IN THE SUPREME COURT OF IOWA

Supreme Court No. 21-1327

DAVINA VALDEZ,

Plaintiff-Appellant,

vs.

WEST DES MOINES COMMUNITY SCHOOLS and DESIRA JOHNSON,

Defendants-Appellees.

APPEAL FROM THE POLK COUNTY DISTRICT COURT
Hon. Jeffrey Farrell

APPELLANT'S REPLY

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ATTORNEYS FOR PLAINTIFF-APPELLANT

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Introduction

Plaintiff's opening brief in this matter was comprehensive and she will not repeat the arguments therein, but instead will focus on a few of the most salient disagreements between the parties and additional information that is needed to resolve them. In particular, Plaintiff recognizes that this record is ripe for a determination under the standards set forth in *Batson v. Kentucky* and progeny, and under state law, that "lack of rapport" is an insufficient basis to strike the only minority juror in a race discrimination case. Plaintiff also explains that individual liability under both the Civil Rights Act and pursuant to her wrongful discharge claim can apply to Defendant Johnson, no matter her formal title nor her alleged inability to hire or fire Plaintiff Valdez—Johnson was both able to and did accomplish adverse employment actions by harassing Valdez until she was forced to discharge. Finally, Plaintiff addresses Defendants' egregious use of settlement correspondence to rebut her claims, which tainted the trial below and continues to infect this appeal.

ARGUMENT

I. UNDER *BATSON* OR LOOKING BEYOND IT, PLAINTIFF IS ENTITLED TO A NEW TRIAL

Defendants argue that this Court should not go beyond *Batson* for a number of reasons. Among the reasons offered by Defendants is adherence

to precedent, and in particular *State v. Veal*. (Defs.' Br., at 20). However, one of the points of Plaintiff's thorough exposition to the *Batson* issue in her opening brief was that adherence to precedent in the realm of *Batson* has produced constitutionally incongruent results for decades. (Pl. Br., at 26) (describing how state laws indisputably conceived in race discrimination, and which allowed nonunanimous convictions for serious offenses, persisted for decades, in part based on *stare decisis*).[1] Further, one cannot ignore the facts of *Veal*, where the basis of the challenged peremptory strike was described by the Court as follows:

> [T]his case involved a special set of circumstances – a prosecutor's use of a peremptory strike on a juror because the same prosecutor had sent her father to prison for the rest of his life.

930 N.W.2d at 334. The Court's description of the challenge included the following explanation provided by the prosecutor at trial:

> So I'll tell you why we struck Ms. [H.]. Ms. [H.] is the daughter of [S.H.] I prosecuted [S.H.] for three class A felonies in this county; kidnapping, sexual abuse, and murder, all in the first

---

[1] Equal protection based on race was not the only issue which took time to establish in precedent; equal rights for female potential jurors also languished. *See Taylor v. Louisiana*, 419 U.S. 522 (1975) (as cited and discussed within *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 132 (1994)) ("Certainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans.")).

> degree. It was a very high-profile case, a very brutal killing . . .
>
> At the time of the – the crime – I can't tell you the year or the date. I do lose dates – but Ms. [H.], I believe, was right around the age of 17 years old. I vaguely remember her being present at least at part of the – if it wasn't the trial, it would have been part of the pretrial proceedings. She was with her mother . . .
>
> I mean, I can't keep a juror on whose father I prosecuted for a class A felony. I mean, there – there – she may have latent hostility toward me personally because of what I did. Her expressions that she made on the – on the record, she said that his sentence was fair. She doesn't appear to have a whole lot of contact with him; but that's not a risk I can take, particularly under the circumstances of this case.
>
> We have – the allegation is that Mr. Veal killed two people. At least based in part on what our expert has said, he may be blaming a – a second person, may be blaming Ron Willis, claiming that he didn't – that Mr. Veal's claiming that he didn't do the crime that he's accused of.
>
> And Ms. [H.] raised that issue with me concerning the fairness and what she thought about the trial of her father, [S.H.], whenever she said somebody else might have been involved.
>
> I can tell you right now, in the [S.H.] case, no one else was involved. We had strong physical evidence against him that he was the sole perpetrator of those three crimes. That's what concerns me about Ms. [H.]. I think those are race neutral reasons to strike her.
>
> If she were white, I would make the exact same objection to having her – or make the same exact strike that I would. And it – this has nothing to do with her race; it has everything to do with her background and who her father is and the fact that I was directly involved in that case and that prosecution. So for those reasons, that's why we exercised our preemptory challenge.

Id. at 333. If a change in Iowa law surrounding *Batson* challenges were to be made—*Veal* was not the vehicle to do it. This is in stark contrast to the

district court's description of Plaintiff's prima facie showing of a discriminatory peremptory challenge in this case:

> In fact, defendants argued at trial, at the new trial hearing, and in their brief, that I erred by directing their counsel to give the race-neutral reason for the strike. I want to put that decision into context. I have presided in 86 jury trials since becoming a district judge. The vast majority of those cases are criminal cases that are much more likely involve a *Batson* issue than the average civil case. Fortunately, *Batson* challenges in Iowa courts are rare. I can only recall hearing a challenge in perhaps three or four cases. In each case that has arisen, I have asked the other attorney to give the reason for the strike. It seems easier to hear the race-neutral reason and move on. Most lawyers understand that and are open to provide the reason(s) for the strike.
>
> This case is the first in which a lawyer has objected to giving me a reason for the strike on the ground that plaintiff had not shown a prima facie case. Defense counsel is within its rights to object based on the *Batson* test, but may not appreciate that I do actually listen during *voir dire*. In my other cases involving *Batson* challenges, there were obvious race-neutral reasons for the strike based on answers given by the juror during *voir dire*. If opposing counsel had objected, I may have simply denied the challenge and moved on. In this case, a race-neutral reason to strike was not apparent. The juror was a long-time supervisor in a state agency that would understand a management perspective in managing staff-level employees. The juror did not make any statements that were obviously concerning. He was the only Black juror in a race discrimination case. My role as a judge requires me not only to provide a fair trial for each party, but also to ensure equal protection for the judicial process as a whole. That includes allowing citizens to be party of the jury process unless there is good reason they should be excluded from that particular case. *See State v. Mootz*, 808 N.W.2d 207, 215 (Iowa 2012) (holding the court has the authority to protect the equal protection rights of individual jurors). In my view, I was justified in finding plaintiff met her prima facie case and directing defense counsel to respond.

(APP. 191; Ruling on Motion for New Trial, p. 21).

Despite this uncertain-terms analysis from the trial court, and Defendants' arguments to this Court to defer to the credibility of the trial court's observations (Def. Br., at 36), Defendants again challenge Plaintiff's ability to make a prima facie case in this Court. (Def. Br., at 27). For the reasons set forth by the trial court, a prima facie case for the *Batson* challenge was clear. Further, and while potentially academically interesting, the existence *vel non* of a prima facie case becomes moot once the trial court engages in the remainder of the *Batson* inquiry. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991).

However, the trial court's description of the prima facie case also instructs as to the remainder of the analysis and undercuts not only that court's ultimate ruling that the *Batson* challenge should be denied but also disposes of any similarity between this case and the facts of *Veal*. The Court's surprise at defense counsel's uncharacteristic refusal to provide a race-neutral reason for her strike when questioned is not without import. *See, e.g., Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) ("The Court has explained that 'the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.'") (citing *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). However, most important was the

trial court's finding that:

> In this case, a race-neutral reason to strike was not apparent. The juror was a long-time supervisor in a state agency that would understand a management perspective in managing staff-level employees. The juror did not make any statements that were obviously concerning. He was the only Black juror in a race discrimination case.

(APP. 191; Ruling on Motion for New Trial, p. 21). In other words, during *voir dire*, the Court did not discern any reasons apparent to support a nondiscriminatory strike of Juror 13.

Next, and in addition to arguing adherence to precedent, Defendants also argue that strengthening *Batson* will result in a "burden on judicial resources" and will increase "the length of litigation" and will "open the floodgates" to such challenges, citing Justice Scalia's dissenting opinion from *J.E.B. v. Alabama*, a case in which the Supreme Court held that peremptory challenges made based on gender also violate the Equal Protection Clause. (Def. Br., at 25); *see also J.E.B.*, 511 U.S. at 144-45. However, despite the fact that the majority opinion of *J.E.B.* extended equal rights to female potential jurors in 1994, over Justice Scalia's objection and concerns, including those about "extensive collateral litigation," since then only one case the undersigned has located cites to Justice Scalia's concerns regarding the potential burden on trial courts. *See Jones v. State*, 229 So.3d 834, 835 (Fla. 4th Dist. Ct. of App., 2017) (Klingensmith, J., concurring).

Finally, Defendants argue, as they must on this record, that lack of rapport alone is a sufficient basis to strike the remaining black juror in a race discrimination case. (Def. Br., at 33). Whether under current *Batson* (and *Veal*) precedent or under an expanded analysis, Plaintiff disagrees—lack of rapport is a subjective and insufficient basis to survive *Batson* scrutiny. *See State v. Clegg*, 867 S.E.2d 885, 907 (N.C. 2022). The North Carolina Supreme Court held early this year, when evaluating a *Batson* challenge and responding to assertions regarding the body language and demeanor of two female, black jurors:

> Historical context provides even more reason for courts engaging in a *Batson* analysis to view generalized 'body language and lack of eye contact' justifications with significant suspicion. For example, as recently as 1995, prosecutorial training sessions conducted by the North Carolina Conference of District Attorneys included a 'cheat sheet' tiled '*Batson Justifications: Articulating Juror Negatives*.' *See* Pollitt & Warren, 94 N.C. L. REV. at 1980 (noting a North Carolina trial court's summary of this document in a 2012 Order on a defendant's motion for appropriate relief). This document provided prosecutors with a list of facially race-neutral reasons that they might proffer in response to *Batson* objections. *See id.*; *see also* Jacob Biba, Race Netural, THE INTERCEPT, Nov. 8, 2021, https://theintercept.com/2021/11/08/north-carolina-jury-racial-discrimination/ (describing the prosecutorial training and Batson Justification worksheet); Tonya Maxwell, *Black juror's dismissal, death penalty, revisited in double homicide*, THE ASHEVILLE CITIZEN-TIMES, Nov. 3, 2016, https://www.citizen-times.com/story/news/local/2016/11/03/black-jurors-dismissal-death-penalty-revisited-double-homicide/93168824/ (same). The list included both 'body language' and 'lack of eye contact,' in addition to 'attitude,' 'air of defiance,' and 'monosyllabic'

responses to questions.

> Of course, North Carolina is not unique here. When placed within our well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination, this historical context cautions against accepting overly broad demeanor-based justifications without further inquiry or corroboration. *See Flowers*, 139 S. Ct at 2239-40 ("And when [other discriminatory] tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors."). Accordingly, the trial court properly rejected the prosecutor's unconfirmed and generalized 'body language and lack of eye contact' rationale below.

867 S.E.2d at 907. Further, subjective reasoning such as lack of rapport should not be permitted to be rescued by one sentence of the trial court's analysis, in a written ruling occurring four months after the jury trial had taken place, and contrary to that court's prior description of the prima facie case and strength of the prima facie case that: "It is difficult to show on the transcript, but the juror appeared to be measured or reticent before or as responding to counsel's questions. This is not a bad trait, but it supports defense counsel's belief that he might be a questionable juror for her case." (APP. 191; Ruling on Motion for New Trial, p. 21). And this is especially the case where these asserted traits of reticence or measured answers were never mentioned by anyone on the record during trial. (TT v. II, p. 50, l. 19 – p. 56, l. 8); *Cf. Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (Marshall, J., concurring) ("Nor is outright prevarication by prosecutors the only danger

here . . . A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically" and also discussing the role of the court in performing similar analysis and attempting to avoid its own implicit biases).

Juror 13 was improperly excused through Defendant's use of a racially-motivated peremptory strike and Plaintiff's *Batson* challenge improperly denied. Plaintiff is entitled to a new trial.

II. JOHNSON IS SUBJECT TO INDIVIDUAL LIABILITY

Defendants make several arguments in attempt to support the trial court's dismissal of Defendant Desira Johnson as an individual defendant. None is compelling.

First, Defendants argue that prior to this Court's decision in *Rumsey v. Woodgrain Millwork, Inc.*, "it was well-established that only a 'supervisory' employee may be subject to individual liability for unfair employment practices under the Iowa Civil Rights Act." (Def. Br., at 41). However, individual liability under the ICRA was not so "well-established." First and foremost, the Iowa Civil Rights Act itself has always prescribed liability not only for employers but also for illegal acts by "a person" which is not explicitly limited to any certain type of employee. Iowa Code § 216.6.

While *Vivian v. Madison*, one of this Court's seminal cases interpreting the ICRA, had made it clear that supervisors were among the "person[s]" who could be held individually liable, 601 N.W.2d 872, 872 (Iowa 1999), the ambit of liability of other classes of employees was not explicitly established. *Compare Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1079 (8th Cir. 2006) (assuming without deciding that ICRA liability could extend to nonsupervisory employee), *with Nelson v. Wittern Grp., Inc.*, 140 F. Supp.2d 1001, 1009 (S.D. Iowa 2001) (holding individual liability rested on whether the employee had "control of the company's hiring decisions").

Rumsey indeed brought needed clarity to a formerly opaque area of law when it held:

> We conclude that an individual who is personally involved in, and has the ability to effectuate, an adverse employment action may be subject to individual liability for discrimination under section 216.6 or retaliation under 216.11(2), assuming the other elements of each claim are satisfied with respect to the individual defendant. Whether an individual has the requisite involvement and ability to effectuate the challenged adverse action will depend on the facts of the particular case.

962 N.W.2d 9, 36 (2021).

While Defendants acknowledge this holding, they then go on to argue, with no support in the text of *Rumsey* itself, or otherwise, that "by its plain terms, *Rumsey* is limited to the claims asserted therein: (1) disparate treatment discrimination; (2) failure to accommodate a disability; and (3)

retaliation in the form of a termination." (Def. Br., at 45). *Rumsey's* holding is explicit and is not so limited. Rather than establish that its holding is contingent upon the particular Chapter 216 claims alleged, the focus of *Rumsey* is the individual's "ability to effectuate an adverse employment action," which must be viewed in the context of the "facts of the particular case." 962 N.W.2d at 36. In this case, Johnson took adverse action against Plaintiff that included but was not limited to harassment which was significant enough that Plaintiff constructively discharged—which harassment included: dictating her day-to-day work, materially changing her job responsibilities, and most especially harassing Plaintiff by harassing Plaintiff's primary student, for whom Plaintiff cared deeply, C.O. (TT v. IV, p. 102 l. 3 – p. 119, l. 14); (Yochum Pres. Dep., Court Ex. 1B, p. 15, l. 6 – p. 19, l. 21); (TT v. IV, p. 88, l. 2 – p. 89 l. 10); (TT v. IV, p. 89, l. 23 – p. 90, l. 20); (TT v. IV, p. 47, l. 22 – p. 49, l. 16); (TT v. IV, p. 89, l. 14-22).

Under only this peculiar set of facts, liability against Johnson, both under the ICRA, and in tort for discharge in violation of public policy, is merited. As *Rumsey* instructs: "Whether an individual has the requisite involvement and ability to effectuate the challenged adverse action will depend on the facts of the particular case," and thus the floodgates argument again offered by Defendants is misplaced. The average "public school

teacher" will not make such a dedicated effort as Johnson did to manage employees like Valdez who were allegedly not under her direct supervision nor will they intentionally cause insidious harm to their subordinates, going so far as to harm non-verbal, Level 3 special education students in an effort to do so.

Individual ICRA liability against Johnson was proper and this Court should order a new trial in which Johnson remains a Defendant in her individual capacity.

III. DEFENDANTS' USE OF PLAINTIFF'S SETTLEMENT CORRESPONDENCE TAINTED TRIAL

Reading through the facts of Defendants brief on this appeal one learns of the amount of a settlement offer that Plaintiff sent, through her attorney, very early on in this case. (Def. Br., at 17) (referencing settlement offer of $225,000). Like their inability to resist the temptation at trial, Defendants continue to employ Plaintiff's settlement correspondence in the exact manner eschewed by the Rules of Evidence, in particular, Rule 5.408—admitting that one of the purposes that settlement letters back and forth between the parties were offered and allowed at trial was "to rebut an allegation by plaintiff in support of her constructive discharge claim." (Def. Br., at 55-56). Defendants fail to explain how such a use escapes Rule 5.408's prohibition that settlement

evidence "is not admissible to prove liability for or invalidity of the claim or its amount." Iowa R. Evid. 5.408.

Defendants then attempt to blame Plaintiff for this admission of settlement correspondence, pointing to Exhibit B-10 and claiming that Plaintiff's offer of B-10 or its analogue in her exhibits caused their need to admit classic settlement correspondence. However, this is a red herring. B-10 was not a demand nor any response to one, but instead was a letter of Plaintiff's attorney and sent to the Defendant school district to formally lodge additional complaints of discrimination, harassment, and retaliation, to provide facts supporting those complaints, and to inform the District of its responsibilities under Iowa Code Chapter 216, including to refrain from retaliating against Plaintiff on the basis of her complaints, which letter never mentioned nor offered any compromise or settlement. (APP. 256-260; Def. Ex. B-10).

Defendants' use of settlement correspondence throughout trial (both Plaintiff's and their own) to weaken or "rebut" Plaintiff's claims was an abuse of discretion which prejudiced Plaintiff and necessitates a new trial.

Conclusion

Plaintiff was deprived of a fair trial before a jury of her peers. Plaintiff respectfully requests that this Court reverse the judgment rendered in Defendants' favor and remand this case for a new trial against all original parties, including against Defendant Desira Johnson, individually.

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 3,429 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 Final Reply with the Clerk of the Supreme Court, Appellate Court's Building, 1111 E. Court Street, Des Moines, Iowa, on the 25th day of May, 2022.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify, that on the 25th day of May, 2022, I caused to be served the attached Appellant's Final Reply by Electronically filing with the Clerk of the Supreme Court for service to opposing parties pursuant to Iowa Rule 16.1201 et. seq. to the following persons:

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