IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1454

STORY COUNTY CASE NO. LACV051186

RONALD HAMPTON
Plaintiff-Appellant

vs.

MARTIN MARIETTA MATERIALS, INC., and DOUG ROBEY

Defendants-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR STORY COUNTY
THE HONORABLE JAMES ELLEFSON

PLAINTIFF-APPELLANT'S FINAL REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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I. THE COURT SHOULD DISREGARD DEFENDANTS' STATEMENT OF FACTS BECAUSE IT IS IRREDEEMABLY SLANTED TOWARD THEMSELVES

Defendants' Statement of Facts ought to have a disclaimer, warning the Court not to rely on it because to do so would flip the summary judgment standards on their head. While Defendants' version has support in the record, so does Plaintiff's. In an appeal from a grant of summary judgment, the Court must view the evidence in the light most favorable to the appellant and give him the benefit of all legitimate inferences the evidence will bear. *Banwart v. 50th Street Sports*, LLC, 910 N.W.2d 540, 545 (Iowa 2018). Defendants set forth facts in the light most favorable to themselves, argue inferences in their favor, and simply omit Plaintiff's best evidence.

Such an approach is not helpful to judges who are duty-bound to view the facts differently. The problem is beautifully illustrated in this case: The District Court's opinion ignores the very same evidence Defendants have omitted from the Statement of Facts in their appellate brief.

Courts have held that it violates ethical standards for a summary judgment proponent not to recite the facts in the light most favorable to its opponent. Attorneys drafting a motion for summary judgment "have a greater responsibility than just as a[n] advocate for their client." *Florida Bar v. Corbin*, 701 So. 2d 334, 336 (Fl. 1997). As officers of the court, attorneys must not

hide the ball or try to paper over evidence that they know creates a genuine issue of material fact.[1] *Id.* at 335-36; *see also Herman v. City of Chicago*, 870 F.2d 400, 404 (7th Cir. 1989); *Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988); *Littler v. Martinez*, 2020 WL 42776, at *31 (S.D. Ind. Jan. 3, 2020); *Taylor v. Kveton*, 684 F. Supp. 179, 185 n.8 (N.D. Ill. 1998).

In *Jordan v. City of Cleveland*, 464 F.3d 584 (6th Cir. 2006), the court took the defendant to task for presenting "a totally different and impermissibly one-sided version of the facts." Those actions did "violence to the fundamental principle that . . . the appellant[2] (like the reviewing court) must treat the record in a manner most favorable to the appellee, with all reasonable inferences drawn in the same direction." The court used the word "impermissible" to describe the defendant's "selective portrayal of the evidence from its own perspective" which ignored the evidence favoring the plaintiff. *Id.* at 596 n.16.

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[1] Attorney Corbin's law license was suspended for 90 days for failing doing just that. *Id.* at 337.

[2] Although this was an appeal after a plaintiff's verdict, the defendant had the same obligation to set forth the facts in the light most favorable to the verdict as if it were a motion for summary judgment.

Similarly, the court in *Escobedo v. Ram Shirdi*, 2013 WL 1787819, at *4 (N.D. Ill. April 25, 2013) struck a motion for summary judgment from the record because defense counsel presented "a view of the evidence from the lens of the Rule 56 movant rather than, as the Rule expressly mandates, that of the nonmovant."

A defendant pursuing summary judgment is not allowed to state the facts in its own favor—or even neutrally. *Carswell v. Monumental Life Ins. Co.*, 2014 WL 3378694 at *17, 24, 25 (W.D. Pa. July 9, 2014). It may not omit inconvenient facts. *Id.* at 17. Even the subtle tactic of referring to evidence the plaintiff swears is true as mere "allegations" is improper, as is paraphrasing a document to make it sound less harsh. *Id.* at 1, 25.

Plaintiff is not suggesting that the Court sanction Defendants. The practice of the moving party ignoring bad facts is all too common. In Iowa, as elsewhere, the approach unfortunately seems to be "it can't hurt to ask" for summary judgment. *See Littler*, 2020 WL 42776, at *4.

In numbered paragraph 10, Defendants sarcastically criticize Plaintiff for voluntarily paring down his three-count Petition to a single count.[3] (D. Brief 21-22). Defendants appear to be inviting the Court to infer that Plaintiff is litigious or grasping at straws—ignoring the fact Plaintiff had no idea when he filed the Petition why he was fired—only that the reason offered by Defendants was false and illogical. Defendants' invitation also ignores the reality that employers have virtually "exclusive possession of evidence of illegal motivation or discrimination" and workers need to conduct discovery before they can sort out what really happened. *See Tabbara v. Iowa State Univ.*, 2005 WL 839405 at *5 (Iowa Ct. App. Apr. 13, 2005); *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 626 (Iowa 2017).

Throughout their Brief, Defendants repeatedly say the Marshall *investigation* is the reason Plaintiff claims he was terminated. Def. Br. 22-23, 28-29, 31. Not so; the reason for the termination was Ron's protected activity in *reporting* Marshall's harassment. It is telling that Ron and Assistant Plant

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[3] Defendants misleadingly say Plaintiff originally alleged five separate reasons—a claim that can be made only by separating the claim of Retaliatory Discharge in violation of public policy into three separate causes of action.

Manager Anson Flaspohler had to wait until Doug Robey was on vacation so they could bypass the chain of command and report Marshall's harassment directly to Human Resources. Ron's reports led to Marshall's termination. By reframing Ron's protected activity as Defendants' own investigation into Justin Marshall's harassment, Defendants obscure Robey's natural motivation to retaliate against Ron for his involvement in the termination of Robey's good friend.

Defendants also complain that it was "salacious" for Plaintiff to tell the Court what Marshall did to get himself fired. Def. Br. 11. On the contrary, courts routinely hold that evidence of the underlying behavior to which the plaintiff objected is admissible in retaliation cases. Details about the harassment are necessary to provide context for the complaints. *Hawkins v. Hennepin Tech. Ctr.*, 900 F.2d 153, 1556 (8th Cir. 1990)*; see also Buckley v. Mukasey*, 538 F.3d 306, 318-19 (4th Cir. 2008); *Quinn v. Consolidated Freightways Corp.*, 283 F.3d 572, 579 (3d Cir. 2002); *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 874 (7th Cir. 1995). Moreover, "an atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation for complaints in individual cases." *Hawkins*, 900 F.2d at 156.

The seriousness of the harassment Marshall committed is relevant to understanding Robey's motive to retaliate, which helps prove causation. Robey

knew Marshall was engaging in crude and discriminatory behavior even before Ron became Marshall's supervisor. Robey not only failed to stop Marshall's behavior, but actively interfered with other managers' attempts to do so. It is important to understand that these were not nitpicky complaints that could lead a reasonable manager to protect a colleague. The complaints were about blatantly racist and sexual misconduct, inappropriate for any workplace.

Robey was so furious at Ron after Marshall was fired that he called and screamed at Ron for "turning Justin in," insisting that they were all "fucking liars."[4] (Hampton Dep. 358:3-59:5) (App. Vol. 1, p. 544); (Dep. Ex. 8, p. 5) (App. Vol. 1, p. 667). Robey then refused to speak to Ron or answer his phone calls *for the next five months*. (Hampton Dep. 358:12-59:5) (App. Vol. 1, p. 544); (Dilley Affidavit ¶ 54) (App. Vol. 1, p. 564); (Shannon Affidavit ¶ 51) (App. Vol. 1, p. 570); (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). Robey started manipulating situations so it would seem like Ron was doing something wrong. (Shannon Affidavit ¶ 50) (App. Vol. 1, p. 569); (Dep. Ex. 8, p. 6) (App. Vol. 1,

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[4] Although Defendants know the Court must rely on Plaintiff's view of the facts rather than theirs, they tell the Court that Robey agreed that Marshall should be terminated. Def. Br. 23. Given Robey's passionately angry response to the termination, a reasonable juror can find differently.

p. 668). It was so bad and so blatant that Ron and others complained to District Production Manager Scott Gerbes about Robey's retaliation. (Hampton Dep. 354:9-24) (App. Vol. 1, p. 543); (Dep. Ex. 8, p. 6) (App. Vol. 1, p. 668). There is no evidence Gerbes took any action.

The most glaring omission from Defendants' Brief is the fact that the MSHA citation was terminated on the same day it was issued *after an electrician repaired the plug exactly the same way Ron had.* (Dep. Ex. 7) (App. Vol. 1, p. 662); (Dep. Ex. 11, p. 2) (App. Vol. 1, p. 670); (Dep. Ex. 31, p. 2) (App. Vol. 1, p. 700); (Flaspohler Dep. 145:14-25) (App. Vol. 1, p. 510). Ryan Meyer, the electrician who made the repair, described to Eller how he pushed the cord back in the housing and tightened the screws. (Dep. Ex. 11, p. 2) (App. Vol. 1, p. 670). Meyer's action was the very same thing Ron had done to repair the welder—a fact Eller noted in his report. *Id.*; (Hampton Dep. 90:7-8) (App. Vol. 1, p. 532).

The problem was not Ron's repair; the problem was that the plug was too small for such a large cable. *See* Hampton Dep. 146:6-20; 148:8-149:3 (App. Vol. 1, p. 540). The plug could not handle the weight of the cable, which kept slipping out, even after being screwed in. *Id.*; (Hampton Dep. 115:11-25) (App. Vol. 1, p. 536). This was confirmed by the MSHA inspector, as well as Electrical Manager Tom Smith. (Dep. Ex. 31, pp. 1-2) (App. Vol. 1, p. 301-02).

During MMM's investigation, Eller asked Smith if the plug was suitable for the welder and he replied, "Probably not, the welder has an 8 cord (size) and once you get that in the screws are already at the end and it would be very easy for the cord to continue to drop out." (Dep. Ex. 31, p. 2) (App. Vol. 1, p. 302). Nevertheless, the electricians did not replace the plug with a larger one. After the MSHA inspector recommended use of a larger plug that would prevent the cord slipping out, it was *Ron* who went to the store, bought a bigger plug, and installed it on the welder. (Hampton Dep. 146:6-20, 148:5-49:3) (App. Vol. 1, p. 540). Ron made this safety modification *after* the electricians had "fixed" the welder and the MSHA citation had been terminated. *Id.* These are not the actions of someone trying to cut corners on a repair, but they appear nowhere in Eller's report or Defendants' Brief.

Defendants repeatedly refer to their investigation into the welder repair as "independent." Def. Br. 2, 10, 17, 19, 28-30, 32-33, 35, 38, 44. The investigation was conducted by one of the parties to this case, making it Defendants' own version of the facts. It is no more "independent" than if Ron claimed to have conducted his own "independent" investigation.

Even more important is the evidence showing how Defendants' managers' opinions changed dramatically once Robey involved himself. *See* Pl. Br. 40-46. On August 9, 2018, both Ron and (truly independent) witness Jason

Reifschnider told Investigator Eller that the MSHA inspector had to bend the cord for any wires to be visible. (Dep. Ex. 11, pp. 1-2) (App. Vol. 1, p. 669-70). On August 13, *after* Doug Robey became involved, Eller questioned whether Ron was telling the truth, but failed to note in his report that Reifschnider had already corroborated and confirmed Ron's statement about the wires. (Dep. Ex. 11, p. 5) (App. Vol. 1, p. 673).

On August 12, 2018, Investigator Eller recommended that Ron receive a warning for "placing the welder back in service and not eliminating the risk of exposed cords would re-occur." (Dep. Ex. 35, p. 1) (App. Vol. 1, p. 706). Then on the morning of August 13, "after speaking with Doug [Robey]," Scott Gerbes suddenly decided Ron was lying about the welder repair. (Dep. Ex. 35, p. 1) (App. Vol. 1, p. 706). Gerbes emailed that conclusion to Eller, and Eller changed his report. *Id.* No new evidence came to light between Eller's recommendation that Ron receive a warning and his about-face recommending termination. *See* Dep. Ex. 42, pp. 2-3 (App. Vol. 1, p. 714-15); Dep. Ex. 11 (App. Vol. 1, p. 669-75). Robey's involvement was literally the only intervening factor. Defendants can deny it all they want, but the jury is entitled to infer from these facts that Robey was the catalyst that led to Ron's termination. In fact, there is no alternative explanation in the record.

II. MOTIVATING FACTOR – SAY IT AGAIN PLEASE

As Plaintiff noted in his initial Brief, the District Court's order relied on a dissenting opinion in *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 582 (Iowa 2017) (Waterman, J., dissenting). Defendants insist that Justice Waterman's view that retaliation must be a "significant factor" motivating the adverse action rather than a "motivating factor" was a plurality opinion. Def. Br. 26 n.7. Seven justices took part in *Haskenhoff*. Three joined the part of Justice Waterman's opinion on "significant factor." Four joined the part of Justice Appel's opinion on "motivating factor."[5] A statutory interpretation that receives four out of seven votes is the majority. One that receives three out of seven votes is a dissenting opinion. *See* BLACK'S LAW DICTIONARY 1201 (9th ed. 2009).

The fighting issue is not what to name the causation standard; it is the substance of that standard. *See* Def. Br. 27 n.8. *Haskenhoff* makes clear that an

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[5] Former Chief Justice Cady wrote separately and agreed that "motivating factor" was the correct standard for discrimination and retaliation claims under the ICRA. *Haskenhoff*, 897 N.W.2d at 602 (C.J., Cady, concurring). This was also the view of Justices Appel, Wiggins, and Hecht. *Id.* at 637. Chief Justice Cady indicated that he joined in Justice Appel's opinion as to issues on which he disagreed with Justice Waterman's opinion. *Id.* at 601.

employer is liable when protected activity plays a part in the adverse action. In other words, it must have been one of the reasons the action was taken, but need not have been the only reason or reasons. The precise weight the illegal factor may have played in the decision is not important. *See Haskenhoff*, 897 N.W.2d at 602 (C.J., Cady, concurring) and 633-37 (majority opinion).

Plaintiff's case is strong enough that a reasonable jury can find causation under the motivating factor standard used in the Court's precedents or under the standard urged by Defendants.

III. THIS IS A CLASSIC CAT'S PAW CASE

Defendants are correct that Plaintiff mistakenly used quotation marks in his analysis of *Staub v. Proctor Hospital*, 562 U.S. 411, 419-20 (2011). *See* Def. Br. 31. The substance of Plaintiff's analysis, however, is correct. An employer is liable if a supervisor's retaliatory bias is one of the proximate causes of the employment decision. *Staub*, 562 U.S. at 419-20. It need not be the only cause. "The decisionmaker's exercise of judgment is also a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes." *Id.* at 420.

A cat's paw can be anyone closely involved in the decisionmaking process. *Thomas v. Heartland Employment Servs.*, LLC, 797 F.3d 527, 530 (8th Cir. 2015); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir. 2000)

(someone who "had influence or leverage"). The decisionmaker does not have to be simply a "rubber stamp" for the retaliator. *See* D. Br. 32 (citing *Qamhiyah v. Iowa State Univ.*, 566 F.3d 733, 745 (8th Cir. 2009)). *Qamhiyah* was decided nearly two years before *Staub*, and *Staub* demands a different analysis.

Defendants also allege that "a 'cat's paw' theory requires showing the investigator 'relie[d] on facts provided by the biased supervisor,' meaning the employer 'effectively delegated the factfinding portion of the investigation to the biased supervisor." Def. Br. 31-32 (citing *Staub*, 562 U.S. at 421). Defendants have it backwards. The Court actually said that "**if**" the employer's investigation "relies on facts provided by the biased supervisor . . . **then** the employer **will** have effectively delegated the factfinding portion of the investigation to the biased supervisor." *Staub*, 562 U.S. at 421. If an ""independent investigation relies on facts provided by the biased supervisor,' then the investigation was not, in actuality, independent and the employer is liable." *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 352 (6th Cir. 2012) (quoting *Staub*, 562 U.S. at 421)). A reasonable juror can find that MMM's investigation relied on "facts" provided by Doug Robey.

The jury may also reasonably find Robey intended Ron to be fired since Robey became involved only *after* MMM had decided to give Ron a warning.

Cf. Staub, 562 U.S. at 422-23 (false allegations show intent to cause termination).

Marshall v. The Rawlings Co. L.L.C., 854 F.3d 368 (6th Cir. 2017) was a Family Medical Leave Act case. *Id.* at 372. In the past, the plaintiff's supervisor had expressed negative comments about the plaintiff's use of leave, which "permit[ted] the inference that [the supervisor] was displeased with Marshall's previous exercise of her FMLA rights." *Id.* at 382. Even though the supervisor did not make the decision to fire the plaintiff, he provided input and a recommendation. *Id.* at 383. The company president who made the decision did so "shortly after receiving [the supervisor's] recommendation. *Id.* Such a short interval indicated the president may not have independently verified the supervisor's claims about the plaintiff. *Id.* The same is true in the case at bar. It was literally a matter of a few hours on the morning of August 13 in between Robey's conversation with Gerbes and MMM's change of course and decision to fire Ron. Robey's involvement was the only independent variable, so a reasonable jury can find it was a proximate cause of Ron's termination. *See Staub*, 562 U.S. at 419-20.

Another key finding in *Marshall* was that the employer never bothered to ask the biased supervisor about his alleged harassment toward the plaintiff. *Id.* at 383-84. In the same vein, there is no evidence that anyone from MMM ever

asked Robey about Ron's complaints to Gerbes that Robey was engaging in retaliatory behavior.

Defendants try to make it seem like Robey's only involvement in Ron's termination was his existence "at the bottom of the chain of command." Def. Br. 33. Robey was Ron's direct supervisor, and individuals in such roles typically have disproportionate influence over a termination decision. Even more crucial is the evidence, discussed above, that MMM's opinions about Ron and its conclusions about what happened took a 180-degree turn as soon as Robey weighed in. Whatever Robey told Gerbes on the morning of August 13 led Gerbes to email Eller and Eller to change his report.

Remarkably similar evidence was afforded great weight in *Burlington v. News Corp.*, 55 F. Supp. 3d 723 (E.D. Pa. 2014). After an investigation showed misconduct, the employer issued the plaintiff a final warning and referred him to the Employee Assistance Program. *Id.* at 730. They were preparing for the plaintiff's return to work a few days later. *Id.* In the meantime, a coworker named Evans urged that the plaintiff be fired and encouraged others to lodge complaints about him that the court said could be based on race. *Id.* at 739. Two days later, the employer changed its mind and decided not to renew the plaintiff's contract. *Id.* at 740. Although Evans was not even a supervisor, the *Burlington* court held the employer could be liable under the cat's paw doctrine

because Evans' actions were one of the proximate causes of the adverse employment action. *Id.* at 740-41.

Defendants assert that MMM could not have retaliated against Ron because Eller had no idea Ron had engaged in protected activity. D. Br. 29. But that is the whole point of cat's paw. Liability applies when the putative decisionmaker has no personal bias, yet is influenced by someone who does. *See Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 965 (8th Cir. 2012) (although the decisionmakers "were unaware of Marez's request for FMLA leave, Saint-Gobain can be held liable based on [the first-level supervisor's] animus that resulted in Marez's termination"). "The honesty or sincerity of the decisionmaker's belief is irrelevant." *Marshall*, 854 F.3d at 380.

In a related argument, Defendants say any "causal link is severed" because MMM's decision was based on an "independent investigation." D. Br. 28. But the "independent investigation" found that Ron should receive a warning. Robey's intercession altered the investigation's outcome and ended any "independence" that may have existed. As the *Burlington* court noted in an identical situation: "Defendants' investigation of the incident does not sever the causal link between Evans's actions and the final determination" because the investigation was largely complete and an initial decision was made that the only discipline the plaintiff would receive would be a final warning. *Id.* at 740.

Even when the biased employee's input is received *during* the investigation itself, "the ultimate adverse employment decision could still be tainted by a biased subordinate's[6] information, participation, or recommendation." *Coe v. N. Pipe Prods., Inc.*, 589 F. Supp. 2d 1055, 1092 (N.D. Iowa 2008). An explicit recommendation to fire the plaintiff is not necessary; biased information can be a proximate cause of the adverse action. *Id.* at 1091-92. "The focus should be *causation*, not whether the employer conducted an 'independent' investigation." *Id.* at 1092 (emphasis in original).

IV. DEFENDANTS' ARGUMENT ABOUT PLAINTIFF'S "ADMISSION" IS ABSURD

Defendants tell the Court that Ron admitted the reason he was fired was a LOTO violation and claim this precludes a finding of pretext. Def. Br. 34. Here is what they claim is the "admission":

> Q. And at the end of that investigation they concluded that you had, in fact, violated LOTO; correct?
>
> **A. Correct. That's why they fired me.**

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[6] It is clear from the context that by "subordinate," the court is referring to a manager who is subordinate to the one making the ultimate decision, not someone subordinate to the plaintiff.

Q. Right. And you disagree with the conclusions of the investigation; is that correct?

A. That is correct.

(Hampton Dep. 42:14-20) (App. Vol. 1, p. 59). Ron also testified that he believed Robey was the deciding factor in his termination because Robey was involved with every investigation at the Ames mine. (Hampton Dep. 188:13-189:23, 192:20-193:4, 367:6-17) (P. App. Vol. 1, p. 95, 96, 546).

The ultimate conclusion of Defendants' investigation—retaliatory as it was—*is* why Defendants fired Ron. An employer may fire a Black employee for poor sales, but that is not inconsistent with a finding of race discrimination. The employee may also prove that they did not fire White people for worse sales and that he would not have been fired but for his race.

Normal people are not as meticulous with their word choices as lawyers. Even in the context of his deposition alone, it is obvious that Ron does not believe that a LOTO violation (that he did not commit) was the real reason he was fired. Furthermore, Ron has spent the last two and a half years pursuing legal claims asserting that he was fired as a result of Robey's desire to avenge Justin Marshall's termination. It is just silly to argue that the above exchange shows that he suddenly changed his mind about that key fact in the middle of his deposition.

V. CIRCUMSTANTIAL EVIDENCE IS NOT SPECULATION

Defendants mischaracterize Plaintiff's circumstantial evidence as "pure speculation." Def. Br. 36. The Court recently found circumstantial evidence far more attenuated than Plaintiff has produced sufficient to prove *specific intent* in a criminal case.[7] *See State v. Ernst*, 2021 WL 297250 (Iowa Jan. 29, 2021).

The *Ernst* decision began by confirming "that specific intent crimes are seldom proved by direct evidence" and the State must "rely on inferences to be drawn from the surrounding circumstances to convince a jury beyond a reasonable doubt that the defendant had a sufficiently culpable mental state to support a conviction." *Id.* at *1. Even though nothing had been stolen, the Court found specific intent to commit a theft under the following circumstances:

- The home was owned by the defendant's parole officer.
- A door that had been locked was found ajar and marred with what might have been pry marks.
- Only one "non-local" vehicle drove down the road that day.
- That vehicle was a white Crown Victoria with chipped paint, a description that also matched the defendant's car.

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[7] Employment discrimination plaintiffs do not need to prove specific intent—only that the employer had a discriminatory or retaliatory motive that played a part in the decision. *See, e.g. Haskenhoff*, 897 N.W.2d at 602, 633-37.

- The driver of the car wore a sleeveless top similar to one the defendant was seen wearing later that day.

The Court rejected the idea that this evidence was too speculative a basis on which to deny a man his liberty. *Id.* at *3. There was no mention that the culprit might have been driving one of the "local" cars or that he may have walked to the house. The question of how many other white Crown Victorias with chipped paint might exist was left unasked and unanswered. The record revealed nothing about Ernst's relationship with his parole officer, whether he had a motive to target her, or what that motive might be. Although both the defendant's mother and sister backed up his testimony and provided him an alibi, their testimony was referred to as "uncorroborated."[8] *Id.* at *7. Moreover, the alibis were used against him as evidence of pretext. "A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt and . . . is relevant to show that the defendant fabricated evidence to aid his defense." *Id.* at *4. Even the fact that nothing had been taken was insufficient to negate the evidentiary inference that Ernst

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[8] A corroborating witness "confirms or supports someone else's testimony." BLACK'S LAW DICTIONARY 1740 (9th ed. 2009).

had theft on his mind because: "'[E]xperience teaches that, in the great majority of cases of unlawful breaking and entering, the act [done is] with intent to steal.'" *Id.* at *3 (alterations in original) (quoting *State v. Allnutt*, 156 N.W.2d 266, 271 (Iowa 1968)).

In sum, even though there was no evidence that Ernst and his family were lying, per se, the jury was free to disbelieve the defendant and his two family members, "leaving them to conclude Ernst offered a false story of his whereabouts." *Id.*

The *Ernst* case illustrates the importance of respecting the jury's ability to sort out fact from fiction as well as the crucial role circumstantial evidence and reasonable inferences play in helping juries reach conclusions in cases where direct evidence is unavailable.

VI. THERE IS NO "HONEST BELIEF" EXCEPTION TO CIVIL RIGHTS LAWS

In the end, Defendants contend the heap of circumstantial evidence against them does not really matter because MMM's managers deny retaliating against Ron. They testified that they really thought Ron had committed a LOTO violation; therefore, the truth is irrelevant. *See* D. Br. 35-39.

Defendants appear to urge that this Court adopt the so-called "honest belief" exception to civil rights laws. To do so would show contempt for the

rules governing summary judgment, the role of the jury, the equality of circumstantial evidence, the common-sense axiom that pretext can prove motivation, and decades of precedent from the Supreme Courts of Iowa and the United States.

Courts have no business assessing credibility at the summary judgment stage. They cannot see witnesses, hear them, or judge their demeanor. Judges should never presume that one side in any dispute will be honest—particularly the side moving for summary judgment since the nonmoving party is supposed to receive the benefit of the doubt. The court need not credit the testimony of interested witnesses for the moving party, even if that testimony is not contradicted. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

Most of us learned in government class—well before law school—that our judicial system affords criminal defendants rights to which ordinary litigants are not entitled. They are presumed innocent; they cannot be compelled to testify; and their guilt must be proven beyond a reasonable doubt. In contrast, defendants in civil cases are entitled to no special treatment.

It is impossible even to imagine a judge-made rule requiring the dismissal of criminal charges whenever a defendant denied having a mindset that was an element of the crime. Yet there are courts that have given this gift to

defendants in civil employment discrimination cases. It is wholly inconsistent with precedent.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 503, 524 (1993), the Supreme Court recognized "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." So far anyway, science had not developed a way to procure eyewitness testimony to someone's mental processes. Yet, that is precisely what Defendants claim Ron needs. On the contrary, it is black letter law that evidence which would allow the jury to find the employer's proffered explanation is false is enough to prove discrimination.[9] *Reeves*, 530 U.S. at 147; *Hicks*, 509 U.S. at 511; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253

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[9] This is illustrated in *Reeves*, where the employer claimed it fired the plaintiff for falsifying payroll records. *Reeves*, 530 U.S. at 144. Reeves showed this explanation was false by introducing evidence that he did not falsify records and that he was not responsible for certain payroll errors. *Id.* at 145. Reeves did not argue that his employer did not honestly believe he falsified company records; he argued the employer's stated reason was pretextual because it was factually wrong. *Id.* It was this evidence to which the Court referred when it said the "falsity of the employer's explanation" allows the finder of fact to infer discrimination. *Id.* at 147.

(1981). There is no additional requirement to show the employer is being dishonest.

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511. *Hicks* distinguished the falsity of an employer's explanation from the existence of any "suspicion of mendacity." *Hicks*, 509 U.S. at 511. "Mendacity" means dishonesty. The phrase "particularly if disbelief is accompanied by a suspicion of mendacity" makes clear that, although evidence raising suspicion that the employer is being dishonest or insincere may certainly help the plaintiff's case, it is not evidence necessary to withstand summary judgment so long as the jury can find the Defendants' proffered reason for termination was incorrect. *See id.*

Just because an employer honestly believes it did not discriminate does not mean that it did not discriminate. The fact that the employer's asserted reason for taking adverse action is rejected by the jury is enough to prove discrimination. *Reeves*, 530 U.S. at 148-49. Proving discrimination simply becomes easier if there is *even the suspicion* that the employer is not just incorrect but lying. *Hicks*, 509 U.S. at 511. This makes sense because human beings are

not always "woke" to their own biases.[10] A manager may "honestly believe" the reason she fired a Latina woman was her persistent tardiness. The manager may be blind to the fact that several Caucasian women are late even more often. We have powerful psychological incentives not to see ourselves as racist or sexist. Employees on whose actions corporate liability depends want to protect their careers. People being sued have powerful financial incentives to remember the past differently than how it actually was. Witnesses' testimony becomes skewed over time due to fear or loyalty. The ICRA is violated when employees suffer adverse consequences because of their protected activity, even when the retaliator fails to recognize his own culpability.

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[10] Human beings often arrive at "honest beliefs" based on stereotypes, and decisions based on those beliefs are just as illegal as those made by overt bigots. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) (Title VII proscribes subjective decisionmaking systems that discriminate just as it does a system pervaded by impermissible intentional discrimination); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (decisionmaking influenced by stereotypes is "the essence of what Congress sought to prohibit in the ADEA"); *U.S. v. Wilson*, 853 F.2d 606, 611-12 (8th Cir. 1988) (prosecutor's honest belief that black jurors would be more sympathetic to black defendant is premised on stereotypes, insufficient under *Batson*, and unconstitutional); *Nelson v. James H. Knight, D.D.S, P.C.*, 834 N.W.2d 64, 77 (Iowa 2013) (Cady, C.J., concurring) (decision based on stereotypes about women is sex discrimination).

VII. CONCLUSION

The facts of this case and reasonable inferences arising from those facts provide a firm foundation on which a jury can find Defendants fired Ron Hampton because of his protected activity. Defendant Robey had the motive and the opportunity to influence the results of the LOTO investigation. The outcome of that investigation flipped immediately after Robey offered input.

The lower court erred in deciding no reasonable jury could find retaliation played a part in Plaintiff's termination.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

I, Amy Beck, certify that there was no cost to reproduce copies of the preceding Plaintiff-Appellant's Final Reply Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

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