of the truck.
>
> So it got stopped and I had come back there. And I'm standing there. Scared the you-know-what out of him. I said, "Yeah." I says, "Let me out of here."
>
> So I jumped out and went into the warehouse office. And his light was green. And I looked at mine and mine was green. So

they were both green at the same time. So I went in and I said, "We got a problem." So I went out. I put a cone in front of that dock so no other truck could back in.

I immediately walked in there, and I went to Josey, the safety coordinator, and said, "We got a problem here." I told him exactly what happened. He said, "Really?" I says, "I'm dead serious, Josey." I said, "Both lights are green." I said, "We've had problems with this dock."

So he said, "Well, we'll get an investigation. We'll get back with you." They never got back to me until a couple days later when they brought this warning to me to sign saying that I was going to be given a written warning for not following policy.

My comeback to them is, "Did you go out and check it?" "Yeah, but we can't get it to duplicate what happened." I says, "That doesn't mean it didn't happen." "Well, there were witnesses." I said, "No there wasn't." "Well, we've got two."

I said, "No, you don't." I says, "One, Jeff Walcott had just went into the truck," I said, "So he wouldn't have saw that. He would have saw my light was green." And I sad, "Second of all, Brandon just went to the other warehouse, so he didn't see it." So I says, "You can't tell me there was witnesses."

"Well, we pulled it on the video camera." So Ron tried to pull it up on the video camera. You can't tell from that angle if there was a light on or not.

So when they called me in to write me up for this, I said, "I'm not signing this, because this isn't right. You can't prove that it didn't do that." I said, "You have history on that dock not working right."

At that point, I was pretty upset and I wrote on – I just said, "I'm not signing this," and I slid it back over. I said, "Do what you got to do, because this is—this wasn't right," and that's were we left that.

(APP. v. II p. pp. 48-49, McClure Dep. 148:10-152:7). Although McClure was not aware of this having happened before where both lights were reported green at the same time, he was aware of previous issues with the dock not latching or unlatching, where the truck driver's light could be green, for example, but the truck bumper was still locked to the dock. (APP. v. II p. 49, McClure Dep. 152:08-152:22). In some situations, employees had also been getting the dock to lock in place by using a broom. (APP. v. II p. 49, McClure Dep. 152:12-152:22). According to long-term current employee Ron Witt, "Sometimes the lights on the docks don't even work." (APP. v. III p. 248, Witt Dep. 37:11-37:13); (APP. v. III p. 241, Witt Dep. 4:11-4:5:3). Witt described the issues with both docks 3 and 4, which as of the time of depositions in this case were still issues at the plant (and which were even on the fritz as of the date of Witt's deposition, November 1, 2022):

> They sometimes do not lock the trucks in. It does not change the light for the driver to see, whether it's red or green, whether he can go or has to stay. When you release the trucks, sometimes they don't release. You have to push the dock lock down to release it with a broom handle. There's an indicator on there that' supposed to turn the lights on and off, from red to green. We've had to use a squeegee to reset them.

(APP. v. III p. 248, Witt Dep. 37:22-38:7).

In addition, plant management, including safety supervisor (at the time) Josey Hubanks, had been made aware of the problems with these two docks. (APP. v. III p. 252, Witt Dep. 50:11-52:17). When Witt was asked, based on his work and experience at the plant, if he thought it was possible that McClure's light was green on April 2 just prior to entering the trailer and being pulled out into the parking lot in the trailer of the truck, Witt responded: "It's very possible." (APP. v. III p. 249, Witt Dep. 38:14-38:17).

Furthermore, plant records show that while another individual was involved in the incident, Brandon Sieren, by giving the keys back to the driver prematurely, Corteva chose not to discipline Sieren, a younger, non-disabled employee. (APP. v. III p. 82, 4.6.20 Hubanks/Brooks/Boone emails); (APP. v. II p. 68, McClure Dep. 227:2-227:9); (APP. v. II p. 66, McClure Dep. 220:2-8).

On April 21, 2020, and completely out of the blue for McClure, supervisor Steve Brooks called him in to question him regarding his attendance, including times that McClure called in late. (APP. v. III p. 87, 4.21.20 Brooks email); (APP. v. III p. 211, McClure Dep. 158:24-161:2). McClure testified that he informed Brooks during this discussion that some of his lates were due to severe migraine headaches he was experiencing at the time and that in response Brooks said "Well I really doubt that. I think

you're just trying to sleep in." (APP. v. III p. 211, McClure Dep. 159:18-160:1). Brooks denies that McClure informed him of the migraines, and Dehrkoop testified that Brooks never informed him of McClure's migraines. (APP. v. III p. 118, Brooks Dep. 31:01-31:15); (APP. v. III p. 131, Dehrkoop Dep. 38:20-39:1). On April 23, 2020, Dehrkoop performed an additional review of McClure's attendance, asking administrative personnel to "run me all of 2019 and 2020 hours thus far for Jeff McClure. I know you ran some, but I will need a more broad number." (APP. v. III p. 85, 4.23.20 Dehrkoop email). On April 30, 2020, Dehrkoop met with McClure to discipline him regarding attendance concerns. (APP. v. III p. 90, 4.30.20 Dehrkoop email).

11. McClure is involved in a forklift accident and is blamed and fired, whereas the other driver, who is younger, without disabilities, and was going much faster prior to the accident, kept working for Corteva

On June 29, 2020, McClure was involved in a forklift accident in which two forklifts (one driven by Plaintiff) collided. (APP. v. III p. 220, McClure Dep. 207:11-209:16). The other worker involved in the forklift accident was substantially younger than McClure, not disabled, and was a temporary employee. (APP. v. III p. 258, McClure Dec. ¶ 10). McClure testified the temporary employee was both backing and driving fast, just prior to the collision, while McClure's forklift was still. (APP. v. III p. 220,

McClure Dep. 207:11-209:16). Meanwhile, Corteva accused McClure of T-boning the temporary worker. (APP. v. I p. 99, Def. SOF # 115). Even using Defendant's evidence, the temporary worker was driving more than twice as fast (6.6 m.p.h.) as Plaintiff (3.0 m.p.h.) just prior to the collision and the impact rating tracked by the temporary worker's forklift's electronic sensor was much greater (11.4) than Plaintiff's (5.6). (APP. v. III p. 281, Unemployment Hearing Transcript, 32:2-32:13). Nevertheless, Dehrkoop relied on the collision when again emailing human resources, on June 30, 2020, about McClure, this time writing: "I think we are unfortunately ready for termination here." (APP. v. III p. 93, 6.30.20 Dehrkoop Email). After this collision, and on July 10, 2020, McClure was called into a meeting and his employment was terminated. (APP. v. III pp. 100-102, Term. Memo). If Corteva had wanted to, it could have precluded the temporary worker from coming back to work at the Corteva plant, but it did not, and that employee continued to work at the Hedrick plant. (APP. v. III p. 171, Hubanks Dep. 78:4-79:4). Dehrkoop later agreed it was his decision to terminate McClure, with the approval of HR and legal. (APP. v. III p. 130, [Dehrkoop] Dep. 36:13-37:12).

12. Another 39-year, disabled employee of Corteva constructively discharges after his day shift accommodation is continually questioned by Dehrkoop

On September 1, 2021, at the age of 61 years old, an employee named Jeff Winn retired early from Corteva after nearly 40 years of employment. (APP. v. III p. 18, Winn Dec. ¶ 3). Winn, who had diabetes and had also had a restriction to work the day shift, like McClure, had encountered, prior to his early retirement, a very similar sequence of events as did McClure. Dehrkoop had required Winn to obtain 3-4 doctor's notes to substantiate his day shift accommodations request which had also pre-Dehrkoop been in place for years by that time. (APP. v. III pp. 18-19, Winn Dec. ¶¶ 4-6). Winn identified the difficulties he encountered in re-obtaining his day shift accommodation as the primary reason for his early retirement. (*Id.*) Winn testified that though he submitted doctor's notes in January or February of 2021, his request was not granted until late June or July of 2021, at which point, Dehrkoop told Winn that as of September 1, 2021 Winn would need to re-do the request again. (*Id.* at ¶ 8). Winn testified: "By that point I had decided I could not stay in my job anymore because of the way management was handling things, and I responded that was fine because I was retiring as of September 1, 2021, and that was the last that we discussed my need for accommodations." (*Id.*).

Winn also described discrimination against older workers, and how he felt he was targeted with the lengthy review of his accommodations request, and with unfair discipline, which he described in detail. (APP. v. III pp. 19-22, *Id.* ¶¶ 9-18). Unfair discipline included, but was not limited to, Winn being accused of breaking a labeler machine when he was 100 feet away from the machine when it broke, and had another employee with him who corroborated that he was nowhere near the machine when it broke. (APP. v. III p. 21, at ¶ 16). In addition, Winn shared that he had raised safety concerns with Hubanks, who said he wanted employees to bring such issues forward, but Winn, based on his interactions with Hubanks, and based Hubanks' failure to meaningfully implement the safety changes Winn brought forward, concluded that "he did not actually want any input from employees about potential safety changes." (APP. v. III pp. 21-22, *Id.* ¶ 17).

13. Current employees continue to experience and observe discrimination and an ongoing hostile work environment and Corteva continues to ignore them

a. Mike Ellis

Corteva employee Mike Ellis is 63 years old and has worked at the Hedrick plant as a production technician for approximately 32 years. (APP. v. III p. 133, Ellis Dep. 3:10-3:13; APP. v. III p. 133, Ellis Dep. 4:10-15; APP. v. III p. 138, Ellis Dep. 25:16-25:18). Mr. Ellis testified as follows:

> Q: Have you experienced any unfair treatment during your time working at Corteva?
>
> A: Yes.
>
> Q: What do you consider unfair treatment that you've experienced?
>
> A: A little harassing and age discriminating.
>
> Q: Describe how that's happened.

(APP. v. III p. 135, Ellis Dep. 12:1-12:7).

Ellis went on to describe, in detail, a series of instances during the last few years in which he had been unfairly disciplined, incurring three write-ups—in his words "lies"—by Hedrick supervisors Chad Langstraat, Will Ritter, Josey Hubanks, and plant manager Dan Dehrkoop. (APP. v. III pp. 135-139, Ellis Dep. 12:7-28:15). Prior to receiving such discipline, he had not received any write ups in his more-than-three decade career. (APP. v. III pp. 136-137, Ellis Dep. 17:22-18:2). Ellis also recounted that supervisor Chad Langstraat was "always watching me personally" and that "And I usually am with them supervisors, but I feel they moved me over to Chad since I've had the three write-ups, to keep an eye on me." (APP. v. III pp. 136-137, Ellis Dep. 19:15-21:18). Ellis's list of unfair discipline included an instance where he was accused by supervisor Steve Brooks of having accused an employee of stealing a fan. Even when Ellis brought the employee to Brooks, and that employee confirmed that Ellis had never

accused him of stealing a fan, Corteva management, including Dehrkoop, refused to modify Ellis's personnel record, and instead referenced the alleged fan incident in a later write up. (APP. v. III p. 138, Ellis Dep. 22:18-24:7).

In addition, Ellis testified that in July 2022 he complained to HR, but when he asked to speak with human resources by phone rather than through email, because "we know of things that—where Dan Dehrkoop can get in and read the emails if he wants to" that "after that [request for phone contact] everything died. Nobody's contacted me again. I've never seen another email or anything." (APP. v. III p. 139, Ellis Dep. 28:16-29:18). Ellis testified of the work environment at Corteva:

> Q: If she [HR lady] did call back, what were you going to tell her?
>
> A: I was going to explain to her—ask her what I can do about all this stuff with Chad Langstraat and the situations that I've been going through [unjustified disciplines].
>
> Q: Anything else?
>
> A: Because I come to work every day not knowing when my last day's going to be there.
>
> Q: Why is it important for you to retire from Corteva?
>
> A: Because I've gone through three companies, and I—it's just me. It's the way I was brought up.

(APP. v. III p. 140, Ellis Dep. 30:11-31:2). Ellis also testified:

> Q: Do you think that safety was the real reason that Jeff McClure was terminated?
>
> A: No.
>
> Q: What do you think was the real reason?
>
> A: He was a Ron Donahue [production manager two prior to Dehrkoop] employee, and they were trying to get us—all the older ones out.

(APP. v. III p. 143, Ellis Dep. 43:18-43:23).

b. McKenna Graves

McKenna Graves began as a production technician at the Hedrick plant in approximately 2018. (APP. v. III p. 147, Graves Dep. 3:16-3:24). Graves suffers from narcolepsy, which affects her sleep/wake schedules, and can make it difficult for her to switch schedules. (APP. v. III p. 147, Graves Dep. 4:13-5:3). Due to her narcolepsy, Ms. Graves sought an accommodation, in the Spring of 2021, to work first shift, which was approved by Corteva to be reevaluated each year. (APP. v. III p. 147, Graves Dep. 5:6-5:22). However, when Graves became pregnant, in 2021, she was forced to go off her narcolepsy medication. Although she requested an accommodation to work part time, that request was denied with no explanation given as to why it was denied and without any interactive process. (APP. pp. 147-148, Graves 5:23-6:23). Graves is therefore off

work until the end of her maternity leave—at least as far as she knows—but she is unsure. (APP. p. 148, Graves Dep. 6:24-7:5).

In approximately March, 2022, Graves complained to Corteva human resources of harassment. (APP. v. III p. 148, Graves Dep. 7:12-8:12). Her complaint included an instance where she had received unfair discipline involving an alleged safety violation while driving forklift. (APP. v. III pp. 149-150, Graves Dep. 15:2-18:12). Graves also challenged a portion of the write up which discussed times that she was late to work. "And when I tried to explain myself and—I just got told that I was expected to be at work on time. And I said, 'I'm aware of that, but I have a neurological sleep disorder.' And then I was told that I was unreliable." (APP. v. III p. 150, Graves Dep. 18:13-20:1). Graves testified that she had a claim through "Sedgwick" [a third party disability/FMLA provider] for such instances when she needed to be late. (*Id.*) Graves also alleged that after her first complaint to human resources, her written time cards had been whited out and changed after she submitted them, resulting in her needing to complain in order to get paid correctly. (APP. v. III pp. 152-154, Graves Dep. 28:8-35:1). Not surprisingly, Corteva's records of Graves's complaints document very little of the items Graves complained about. (APP. v. III p. 109, Graves records). The only response Graves ever received to her various complaints

was a disciplinary meeting with Dehrkoop wherein her claims were not addressed. (APP. v. III pp. 151-152, Graves Dep. 25:3-27:12). In addition, after her complaint to human resources, and at Dehrkoop's request, Graves, like both McClure and Jeff Winn, was required to re-do her disability accommodations paperwork with her doctor. (APP. v. III pp. 150-151, Graves Dep. 19:5-22:7).

14. Corteva's Hyster tracker forklifts/impact sensor data is unreliable—a fact which Corteva management has known all along and continues to attempt to hide

Corteva relied heavily upon its forklift impact sensor data when firing McClure and in its motion for summary judgment relied heavily upon an expert report created and based on testing of forklift machines during the litigation, years after McClure was terminated. Corteva's "Wandling Report" concludes, in short, that the data from Corteva's Hyster tracker forklifts, and impact sensors within those forklifts, including the data Corteva associates with McClure, is reliable. (APP. v. I p. 97, Def. SOF # 100). Corteva identifies, within the report, employee Bob Swearingen as the employee who assisted with the testing. (APP. v. I p. 230, Wandling Report, p. 31, Def. App. at 220). There are facts regarding the testing, and the impact sensors, however, that the Wandling report does not contain or address. Without them, the report is deficient at best and misleading at

worst. Swearingen describes facts surrounding the testing and the forklift sensors as follows:

> 1. I began employment with the company then known as Pioneer (now known as Corteva Agriscience) in February 1995.
>
> 2. My position with the company is production technician.
>
> 3. I am 66 years old, and I do not have any disabilities.
>
> 4. On or about the end of November or beginning of December 2022, I was asked by Plant Manager Dan Dehrkoop to assist with some testing that was being done of forklifts at the Hedrick, Iowa plant where I currently work.
>
> 5. I had just begun my shift at 2p.m. when Mr. Dehrkoop asked if I could drive a forklift and do some maneuvers on it for him.
>
> 6. There were a couple of gentlemen from Ames, Iowa who were involved in the testing as well as Mr. Dehrkoop, Mr. Josey Hubanks (who now works at a plant in Durant but previously worked in Hedrick), and Sandra McBeth, Safety Supervisor for Corteva.
>
> 7. For approximately the first hour or so, the gentlemen from Ames had a machine set up and they were doing some testing on the forklift. I also saw Joel Crow, the forklift mechanic, with the hood up on the forklift and he appeared to be looking at the forklift impact sensor.
>
> 8. I performed my normal job duties during this hour or so, which was loading trucks using the forklift I use most often (#65) while they performed testing on forklift #53.
>
> 9. Forklift #53 was the forklift Jeff McClure used most often when he was working as a production technician at the Corteva plant.
>
> 10. While I was in the process of continuing to load trucks, Mr. Dehrkoop came over to me and told me to slow down

because he did not want my forklift to have any impacts (or events that would set off the impact sensor) while the testing group was there. I told him it would be difficult for me to go any slower and still get in and out of the trucks with the forklift. Sometimes just the process of driving in and out of the trailer of a truck with the forklift can set off an impact sensor even though there is not actually any impact to the forklift.

11. I continued to load trucks, driving more slowly than normal, and while I was doing this I saw Mr. Dehrkoop, Mr. Hubanks, the men from Ames, and Ms. McBeth in discussions together.

12. At about 4-4:30p.m. I was asked to go back with the testing group to warehouse 5, which was away from all of the normal work activity of the plant. There were cones set up and the area had been taped off and other employees were not working at the time in warehouse 5.

13. The testing group asked me to drive the forklift through cones, slam on the brakes, spin in circles, and drive at full speed or close with a ProBox (box of seed) and then slam on the brakes. I performed all of the maneuvers requested. The forklift impact sensors did not go off and did not shut down the forklift at any point while I helped with testing.

14. Based on my 28 years of experience driving a forklift for the company now known as Corteva, the driving I did in the testing scenario did not fairly replicate and was not similar to the driving I do on a daily basis in my job as a production technician.

15. I was not asked to perform any loading or unloading of trucks or anything that involved similar movements, driving, or elevation changes.

16. In addition, the concrete in warehouse 5 where I was being asked to test is very smooth and is not like the surfaces I drive a forklift across on a daily basis which often contain seams or patches and are not smooth like the concrete I was on in warehouse 5.

17. I was also asked to test forklift #49 by the testing group. Another employee was using it at that time and so I went to get it. When the employee who was driving #49 got out of the forklift, he dropped a clipboard which fell on the area of the forklift where the impact sensor resides. Forklift #49 shut down because of the impact from the clipboard and the employee driving it had to call a supervisor to come and unlock it so I could perform maneuvers for the testing group.

18. I told Mr. Dehrkoop about what happened with the clipboard falling and shutting down #49 and he rolled his eyes. He did not share this information about #49 shutting down with the rest of the testing group.

19. In my experience, the forklift impact sensors are not reliable indicators of how a person is driving the forklift. They can be set off either for a low impact or high impact by fairly minor events, such as a clipboard falling and hitting the area of the forklift that contains the impact sensor and they also give incorrect indications of driving speed.

20. I can also provide additional examples of situations in which the sensors are not reliable from approximately the past two years from my own driving.

21. On one occasion, I was called in by a shift supervisor, Chad Langstraat, who said that I had been going 7.6 or 7.7 miles per hour. That is not possible because the forklift trucks only go a maximum of 6 miles per hour. Even though the fork trucks can only go a maximum of 6 miles per hour and I told Mr. Langstraat this, his response was that: “the computer doesn’t lie.” I was accused of having driven 7.6 or 7.7 miles per hour, which I was not doing, and which is impossible.

22. On another occasion, an impact sensor was set off when my forklift was completely still. The impact sensor which notified management of an impact said that I had been going 2 miles per hour, but I had been completely still. I had an empty box on the front of the forklift that bounced and I believe that may have been what set off the impact sensor, but in any event, it recorded 2 miles per hour when my forklift was still.

> 23. There are also other times when the impact sensor could have gone off for more jarring events but it did not. Just last week I was loading a trailer and the trailer had a metal plate in it that stuck out a quarter of an inch in the air. When I went over this plate it busted out the center of the ProBox sitting on my forklift. No impact sensor went off.
>
> 24. I am also aware that impact sensors can go off due to changes in elevation or floor surface—such as seams in the concrete or the change from warehouse floor to a truck trailer when using a forklift to load trucks. Within the past year I have also had an impact sensor go off just from driving in and out of a trailer at a normal rate of speed.

(APP. v. III p. 12-15, Swearingen Dec. ¶¶ 1-24).

Other Hedrick current employees, including Ron Witt and Mike Ellis, corroborated Swearingen's testimony with regard to the inconsistency of the impact sensors. (APP. v. III p. 249-250, Witt Dep. 39:11-44:15); (APP. v. III p. 142, Ellis Dep. 39:3-41:3). Further, Witt testified that the plant mechanic, Joe[l] Crow, told him of a video in the possession of supervisor Chad Langstraat in which an impact sensor was set off with no one even in the forklift. (APP. 249, Witt Dep. 41:2-41:13). In addition, Winn reported that different Hyster forklifts and their sensors responded differently to the same driving conditions—meaning going in and out of a trailer or just braking on one forklift might set it off while another Hyster forklift will not register any impact with the same driving conditions. (APP. v. III p. 23, Winn Dec. ¶¶ 20).

Most important, Corteva was well-aware of the issues with its impact sensors, as demonstrated by Dehrkoop's request to Swearingen to slow down while loading a truck next to the experts, so as not to inadvertently set off his impact sensor and therefore alert the experts to the truth—the sensors are set off by no impact at all—and Dehrkoop's use of the smooth concrete in warehouse #5, and his failure to report the falling of the clipboard on #49, which shut that forklift down just prior to experts testing it. In addition, former Hedrick safety supervisor Hubanks testified that there were many employee complaints regarding the Hyster forklifts and the data they generated. (APP. v. III p. 163, Hubanks Dep. 23:20-24:13).

Finally, testimony of Mike Ellis reveals that at least one of the impacts recorded against McClure was actually caused by a different employee who drove McClure's forklift. (APP. v. III pp. 142-143, Ellis Dep. 41:9-42:22). This scenario calls into question all Hyster data in yet a different way (not just for its inability to accurately record impact and speed data or for its inconsistency between different forklifts) but also because there is no conclusive means by which the forklift data can be tied to any one particular employee.

Against this backdrop, the district court granted summary judgment to Defendant Corteva, dismissing all of Plaintiff's claims, ruling on issues such

as causation as a matter of law, holding that McClure was not "satisfactorily" performing his work under the prima facie case as a matter of law, neglecting to consider Plaintiff's evidence of discrimination to employees other than McClure, and reviewing the evidence in the light most favorable to Corteva.[1] Instead, on March 29, 2023, and after the filing of pre-trial pleadings, the Court dismissed all claims and canceled the then-scheduled April 11, 2023 jury trial.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FAILING TO VIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO MCCLURE, THE NONMOVING PARTY

A. Standard of Review

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa

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[1] During the hearing on summary judgment the Court asked both sides to create proposed rulings, which each side did, filing and submitting them to the Court, as requested, on March 7, 2023. Plaintiff's proposed ruling, annotated carefully with record facts and citations to those facts, offered a sample, if one was needed, of interpreting the record in the light most favorable to McClure. (*See* APP. v. I pp. 212-241, Plaintiff's Proposed Ruling on Defendant's Motion for Summary Judgment).

R. Civ. P. 1.981(3). Facts are reviewed in the light most favorable to the nonmoving party and a court must consider "every legitimate inference reasonably deduced from the record on behalf of the nonmoving party." *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692-93 (Iowa 2009). On appeal, this Court reviews a district court's ruling on a motion for summary judgment for correction of errors at law. *See* Iowa R. App. P. 6.907; *see also Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 181, 185 (Iowa 2007).

B. Reviewing the Evidence in the Light Most Favorable to Corteva, the District Court Dismissed McClure's Age Discrimination Claim on the Sole Basis that McClure, as A Matter of Law, Did Not "Perform His Work Satisfactorily"

Approximately two days after the District Court entered its ruling in this case, the Iowa Supreme Court issued its opinion in *Feeback v. Swift Pork Company*, 988 N.W.2d 340 (Iowa 2023), a case in which the Court was addressing an age discrimination claim, among others, in the context of a summary judgment ruling.[2] In *Feeback*, the Court modified the *McDonnell*

[2] By citing to *Feeback*, McClure does not concede that it operates retroactively. *See Beeck v. S.R. Smith Co.*, 359 N.W.2d 482 (Iowa 1984) (case setting for standard regarding retroactivity of judicial decisions). Instead, McClure reserves that argument, at present, and instead argues that whether under the past articulated *McDonnell Douglas* test or the presently modified test, the result in this case is the same—summary judgment on McClure's age discrimination claim was error.

Douglas analysis applicable to indirect evidence discrimination claims on summary judgment and articulated a new modified *McDonnell Douglas* analysis. Under either the prior version of the *McDonnell Douglas* test applied by the Supreme Court or the present version articulated in *Feeback*, dismissal of McClure's age discrimination claim was reversible error. *Feeback* articulated the new test as follows:

> Under our modified *McDonnell Douglas* test, employees 'must carry the initial burden of establishing a prima facie case of age discrimination.' . . . Employees do so by showing that they are members of a protected group (i.e., age sixty), were qualified for their positions, and the circumstances of their discharge raised an inference of discrimination . . . Then, the employer must articulate some legitimate, nondiscriminatory reason for its employment action . . . At that point, the burden shifts back to the employee to demonstrate the employer's proffered reason is pretextual or, while true, was not the only reason for his termination and that his age was another motivating factor.

988 N.W.2d at 347-348.

The District Court began and ended its analysis of McClure's age discrimination claim by analyzing the second element of the prima facie case, holding, as a matter of law, that McClure, who had worked for Corteva and its predecessors for more than 39 years driving a forklift, could not show that he "performed his work satisfactorily." It held:

> While no formal test for satisfactory performance has been adopted by our supreme court, our court of appeals has used the following standard: "The standard for assessing performance 'is

> not that of the ideal employee, but rather what the employer could legitimately expect.'"

(APP. v. I p. 252; Ruling, at 11) (citing *Johnson v. Mental Health Institute*, 912 N.W.2d 855, 2018 WL 351601 at *6 (Iowa Ct. App. Jan. 10, 2018)).

Diving straight into the merits of the case, including alleged policy violations and discipline of McCure, and viewing the facts in the light most favorable to Corteva, while ignoring McClure's facts, the District Court neglected to consider apposite case law on this element of the prima facie case instead relying solely upon *Johnson*, a distinguishable case, when holding that McClure could not show that he had performed his job "satisfactorily." This analysis was wrong on both the law and the facts.

First, and as the Iowa Supreme Court recognized in *Smidt v. Porter*, the prima facie case "is a minimal requirement that is not as onerous as the ultimate burden to prove discrimination." *Smidt v. Porter*, 695 N.W.2d 9, 14-15 (Iowa 2005) (citing *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1022 (8th Cir. 1998)). Furthermore, in the case of a 39-year employee who was doing his job up to the point of termination, that McClure can meet this element of the prima facie case is inferred. *Riley v. Lance*, 518 F.3d 996, 1000 (8th Cir. 2008) (holding it was error for the district court to require the plaintiff to show that he was "performing his job at the level that met the employer's legitimate expectations" and instead held that, at the prima facie

stage, the plaintiff needed only to show that he was "otherwise qualified" for the position he held, which in that case was shown because he had been performing the job successfully for years).

Thus, "[t]he question at the prima facie case level . . . is not whether the plaintiff performed to the employer's expectations but whether he was 'otherwise qualified for the position he held.'" *Cox v. Infomax Office Systems, Inc.*, No. 4:07-cv-0457-JAJ, 2009 WL 124700, at *4 (S.D. Iowa Jan. 16, 2009) (citing *Riley,* 518 F.3d at 1000); *see also Peterson v. Martin Marietta Materials, Inc.*, 2016 U.S. Dist. LEXIS 64469, (N.D. Iowa May 17, 2016) (Strand, J.) (analyzing summary judgment claims under the ADA and ICRA and holding as to the "qualified" element that "I am unable to find as a matter of law that Peterson was not qualified to perform this essential duty. The fact that Peterson was involved in two property damage accidents does not conclusively demonstrate that Peterson was unqualified to follow safety practices. While defendants argue that Peterson was not meeting his employer's legitimate expectations, the Eighth Circuit has rejected that standard") (citing *Riley*, 518 F.3d at 1000); *Roberts v. USCC Payroll Corp.*, 635 F. Supp.2d 948, 964 (N.D. Iowa 2009) (Bennett, J.) (citing *McGinnis v. Union Pac. R.R.*, 496 F.3d 868, 874 n.2 (8th Cir. 2007) and holding "Applying the *Riley-McGinnis* criterion in this case, plaintiffs easily meet

their burden of establishing this stage of the prima facie case based on their multi-year work history at USCC").

McClure's length of tenure with Corteva of more than 39 years, combined with his overall satisfactory annual performance reviews leading all the way up to the time he was terminated, are sufficient at this stage to, at the very least, generate a fact issue as to this element of the prima facie case. (APP. v. III p. 190, McClure Dep. 42:14-42:16) (length of service to Pioneer/Corteva); (APP. v. III pp. 31-40; McClure 2017 Performance Evaluation Form) (giving scores of all "on track"); (APP. v. III pp. 41-42; McClure 2018 Annual Performance Review) (giving overall rating of "Successful Performance"); (APP. v. III pp. 43-46; McClure 2019 Annual Performance Review) (giving overall rating of "Successful Performance").

Apparent from review of the District Court opinion, *Feeback*, and the case law cited above, however, is that confusion exists under both federal and Iowa precedent regarding whether the second element of the prima facie case should be articulated as "qualified" for the position or performing the job "satisfactorily." United States District Court Judge Strand addressed exactly this conflict when addressing a motion for summary judgment, holding ultimately, that a plaintiff need only show that he or she was "otherwise qualified" for the job at this stage of the test. *Garang. v.*

Smithfield Farmland Corp., 439 F. Supp.3d 1073, 1086 (N.D. Iowa 2020). The *Garang* ruling offers a collection of case law on this point, and Judge Strand also analyzed an Eighth Circuit case on point, *Lake v. Yellow Transport, Inc.* *Id.* (citing *Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 874 (8th Cir. 2010)). Judge Strand held that in *Lake*, "[t]he Eighth Circuit explained that an analysis of whether a plaintiff has established the second element must be guided by the fact that the plaintiff does not have to disprove the defendant's proffered legitimate reasons for an adverse employment action during the prima facie stage of the *McDonnell Douglas* analysis." *Id.* "That must be reserved for step three of the *McDonnell Douglas* test." *Id.* "To do otherwise would collapse the *McDonnell Douglas* burden-shifting analysis 'into the second element of the prima facie case' and create too onerous a burden for plaintiffs at the prima facie stage." *Id.* Judge Strand further held: "Thus, a plaintiff establishes the second element of the prima facie case if, setting aside the employer's reasons for the alleged adverse employment action, the plaintiff 'was otherwise meeting expectations or otherwise qualified' for his or her position." *Id.*

Exactly what was predicted in *Lake* of "collapse[ing] the *McDonnell Douglas* burden shifting analysis into the second element of the prima facie case is what happened in the District Court's analysis of McClure's case.

McClure offers this analysis regarding the second step of the prima facie case not because it is dispositive, but because the applicable standards are easily convoluted and confused, or purposefully conflated, with significant negative effects. Swapping "qualified" for performing "performing satisfactorily," without thoroughly understanding the case law, for example, can have a significant impact. Injustices arise when the *McDonnell Douglas* test is not carefully applied. If read carefully, *Feeback* also puts this confusion to rest with its articulation of the new modified test with a "qualified to perform their positions" articulation of the second element of the prima facie case. *Feeback*, 988 N.W.2d at 347-48.

Finally, also as to the second element of the prima facie case, the *Johnson* case cited by the District Court for its test for satisfactory performance, apart from being pre-*Feeback*, is sufficiently distinguishable from McClure's case that it does little to inform the analysis in this case. *Johnson,* 2018 WL 351601 *6 (Iowa Ct. App. Jan. 10, 2018).

In *Johnson*, the employee seeking to overcome summary judgment on her race discrimination and retaliation claims had uncontested absenteeism issues and discipline (4 write ups, two one-day suspensions, one five-day suspension, and seven coaching and counseling sessions) with no evidence to dispute, rebut or otherwise explain her absenteeism or the ensuing

discipline. The Court of Appeals held: "But Johnson has not presented any such evidence—either by disputing MHI's facts or providing her own material facts." *Johnson*, 2018 Iowa App. LEXIS 7 at *15. The facts in *Johnson* therefore bear no resemblance to the long and successful job tenure of McClure nor to comprehensive record evidence McClure provides in this case.

Given all of the above, McClure will analyze the District Court's evaluation of whether McClure could prove "satisfactory" job performance at the third step of the *McDonnell Douglas* analysis along with the question of whether Defendant's proffered legitimate, nondiscriminatory reasons for terminating Plaintiff's employment were a pretext to hide illegal discrimination. McClure, having addressed the prima facie case, agrees that Defendant can meet its burden of production and thus advances to the third step of *McDonnell Douglas*.

With respect to discipline against McClure, the Court held: "Plaintiff cannot deny he violated policies of Defendant when he has admitted to as much under oath" and then: "Whether the discipline was warranted is not an issue before the Court, only whether Plaintiff did perform his work satisfactorily." (APP. v. I p. 252, Ruling at 11). First, to say that McClure admitted to policy violations, without addressing the surrounding factual

context and McClure's testimony on the subject, at a minimum, improperly interprets the evidence in the light most favorable to Defendant. While McClure may have admitted to conduct that allegedly violated policy, there was a significant justification in each case that at the very least creates a fact question as to whether McClure was justifiably disciplined. Furthermore, whether the discipline was actually justified *is* relevant to determining whether Corteva was engaging in legitimate, non-discriminatory discipline or whether its actions were instead motivated by discrimination or retaliation.

One of the relevant situations addressed by the District Court was an instance in 2016 where McClure and another older and disabled worker, Jeff Winn, moved a four-box stack across the warehouse after which both men were confronted by management. (APP. v. III pp. 134-135, RSOF # 52). However, both McClure and Winn challenged the discipline because as far as they knew they were following policy. (*Id.*) They informed supervisor Langstraat of their understanding of the policy, Langstraat become flustered and proceeded to walk off and said that he would talk to safety supervisor Hubanks. (*Id.*) McClure and Winn then confronted Hubanks, who admitted that there had been a policy change. (*Id.*) Both McClure and Winn were not made aware of the policy change. (*Id.*) Therefore, if McClure was not

following this particular policy moving a four-box stack, it was because he, like Winn, was unaware of it. (*Id.*)

The District Court next focused on a March of 2017 incident where "Plaintiff was discovered having and using his cell phone during work hours against Corteva policy." (APP. v. I p. 253, Ruling, at 12). The District Court then recounted that: "Plaintiff testified he only did so because the then-assistant plant manager told him to use it to photograph issues to be addressed though he stated that she later denied giving that direction." (*Id.*) Apparently, according to the District Court, because McClure testified honestly that the assistant plant manager had, after the fact, recanted her instructions to McClure to take the photos, denying she gave him permission, this was sufficient to justify the discipline against McClure. This is an example of the Court reviewing the evidence, again, in Corteva's favor. At the very least, this evidence reveals genuine issues of material fact that are disputed. (APP. v. I p. 23, RSOF #54). Next, the District Court held: "In September of 2019, Plaintiff was again disciplined for moving boxes stacked improperly. Plaintiff testified he did this because he was told by coworkers it was okay and points to the fact that no supervisor intervened to stop him." (APP. v. I p. 253, Ruling, at 12). This rendition of the facts is not even accurate, let alone reviewed in McClure's favor. McClure testified

not that he did this because coworkers told him it was okay, but instead testified that coworkers said this method of moving boxes had been approved by safety supervisor Hubanks and used for weeks during a busy time period of truck unloading. (APP. v. I pp. 135-136, RSOF #55). And the significance of the supervisors being present but not stopping the process of multiple employees unloading four boxes at a time (the alleged policy violation) is that if this was in fact an unapproved and concerning safety violation, as Corteva now contends and as Corteva wrote in one of its write ups to McClure, one would expect supervisors on site to intervene in real time to stop unsafe activity. (*Id.*)

The District Court continued: "Whether the discipline was warranted is not an issue before the Court, only whether Plaintiff did perform his work satisfactorily." (APP. v. I p. 253, Ruling, at 12). This holding, combined with the Court's predisposition to review the facts in Corteva's favor, not McClure's, was tantamount to holding that an employee who receives discipline, no matter whether justified, and no matter the surrounding circumstances, cannot meet the prima facie case for age discrimination. This approach would eviscerate most if not all age discrimination claims in which an employee had received any discipline.

Next, the District Court turned to the Hyster tracker forklift data holding that although Plaintiff disputed the validity of the forklift sensor data "and provided testimony from other employees who also believe the sensors to provide false or misleading data"—which gives short shrift to Plaintiff's evidence—the Court held: "At deposition, Plaintiff was questioned about the impacts the sensors recorded. He was unable to remember anything about the two reported impacts in March of 2020, the four reported impacts in April of 2020" etc. (APP. v. I p. 253, Ruling, at 12). This rendition of the facts was again very Corteva-friendly. The Court held that because McClure could not specifically deny each impact sensor event, that he could not meet the prima facie case element of satisfactory performance. (*Id.*)

Yet Plaintiff offered evidence from employees not only that they believed the tracker data to be unreliable, but evidence of specific examples of instances in which they had known the tracker data to be unreliable—sensors set off by cracks in the concrete floor, sensors set off by a clipboard falling on the sensor, sensors set off by the forklifts driving in and out of trucks, etc. (APP. v. III pp. 12-15, Swearingen Dec. ¶¶ 1-24); (APP. v. III p. 249-250, Witt Dep. 39:11-44:15); (APP. v. III p. 142, Ellis Dep. 39:3-41:3). McClure also offered evidence to show that on at least one occasion, McClure was

disciplined for an impact sensor event that happened when another employee drove McClure's forklift. (APP. v. III pp. 142-143, Ellis Dep. 41:9-42:22).

Thus, McClure being questioned about impact events one by one during his deposition in October, 2022, more than two years after such events occurred, would be unlikely, it is true, to remember particular instances of running over cracks in the concrete floors, or to remember driving his forklift in and out of trucks, something he did all the time at the Hedrick plant, or to remember what happened when he himself was not even driving his forklift (another employee was) and the sensor went off.

In addition, McClure offered evidence, primarily through the declaration of long-time Hedrick employee Bob Swearingen, which attacked the credibility of the expert testing and report on which Defendant relied heavily in claiming that McClure was an unsafe forklift driver whose termination was justified. Not only did Swearingen's testimony undercut Corteva's assertions that the tracker data was reliable but more importantly it showed that plant manager Dehrkoop knew the data was unreliable and was attempting to hide that fact from the experts—which demonstrated serious issues of credibility as to the reasoning behind McClure's termination that must be resolved by a jury.

Furthermore, McClure did not stop at contesting the discipline he received as unmerited and discriminatory. He also offered additional evidence to show that Corteva's alleged reasons for terminating his employment were not the real reasons. "A pretext instruction states a jury may infer intentional discrimination if it disbelieves the employer's asserted reasons for terminating the employee." *DeBoom v Raining Rose, Inc.*, 772 N.W.2d 1, 9 (Iowa 2009). In this case, McClure offered evidence that younger, non-disabled workers, such as the worker, Brandon Sieren, who gave the keys to the truck driver which allowed the truck driver to drive off with Plaintiff in the back of the truck in April, 2020, and the temporary worker who collided with Plaintiff in the end of June, 2020, both were not disciplined the same way Plaintiff was—Sieren received no discipline at all—and the temporary worker—who had actually driven his forklift faster during the collision and into McClure's forklift to cause the accident—was allowed to keep working at the Hedrick plant while McClure, a nearly 40-year employee, was terminated. While the District Court again analyzed these facts in Corteva's favor, and proffered Corteva's alleged reasons for treating these younger and non-disabled employees differently, (APP. v. I p. 255, Ruling, at 14), these reasons, no matter how compelling, merely present further factual dispute and evidence that must be weighed by a jury.

In addition, McClure has offered additional evidence that, when reviewed in the light most favorable to McClure, reveals that Dehrkoop was targeting and McClure based on his age and disabilities and his restriction from working the night shift, which includes but is not limited to a paper trail of emails between Dehrkoop and human resources where Dehrkoop was questioning McClure's entitlement to his restrictions, claiming that he improperly worked other jobs while on disability leave from Corteva, requiring McClure to obtain four separate doctor's notes to obtain an accommodation to work a day shift, and looking for reasons to discipline plaintiff—e.g. the emails requesting Plaintiff's complete 2019 and 2020 time records sent by Dehrkoop in April, 2020.

Dehrkoop undertook the same or similar tactics (a clear pattern) with other older or disabled workers at the plant, including Jeff Winn (aged 61). (APP. v. III p. 18, Winn Dec., at 1). Winn testified that, like McClure, he was required to obtain multiple doctor's notes to support his restriction to work a day shift, after which, Winn ended his employment—primarily over the interactions with Dehrkoop. (APP. v. III pp. 20-21, Winn Dec., at 11-16). McClure also offers evidence that under new and substantially younger management, other older workers, including Mike Ellis, Ron Witt, and Bill Leach, each perceived that they were being discriminated against or harassed

based on their age and via unfair discipline that was being levied against them, each describing a similar pattern to that experienced by McClure and describing instances of unmerited discipline by Dehrkoop and those working under him in great detail. (APP. v. III, pp. 135-39, Ellis Dep. 12:7-28:15) (APP. v. III p. 140, Ellis Dep. 30:11-31:2); (APP. v. III pp. 135-139, Ellis Dep. 12:7-28:15); (APP. v. III pp. 136-137, Ellis Dep. 17:22-18:2); (APP. v. III p. 137, Ellis Dep. 19:15-21:18); (APP. v. IIII p. 138, Ellis Dep. 22:18-24:7); (APP. v. III p. 139, Ellis Dep. 28:16-29:18); (APP. v. III p. 140, Ellis Dep. 30:11-31:2); (APP. v. III p. 143, Ellis Dep. 43:18-43:23); (APP. v. III p. 150-151, Graves Dep. 19:5-22:7); (APP. v. III p. 253, Witt Dep. 54:15-54:55:2); (APP. v. III pp. 255-256; Witt Dep. 65:1-68:10); (APP. v. III p. 80, Bill Leach Resignation Letter).

The District Court again attempted to downplay this evidence—describing it as follows: "Testimony from individuals that they felt discriminated against without supporting evidence is not the sort of competent evidence to defeat a motion for summary judgment." (APP. v. I p. 255, Ruling, at 14). In fact, the evidence of other employees, in particular 63-year old employee Mike Ellis, regarding the specific factual circumstances such as unfair discipline, which mirrors McClure's experience, and which led Ellis to not only believe he was being

discriminated against based on his age but to complain to Corteva human resources about it, is exactly one type of competent evidence to be offered in an employment discrimination case to defeat summary judgment. *Salami v. Von Maur, Inc.*, No. 12-0639, 2013 WL 3864537, at *8 (Iowa Ct. App. Jul. 24, 2013); *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262-63 (Iowa 1991); *Sandoval v. Am. Build. Maint. Indus., Inc.*, 578 F.3d 787, 802-803 (8th Cir. 2009); *Madison v. IBP*, 257 F.3d 780, 794 (8th Cir. 2000); *White v. Honeywell, Inc.*, 141 F.3d 127 (8th Cir. 1998); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988).

Taking all of this evidence together, genuine issues of material fact exist as to McClure's age discrimination claim, and the District Court's summary judgment ruling should be reversed and remanded with instructions to proceed directly to jury trial of this case.

C. Reviewing the Facts in Corteva's Favor, the District Court Dismissed McClure's Retaliation Claim As Lacking "Causation"

The ICRA prohibits a person from retaliating against another person "because such person has lawfully opposed any practice forbidden under this chapter, obeys the provisions of this chapter, or has filed a complaint, testified, or assisted in any proceeding under this chapter." Iowa Code § 216.11(2). In order to recover for retaliatory discharge, the plaintiff must prove: (1) he was engaged in statutorily protected activity; (2) he employer

took adverse employment action against him; and (3) there was a causal connection between his participation in the protected activity and the adverse employment action taken. *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 571 (Iowa 2017) (citing *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 750 (Iowa 2006)). Causation is shown through a "motivating factor" standard. *Haskenhoff*, 897 N.W.2d at 567 (Iowa 2017) (Waterman); *id.* at 602 (Cady, C.J.); *see also id.* at 634-35 (Appel, J.); *see also Johnson*, 2018 Iowa App. LEXIS 7, at *18-*19.

Plaintiff's two complaints to human resources, as held by the District Court, were protected activity as based his: "age, [his] years of service, or [his] medical condition." (APP. v. III p. 55, McClure Compl.); (APP. v. I pp. 257-258, Ruling, at 16-17). The District Court, however, dismissed McClure's retaliation claim on the basis of causation, a classic jury question. *Hedlund v. State*, 930 N.W.2d 707, 735 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) ("Further, discrimination cases often involve questions of intent and causation. Both these elements are traditionally not amenable to summary judgment.").

While Defendant claims, and the District Court agreed, that more than two years is too large a gap for Plaintiff to bridge in between the protected activity and the adverse action, Iowa law holds that while temporal

proximity between the protected activity and adverse action is important, it is not dispositive. *DeBoom,* 772 N.W.2d at 12-13. Plaintiff has produced evidence not only that Dehrkoop was made aware of his complaint to human resources around the time his complaint was made in the fall of 2017, but has also produced evidence that showed that Defendant's scrutiny of Plaintiff, and discipline it issued to Plaintiff increased in both amount and severity after Plaintiff's 2017 complaint. The District Court acknowledged as much holding: "While true that concern about Plaintiff's safety issues ramped up in the years following the complaint, the fact that the concerns were documented before the complaint was made cut against any argument that they were retaliation due to the complaint being made." (APP. v. I pp. 258-259, Ruling, at 17-18). This ruling, however, usurps the jury's role in weighing conflicting evidence, and ignores Dehrkoop's intense focus on McClure after the complaint to human resources, which included not only "ramped up" discipline, but also the behind the scenes emails to human resources, requests to review McClure's absence records, and ultimately, termination.

Further, Plaintiff has shown that at least one other employee (McKenna Graves) experienced, unjustified discipline, and scrutiny of any time she missed for work/attendance, including time she missed that was

related to her disability, after complaining to human resources—again, pattern and intent evidence applicable to Dehrkoop.

Surprisingly, the District Court also held Dehrkoop should have made his intent to retaliate more clear: “Certainly, a person could hold a grudge for many years, but the Court would expect some evidence that the complaint was still in the mind of Dehrkoop during this period.” (APP. v. I p. 259, Ruling at 18). *Really? It would?* Other than circumstantial evidence of the type Plaintiff has offered with Dehrkoop sending emails to human resources questioning McClure’s restrictions and honesty after McClure suffered his second heart attack, asking for his payroll records and time off to be reviewed, and disciplining him unrelentingly after the complaints? In *Peterson*, Judge Strand, quoting Judge Bennett, held: “Today’s employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it.” *Peterson*, 2016 U.S. Dist. LEXIS 64469, at *9. Plaintiff generated genuine issues of material fact regarding retaliation and the district court’s decision dismissing this claim should be reversed.

D. The District Court’s Dismissal of McClure’s Harassment Claim Usurped the Jury’s Role

McClure argues he was subjected to a hostile work environment based on his age and disabilities not only through unjustified discipline (lasting

from the fall of 2017 and through the time that Plaintiff was terminated in July, 2020) but also through Dehrkoop's questioning of his doctor's notes, which resulted in him needing to provide four doctor's notes in order to obtain an accommodation that was, from his point of view, already in place. It was similar behavior with respect to doctor's notes that caused at least one employee, Jeff Winn, to resign (APP. v. III p. 18, Winn Dec. at ¶ 4). Plaintiff also identified discrimination against and mistreatment of other employees in his complaint to human resources. Plaintiff described some of the harassment he was experiencing, including physical symptoms of the stress, directly to Corteva human resources in his October 30, 2017 update to his complaint. (APP. v. III pp. 54-64, McClure Complaint and Complaint Update).

Plaintiff was and is not alone in having felt this way at the Hedrick plant—Plaintiff's evidence demonstrates an ongoing hostile work environment for older and disabled workers. Witness Bob Swearingen describes the "tension" in the air and witnesses Ellis, Graves, and Witt each also testify to their experiences—with Witt, aged 59 at the time of his deposition, being "one good piss off" from resigning. (APP. v. III p. 16, Swearingen Dec. ¶ 28); (APP. v. III pp. 135-139, Ellis Dep. 12:7-28:15) (APP. v. III pp. 132-145, Ellis Dep.); (APP. v. III pp. 150-151, Graves Dep.

19:5-22:7); (APP. v. III p. 241, Witt Dep. 3:10-3:14; APP. v. III p. 253, Witt Dep. 54:15-54:55:2; APP. v. III pp. 255-256, Witt Dep. 65:1-68:10). And Bill Leach's resignation letter also contains allegations of a hostile work environment. (APP. v. III p. 80, Leach Res. Lttr.). While the District Court held that McClure's evidence of harassment to himself and others and of a discriminatory and harassing atmosphere at the plant was insufficient to rise to the level of severe or pervasive harassment, this analysis again usurped the role of the jury. Genuine issues of material fact exist as to whether McClure was harassed by plant management, including Dehrkoop, and if so, for which period of time. Summary judgment should not have been granted on McClure's harassment claim.

E. The District Court's Dismissal of McClure's Disability Claims Again Relies Upon Corteva's Facts and Ignored Disputed, Material Facts, Especially as to McClure's Perceived Disability Claim

To make out a prima facie case of disability discrimination, McClure must show that he: (1) had a disability; (2) he was qualified to perform the essential functions of his job; and (3) the circumstances of his termination raise an inference of illegal discrimination. *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 6 (Iowa 2014) (quoting *Schlitzer v. Univ. of Iowa Hosp. & Clinics*, 641 N.W.2d 525, 530 (Iowa 2002)); *Boelman v. Manson State Bank*, 522 N.W.2d 73, 76 (Iowa 1994).

The ICRA prohibits employers from discharging or otherwise discriminating against "any employee . . . because of the . . . disability of such . . . employee." Iowa Code § 216.6(1)(a). A plaintiff is disabled and protected by the ICRA if: (1) they have a physical or mental impairment that substantially limits one or more of their major life activities; (2) they have a record of such an impairment; or (3) they are regarded as having such an impairment. *Goodpaster*, 849 N.W.2d at 6 (quoting Iowa Admin. Code r. 161—8.26(1)). In this case, Plaintiff argues he was both disabled and regarded as or perceived as disabled as a result of his two heart attacks, which resulted in a restriction to work daytime hours, and his migraine headaches. In *Goodpaster*, the Supreme Court reinforced the idea that whether a condition qualified as a disability was an analysis that incorporated the ICRA's demand that it "shall be construed broadly to effectuate its purposes," rejecting the notion, set forth in pre-ADAAA federal case law, that the existence *vel non* of disabilities should be "strictly" interpreted. *Id.* (quoting Iowa Code § 216.18(1))). Thus, the Court held in that case that multiple sclerosis, though episodic in nature, could qualify as a disability under the ICRA. *Goodpaster*, 849 N.W.2d at 9, 13. Similarly, McClure suffered from heart attacks/cardiovascular disease and migraines that substantially limited his ability to work, a major life activity.

As to a perceived disability, Dehrkoop perceived McClure and others as disabled and took similar actions against these employees (e.g. Winn, Graves)—unfair discipline, questioning accommodations, requiring multiple rounds of accommodation letters from the medical providers, reviewing and scrutinizing attendance, and treating non-disabled employees like Brandon Seiren and the temporary worker better and differently from workers like McClure, who had disabilities. When the evidence is viewed in the light most favorable to McClure, a jury could conclude that Dehrkoop targeted for discipline, employment, and strict review of accommodations requests, employees he perceived as disabled including Jeff McClure, Jeff Winn, and McKenna Graves. *See, e.g., Galambos v. Fairbanks Scales*, 144 F. Supp.2d 1112, 1127 (E.D. Mo. 2000) (discussing similar facts supporting a perceived disability discrimination claim).

With respect to the other elements of the prima facie case including that McClure was "qualified" for his position, and the pretext analysis applicable in the final step of the *McDonnell Douglas* analysis, McClure refers the Court to his analysis in Section I.A, *supra*, regarding age discrimination. Genuine issues of material fact exist as to McClure's disability claim and judgment of the district court should be reversed.

Conclusion

The District Court, when it granted summary judgment as to all of McClure's claims in this matter, committed reversible error. Genuine issues of material fact preclude summary judgment as to each of McClure's claims. The case should be reversed and remanded and McClure should be permitted to proceed directly to a jury trial on all of his claims.

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REQUEST FOR ORAL ARGUMENT

Comes now Appellant, by and through the undersigned attorneys, and requests that he have oral argument pursuant to Iowa Appellate Rule 6.903(2)(i).

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COST CERTIFICATE

I hereby certify that the costs of printing this brief were $0.00 because it was filed electronically.

/s/ Megan Flynn

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements of Iowa R. App. P. 6.903(1)(g) because it contains 13,326 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the typestyle requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14 type.

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CERTIFICATE OF FILING

I, the undersigned attorney, hereby certify that I have cause to be filed electronically pursuant to Iowa Rule 16.1201 et. seq. this Appellant's Brief and Request for Oral Argument with the Clerk of the Supreme Court, Appellate Court's Building, 1111 E. Court Street, Des Moines, Iowa, on December 1, 2023.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify, that on the 1st day of December, 2023, I caused to be served by electronic filing Appellant's Final Brief and Request for Oral Argument pursuant to Iowa Rule 16.1201 et. seq. which service included the following attorneys of record for Defendant Corteva:

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