IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1467
Marshall County No. LACI009957

DAVID ALAN FEEBACK,

Plaintiff-Appellant,

vs.

SWIFT PORK COMPANY, TROY MULGREW and TODD CARL,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR MARSHALL COUNTY
THE HONORABLE BETHANY CURRIE, JUDGE

APPELLANT'S FINAL REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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ARGUMENT

ISSUE I: The District Court Erred in Granting Summary Judgment on Count I—Age Discrimination by Applying the Incorrect Causation Standard. Even if the District Court had Applied the Proper Causation Standard, it Nonetheless Erred by Taking the Place of a Finder of Fact and Improperly Discounting Plaintiff's Evidence of Pretext.

Defendants contend they terminated Plaintiff's employment following an "investigation" and "had an honest good faith belief that Feeback purposefully sent the inappropriate text message to Mulgrew." (Appellee Br. p.15). Yet this investigation was anything but. A reasonable jury could easily conclude that an improper factor, Plaintiff's age, actually motivated Defendants' decision to terminate and that the "legitimate nondiscriminatory reason" was just pretext. The District Court erred in granting of Summary Judgment on Plaintiff's age discrimination claim for the reasons explained below.

A. *The District Court erred in discounting Plaintiff's affidavit.*

Appellant testified that in his nearly 30 years with the company, he had "worked with hundreds of employees in supervisory and management roles," and "[o]f those employees, [he could] recall only five or six employees who retired with the title of manager; three or four employees who have retired with the title of supervisor, and only one employee who has retired with the title of superintendent." (J.A. p.405). Additionally, Plaintiff identified eight

specific instances of younger employees swearing at supervisors or superintendents. (J.A. pp.405–06). Plaintiff then named more than 75 employees who: (a) swore at or in front of supervisors; (b) were younger than Plaintiff; and (c) were not terminated. (J.A. pp.406–09).

The I.R.C.P. expressly contemplate the consideration of affidavits at the summary judgment stage. *See* Iowa R. Civ. P. 1.981(3); *see also* Appellant Br. pp.34–35. Defendants nonetheless offer a laundry list of reasons to discount Plaintiff's particular affidavit, arguing that his allegations "are based on speculation, lack foundation, constitute inadmissible hearsay, are conclusory, and/or are legal conclusions." Appellee Br. p.46. Yet, Defendants have done nothing more than "take[] a kitchen-sink approach" that "fram[es] its objections only in the most general terms." *Mt. Hawley Ins. Co. v. Adell Plastics, Inc.*, 348 F. Supp. 3d 458, 464–65 (D. Md. 2018); *see also United States v. Williams*, 2015 WL 4477785, at *1 (N.D. Ga. July 21, 2015) ("Defendant's kitchen sink approach to the facts and his objections generally were not helpful to the Court's consideration of his Objections."). Ironically, Defendants' arguments that Plaintiff's affidavit is speculative, conclusory, or constitute legal conclusions are themselves speculative and conclusory, and thus should be disregarded by the Court. *See, e.g.*, *United States v. Farrell*, 2007 WL 2348751, at *3 (N.D. Cal. Aug. 14, 2007) (finding that Defendants'

"kitchen sink" objections" without merit); *cf. Ross v. Ricciuti*, 2015 WL 3932420, at *9 (D. Md. June 24, 2015) (denying a motion to strike an affidavit as inadmissible hearsay because the litigant "only made general objection to the affidavits as hearsay"); *United States v. Coffey*, 1994 WL 282269, at *1 (N.D. Ill. June 22, 1994) (rejecting an "'everything but the kitchen sink' approach" to post-trial evidentiary objections).

Defendants' arguments that Plaintiff's affidavit is not based on personal knowledge and constitutes inadmissible hearsay fare little better. This is because they depend on mischaracterizations of the record and misunderstandings of the law.

"The test for admissibility is whether a reasonable trier of fact could believe the witness had personal knowledge." *Guinan v. Boehringer Ingelheim Ventmedica, Inc.*, 803 F. Supp. 2d 984, 992 (N.D. Iowa 2011) (citing *State v. St. Francis Hosp.*, 94 F. Supp. 2d 423, 425 (S.D.N.Y. 2000)); *see also Thompson v. Ault*, 2013 WL 12088582, at *1 (S.D. Iowa Mar. 8, 2013) (same). An affiant's personal knowledge may be based on personal observations over time. *Guinan*, 803 F. Supp. 2d at 992 (citing *St. Francis Hosp.*, 94 F. Supp. 2d at 425). An affiant also "may testify . . . as to the contents of records he reviewed in his official capacity." *Thompson*, 2013 WL 12088582, at *1.

However, the Rules do not require an affiant to have witnessed every incident supporting an employment decision, so long as he had personal knowledge of the decision. *See Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1318 (8th Cir. 1996). Statements may be considered personal knowledge by inference if the facts support such a finding. *State v. Rawlings*, 402 N.W.2d 406, 409 (1987); *see also Jordison v. State*, 2002 WL 1585647 (Iowa Ct. App. July 19, 2002) ("[O]ur courts have recognized that even in the absence of conclusive evidence, a declarant's statements may be considered personal knowledge by inference if the facts support such a finding.").

In particular, it is "proper in the summary judgment context for district courts to rely on affidavits where the affiants' 'personal knowledge and competence to testify are reasonably interred from their positions and the nature of their participation in the matters to which they swore.'" *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 & n.43 (5th Cir. 2005) (quoting *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990)).

Courts have concluded that personal knowledge may be reasonably inferred from the affiant's position within a corporation. *See, e.g.*, *Aucutt*, 85 F.3d at 1317 (finding that the district court properly considered affidavit from supervisor "because it was based on the [supervisor's] personal knowledge of the reasons underlying the challenged employment decision"); *McCarney v.*

Des Moines Reg. & Trib. Co., 239 N.W.2d 152, 157 (Iowa 1976) (admissibility of newspaper editor affidavit); *Capital One Bank (USA), N.A. v. Taylor*, 873 N.W.2d 551 (Table), 2015 WL 7567398, at *6 (Iowa Ct. App. Nov. 25, 2015) (admissibility of bank employee affidavit).

In *McCarney*, for example, the Iowa Supreme Court held that an affidavit by the assistant managing editor of the Defendant's corporation concerning newspaper practices and procedures governing the receipt, editing, and publication of news stories" was admissible. 239 N.W.2d at 157. This is because, by virtue of his position within the company, "[h]e was qualified to state such matters and clearly would have been allowed to testify concerning them." *Id.* Similarly, the Iowa Court of Appeals held that a bank employee's summary judgment affidavit in collection proceedings was admissible because "[i]t is based on the affiant's personal knowledge as a result of her employment position." *Capital One Bank*, 2015 WL 7567398, at *6. "[K]nowledge acquired through others may still be personal knowledge within the meaning of Fed. R. Evid. 602." *Id.*

Plaintiff worked for Defendants for nearly 30 years, was a supervisor and "worked with hundreds of employees in supervisory and management roles." (J.A. p.405). During his employment, had had seen "dozens of employees with no prior disciplinary action or workplace performance issues

start receiving disciplinary infractions and negative performance reviews." (J.A. p.404). In sum, Plaintiff was a long-time employee who held a supervisory role at Swift Pork. As such, he possessed personal knowledge of the operations and workings of the Marshalltown plant. Therefore, Plaintiff's affidavit was properly submitted affidavit based on the personal knowledge of a supervisor and should not have been discounted. *See Aucutt*, 85 F.3d at 1317.

Defendants do not—and indeed cannot—dispute Mr. Feeback's status as a long-term supervisor. Instead, they assert that he nonetheless admitted to a lack of personal knowledge. (Appellee Br. pp.49–50). Defendants mischaracterize the record. Plaintiff did not state that he lacked all knowledge of the adverse employment actions. Rather, he stated that he did now know the precise details surrounding these terminations; he did not say he lacked all personal knowledge of the terminations. (J.A. pp.188, 189, 190–91, Feeback Tr. 105:8–14; 106:9–13; 107:23–108:22). In particular, Feeback testified that Vern Casselman had worked with him on the cut floor where Plaintiff could observe his performance and that he was offered a demotion to the line Plaintiff oversaw. (J.A. p.187, Feeback Tr. 104:4–25). He also testified that he was selected to replace Charlie Freese, and that Elmer Freese was the superintendent on the kill floor while Feeback worked there. (J.A. pp.189,

190, Feeback Tr. 106:3–8; 107:2–9). When Plaintiff's testimony is read in context, the record demonstrates that he possessed personal knowledge of the terminations referenced in deposition and in his affidavit. Thus, the district court erred in discounting them.

Defendants fundamentally misunderstand hearsay. As explained in Iowa Rule of Evidence 5.801(c) hearsay is "a statement that [t]he declarant does not make while testifying at the current trial or hearing . . . offer[ed] into evidence to prove the truth of the matter asserted." (emphasis added) However, it is basic hornbook law that when a statement is not offered "for the truth of the matter asserted," it is not hearsay. *See State v. Dullard*, 668 N.W.2d 585, 589–90 (Iowa 2003) (explaining that if a statement is not offered for the truth of the matter asserted, "it is not hearsay and is excluded from the rule by definition." (citing 2 John W. Strong, et al., McCormick on Evidence § 249, at 100 (5th ed. 1999)); *see also* McCormick §225; 5 Wigmore §1361, 6 id. §1766. Rather, "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. Advisory Committee Note to Federal Rule of Evidence 801(c) (citing *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds* 340 U.S. 558)).

Here, Plaintiff is not offering these employee statements to prove the veracity of the particular obscene statement. Instead, the statements are offered to prove that swearing occurred. To illustrate, the statements offered can be summarized as follows: (1) Individual "X" uttered obscenity "Y"; (2) Individual "X" is younger than Plaintiff; (3) Individual "X" was not terminated. (Feeback Aff. ¶25–33). Based on these statements, a reasonable jury infer that unlawful discrimination occurred. The above chain of inferences does not turn on whether the proffered statement is true or false, i.e., whether a particular employee is or is not a "son of a b***h" or a "mother****r." In other words, whether the person is the offspring of a female dog or a person that has relations with a mother. It matters only that the statement was made. As such, they are not hearsay. *Dullard*, 668 N.W.2d 585, 589–90; *see also* Laurence Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957 (1974). (explaining that in reviewing a statement for hearsay, one considers whether the truth of the matter asserted in the statement requires a trip through the mind of the declarant.)

In Defendants' cases, the statements at issue were variations on Individual "X" said that illegal employment action "Y" regularly occurred. *See Macuba v. Deboer*, 193 F.3d 1316, 1322–1333 (11th Cir. 1999) (statement that Plaintiff was on a list of older employees targeted for

termination offered to prove that Plaintiff was an older employee who was targeted for termination); *Ashley v. Southern Tool, Inc.*, 201 F. Supp. 2d 1158, 1164 (N.D. Ala. 2002) (same); *Harrison v. McDonald's Corp.*, 411 F. Supp. 2d 862, 865–67 (S.D. Ohio 2005) (statements that employees experienced pay shortages offered to prove existence of pay shortages); *Wusk v. Evangelical Retirement Homes, Inc.*, 876 N.W.2d 814 (Table), 2015 WL 9450914, at *4 (Iowa Ct. App. Dec. 23, 2015) (statements that retaliation had occurred offered to prove that retaliation had occurred).

Contrasting with *Wusk*, the Plaintiff submitted an affidavit containing a blanket statement that it was "common knowledge" among Defendant employees that filing a workers' compensation claim would result in termination. 2015 WL 9450914, at *4. The district court rejected Plaintiff's affidavit because she "failed to set forth specific facts to support her allegations that [Defendant] had a reputation for firing employees who submitted workers' compensations claims." *Id.*

Feeback did not submit an affidavit stating "these individuals were unlawfully discriminated against based on age," or "Swift Pork unlawfully discriminates against individuals based on age." Feeback (1) names nine employees, (2) states that these employees had no prior performance issues; and (3) these employees were terminated and/or demoted. (Feeback Aff.

¶19(a)–(i)). Based on these statements, a jury could reasonably infer that Swift Pork discriminates based on age. Plaintiff's affidavit "set[s] forth specific facts to support [his] allegations" that Defendant had a history of terminating employees based on age. *Wusk*, 2015 WL 9450914, at *4.

Defendants argue for the first time on appeal that Plaintiff's affidavit violates the "contradictory affidavit rule." (Appellee Br. pp.48–49). This is improper. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)). Moreover, it is incorrect. "To invoke the contradictory affidavit rule, 'the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous.'" *Susie v. Family Health Care of Siouxland, PLC*, 942 N.W.2d 333, 339 (Iowa 2020) (quoting *Estate of Gray ex rel. Gray v. Baldi*, 880 N.W. 2d 451, 464 (Iowa 2016)) (emphasis added). This is because "[a]ssessing these individuals' credibility and the reliability of their memories is precisely the type of inquiry that should be resolved by the trier of fact, not by the court at summary judgment." *D'Lil v. Riverboat Delta King, Inc.*, 59 F. Supp. 3d 1001, 1018 (E.D. Cal. 2014) *cf. Mandengue v. ADT Sec. Sys., Inc.*, 2012 WL 892621, at *18 (D. Md. Mar. 14, 2012) (explaining that the application of the sham affidavit rule at the summary judgment stage "must be carefully limited to situations involving flat contradictions of material

fact")

Defendants' assert that the inconsistencies between Plaintiff's deposition testimony and his affidavit are "clear and unambiguous" because "Feeback admitted that he had no personal knowledge relating to the alleged adverse actions of other employees." (Appellee Br. pp.48–49). As explained above, this statement mischaracterizes the record. Moreover, Defendants' argument that Plaintiff's inability to recall certain details or names in deposition unambiguously contradicts later statements recalling additional names and details fails as a matter of logic and a matter of law.

The Iowa Supreme Court's requirement that "the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous" is based on the Ninth Circuit's formulation of the rule. *See Baldi*, 880 N.W. 2d at 464 (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009)). For this reason, a journey to another jurisdiction is instructive. The Ninth Circuit makes clear that under the rule "the non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovery evidence afford no basis for excluding an opposition affidavit." *Van Asdale*, 577 F.3d 998–99 (quoting *Messick v. Horizon Indus.*, 62 F.3d 1227,

1231 (9th Cir. 1995)). "Newly remembered facts, or new facts, accompanied by a reasonable explanation, should not ordinarily lead to the striking of a declaration as a sham." *Yeager v. Bowling*, 693 F.3d 1076, 1081–82 (9th Cir. 2012).

Ninth Circuit Courts have routinely held that omissions by the declarant, failures to recall certain details in deposition, and newly remembered facts, do not make inconsistencies clear and unambiguous. *See, e.g.*, *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 694 (E.D. Cal. 2019) ("prior statement is most accurately characterized as equivocal"); *Kyles v. Baker*, 72 F. Supp. 3d 1021, 1032 (N.D. Cal. 2014) (subsequent revelation of additional details is not inconsistent with prior testimony); *Stonefire Grill, Inc. v. FGF Brands, Inc.*, 987 F. Supp. 2d 1023, 1036 (C.D. Cal. 2013) (declaration does not directly contradict prior testimony when declarant responded that he did not know answers in deposition); *Schultz v. Wells Fargo Bank, N.A.*, 970 F. Supp. 2d 1039, 1067–68 (D. Or. 2013) (failure to recall certain comments does not "flatly contradict" deposition testimony); *Equal Emp. Opportunity Comm'n v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1018–19 (D. Ariz. 2013) (omissions by declarant "do not rise to the extreme level of forgetfulness" that would justify striking affidavit). Therefore, even if the rule had been properly raised below, it would be improper to invoke it here.

Thus, the District Court erred in disregarding Plaintiff's affidavit. This error is particularly egregious because the court did not similarly discount Defendants' Declarations even though they suffered from the same alleged flaws. (*See* J.A. pp.273, 274, 274, Mulgrew Decl. ¶15 (speculation); ¶19 (legal conclusion); ¶22–23 (speculation, lack of personal knowledge); J.A. pp.280, 280–81, 281, Charboneau Decl. ¶16 (legal conclusion); ¶19–20 (speculation, legal conclusion); ¶24 (legal conclusion)). The effects of such evidentiary exclusions are particularly damaging in employment discrimination cases. As Judge Richard Posner has explained:

> Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it.... The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for ... firing ... a worker who is not superlative. A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance.

Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

In other words, at best Defendants outline why some affidavits may be inadmissible generally. However, they fail to properly explain why Plaintiff's affidavit in particular is inadmissible. This is likely because they cannot.

Instead, Defendants appear to ask the court the reject Plaintiff's affidavit because it is not the "best evidence" to support Plaintiff's allegations. The Best Evidence Rule, however, requires a court to weigh the evidence and determine what evidence is "best." Nowhere does Iowa law say the rule applies to summary judgment, nor does Iowa law say weighing of evidence is proper at summary judgment. *Linn v. State*, 929 N.W.2d 717, 730 (Iowa 2019) (citing *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996)).

When Plaintiff's affidavit is properly considered, it demonstrates that his age was a motivating factor in his termination and that Defendants' alleged nondiscriminatory reason was pretext.

B. *The District Court erred in failing to apply Iowa's motivating-factor test.*

In the district court, Defendants ignored Plaintiff's argument as to the proper causation standard under Iowa law and made no attempt to argue that Plaintiff's age discrimination claims failed under this standard. Accordingly, they should be prohibited from doing so on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Even if this Court were to overlook Defendants' failure to preserve these arguments for appeal, the Court nonetheless should reject Defendants'

belated attempts to apply federal law to Plaintiff's Iowa law claims.

Defendants concede that "the Iowa Supreme Court has determined that it will no longer rely on the *McDonnell Douglas* burden-shift[ing] analysis and determining-factor standard when instructing the jury." (Appellee Br. p.27.) Defendants, however, point to a subsequent case to argue that "this analysis has not been disturbed as it applies to summary judgment. (Appellee Br. p.27) (citing *Hedlund v. State*, 930 N.W.2d 707, 719 n.8 (Iowa 2019)). To be sure, the Iowa Supreme Court "did not disturb our prior law as it applies to summary judgment" in *Hawkins*, but that because was because *Hawkins* was not a summary judgment case. As such, it would have been quintessential judicial overreach to do so. Moreover, although Defendants admit that "Iowa courts no longer use *McDonnell Douglas* at *trial,*" (Appellee Br. p.27), they fail to explain why a different, higher standard should apply at the summary judgment stage. *See Hedlund*, 930 N.W.3d at 726 (Appel, J., concurring in part, dissenting in part) ("It would certainly be odd, to say the least to apply a standard at summary judgment that is different than the standard at trial."). This is because Iowa courts recognize that such dissonance would replace trial with summary judgment. *See* cases cited in Appellant Br. p.38. Thus, "[w]hen we review the instructions given to the jury to determine whether the instructions properly state the law, we look to the instructions to determine if

the instructions taken as a whole accurately reflect the law." *Andersen v. Khanna*, 913 N.W.2d 526, 548 (Iowa 2018) (citing *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 902 (Iowa 2015); *State v. Pelelo*, 247 N.W.2d 221, 225 (Iowa 1976) (en banc)).

As such, it is unsurprising that Defendants do not point to a single Iowa case applying only *McDonnell Douglas*. *See Randall v. Roquete Am. Inc.*, 2021 WL 210951, at *4–5 (Iowa Ct. App. Jan. 21, 2021) (deciding Plaintiff's disability discrimination claim on other grounds and applying neither causation standard); *Deters v. Int'l Union, Sec. Police and Fire Prof'ls of Am., Local Union #249*, 2020 WL 6157816, at *3 (Iowa Ct. App. 2020) (concerning a motion for new trial based on evidentiary rulings); *Watkins v. City of Des Moines*, 2020 WL 2988546, at *4 (Iowa Ct. App. 2020) (analyzing Plaintiff's claims under *both* causation standards at summary judgment). Indeed, as the Court of Appeals explained in *Watkins*, "whether *McDonnell Douglas* still governs summary-judgment motions on mixed-motive claims remains an open question." *Id.* at *4 (citing *Hedlund*, 930 N.W.2d at 720); *Id.* at *7 (analyzing under summary judgment both frameworks); *see also Rumsey v. Woodgrain Millwork, Inc.*, 2019 WL 5396102, at *3 (Iowa Dist. Aug. 6, 2019) (same).

The Eighth Circuit's decision in *Couch v. American Bottling Co.*, 955

F.3d 1106 (8th Cir. 2020), which pertains to *retaliation* not discrimination, is inapplicable here. The Eighth Circuit's discussion of Iowa law is dicta, and, in any event, misinterprets Iowa law, for the reasons explained above. Moreover, and perhaps most importantly, federal courts are not the arbiters of Iowa law; *Iowa* courts are. Thus, as Iowa courts have concluded, at minimum, both standards apply.

Curiously, Defendants' argument that Plaintiff's age discrimination claim fails under Iowa's motivating factor analysis depends entirely on an unpublished Sixth Circuit case applying the federal Age Discrimination in Employment Act and Ohio law. *See* Appellee Br. pp.45–45 (citing *Hausler v. Gen. Elec. Co.*, 134 App'x 890 (6th Cir. 2005)). However, Defendants' dependence on *Hausler* is misplaced not just geographically but legally and factually as well. Because the age discrimination claims in *Hausler* were based on the ADEA, the court applied the [determining factor under federal law.] To be sure, the decision uses the phrase "motivating factor" in a colloquial sense, but the Court in *Hausler* was clear: "the burden shifting analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), applies both to his federal ADEA and his Ohio statutory age discrimination claims." *Hausler*, 134 App'x at 892 (citing Sixth Circuit and Ohio case law); *see also Hausler v. Gen. Elec. Co*., 2003 WL 257342, at *15 (S.D. Ohio Nov.

20, 2003) ("Ohio courts apply the *McDonnell Douglas* framework to state law claims of employment discrimination.").

Even if *Hausler* were an Iowa case, and even if it had applied Iowa's motivating factor framework, it still would not support Defendants' argument. This is because although the facts appear similar on the surface, a closer reading reveals a fundamental difference: in *Hausler*, there was no dispute that Plaintiff yelled "Fuck you. That's bullshit." at his supervisor. 134 App'x at 891. The interaction occurred face-to-face, not via text. 2003 WL 257342, at *4 (describing the conversation that took place "[d]uring the drive to a sales call). And the Plaintiff himself admitted in deposition that he made that statement to his supervisor. *Id.*

That is not the case here and the difference is fatal to Defendants' argument. Here, Plaintiff testified that the text message was intended for someone else, not for Defendant Mulgrew. Mr. Charboneau testified that he did nothing to determine if Plaintiff was telling the truth. Additionally, Plaintiff presented evidence that other, younger employees had sworn at supervisors and not been terminated. These facts, which were not present in *Hausler*, would allow a reasonable jury to infer that age was a motivating factor in Plaintiff's termination. No such inference was possible in the Ohio case. Thus, the District Court erred in granting summary judgment in favor of

Defendants on Plaintiff's age discrimination claim.

C. Plaintiff also can establish a genuine issue of material fact under *McDonnell Douglas*

Defendants' arguments as to pretext can be summarized as follows: (1) Plaintiff's affidavit is self-serving, (2) Plaintiff's affidavit is insufficient, and (3) Plaintiff's argument is just his opinion. (*See* Appellee Br. pp.34–42). All three of Defendants' arguments fail.

First, Defendants contend that Feeback's argument is based only on "conclusory and self-serving allegations" that "are devoid of any specific factual allegations." This statement is incorrect and little more than another attempt to discredit a properly submitted affidavit. Iowa Rules of Civil Procedure governing the use of affidavits at summary judgment state:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or filed therewith.

Iowa R. Civ. P. 1.981(5). Nowhere in that definition does the Rule say that an affidavit cannot be self-serving.

Second, Defendants federal law-based arguments about the lack of detail in Plaintiff's affidavit not only are inaccurate, would have the potential

to gut Iowa anti-discrimination law. Allowing a district court to disregard a properly submitted affidavit outlining disparate treatment would create a silver bullet that would allow employers to kill employment discrimination claims by creating classes of one. In short, follow Defendants' lead and argue Plaintiff's age discrimination claim must fail unless he can find a superintendent that not only swore at a supervisor, but "swore 'at or in front of' Mulgrew." (Appellee Br. p.38)

Third, even if this Court were to disregard Plaintiff's affidavit, Plaintiff nonetheless could establish pretext. The U.S. Supreme Court was clear when it explained that "a prima facie case and sufficient evidence to reject an employer's explanation may permit a finding of liability." *Reeves v. Sanderson*, 530 U.S. 133, 149 (2000). Thus, it is error to insist that "a plaintiff must always introduce additional independent evidence of discrimination." *Id.*; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Farmland Foods v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 741–42 n.1 (Iowa 2003); *Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519–20 (Iowa 2003).

Defendants did not dispute Plaintiff's prima facie case for purposes of summary judgment. (Appellee Br. pp.32). Plaintiff argues that an investigation in which the investigator admitted that "No, I did not" do

anything to figure out of Mr. Feeback was telling the truth cannot be the basis for *any* belief—and certainly not a good faith belief—that he engaged in wrongdoing. Contrary to Defendants' assertions, this argument is based on more than Plaintiff's "own subjective statement that he did not intend to send the text to Mulgrew." (Appellee Br. p.41). It is based in no small part on the investigator's own admissions. Therefore, as explained in Plaintiff's opening brief, Defendants' nondiscriminatory explanation lacks credence because it was based on an "investigation" in name only.

II. The District Court erred in granting summary judgment on Count II—Harassment by improperly discounting and disregarding evidence demonstrating the harassment of the Plaintiff was based on age.

Defendants' core argument is that only comments and statements that directly reference age may support a harassment claim based on age. (Appellee Br. pp.52–53). Defendants' position not only would hollow out anti-harassment law, but it is legally incorrect.

As the Iowa Supreme Court has explained, "a discriminatory motive will rarely be announced or readily apparent. Consequently, evidence concerning an employer's state of mind is relevant in determining what motivated the acts in question." *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 263 (Iowa 1991). Accordingly, courts routinely consider evidence that a Defendant has a history of discriminating against other

employees. *See id.* (collecting cases); *see also Shattuck v. Kinetic Concepts*, Inc., 49 F.3d 1106, 1110 (5th Cir. 1995) (finding error in excluding evidence of age discrimination against other employees); *Lindsey v. Prive Corp.*, 987 F.2d 324 (5th Cir. 1993) (finding evidence of age discrimination in the fact that three other dancers over 40 were dismissed at the same time as plaintiff); *Hawkins v. Hennepin Tech. Ctr.*, 900 F.2d 153, 155–156 (8th Cir. 1990) (Plaintiff entitled to present evidence of an atmosphere that condoned sexual harassment); *Patterson v. Massem*, 774 F.2d 251, 255 (8th Cir. 1985) (history of segregation in a school district may be evidence of districts discriminatory employment practices); *Reeves v. Gen. Foods Corp.*, 682 F.2d 515 (5th Cir. 1982) (testimony of another older employee who was forced to resign bolstered the inference of age discrimination).

In *Hernandez*, the Fifth Circuit refused to consider other incidents of harassment not based on race. *See Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644 (5th Cir. 2012). Evidence of discrimination against other members of a plaintiff's same protected class was admissible." *Id.* at 653 (citing *Shattuck*, 49 F.3d at 1109–10). Evidence of harassment that is not based on Plaintiff's protected class may be considered if it was "part of a pattern" of harassment. *Id.* at 654.

Appellant presented facts that establish a pattern of harassment against

older employees at Swift Pork. (*See* Appellant Br. pp.57–60.) He then presented facts that demonstrate how the harassment he suffered fit this pattern. (*See* Appellant Br. pp.55–57, 60).

In unpublished federal district court case (cited by Defendants) from the Eastern District of Arkansas, the Plaintiff's evidence of harassment included: his testimony that "[m]y heart told me" that a new supervisor was hired to force out older employees; vague warnings from former co-workers, and statements that it was "common knowledge" the company had a policy of forcing out older employees. *Rickard v. Swedish Match. N. Am., Inc.*, 2013 WL 12099414, at *5 (E.D. Ark. Nov. 25, 2013). In the other case, the court concluded that a single statement in an affidavit that a performance test "had no relevancy to the jobs that [Plaintiff] performed" was insufficient to withstand summary judgment where Defendant provided expert testimony that the test was job-related. *Allen v. Entergy Corp.*, 181 F.3d 902, 905–906 (8th Cir. 1999).

In contrast, Feeback provides names, dates, and ages of multiple older employees who were terminated, demoted or forced to resign. (Appellant Br. pp.57–60). Moreover, unlike the Plaintiff in *Rickard*, Feeback also states that these employees did not have a prior history of disciplinary action or performance issues. (J.A. p.404). He also provides testimony in his affidavit

and his deposition concerning retirement rates and turnover rates at Swift Pork. (Appellant Br. pp.59–60). Contrary to Defendants' repeated assertions, these statements are based on personal knowledge. (*See* Issue I.A). This evidence also was corroborated by Plaintiff's deposition testimony—testimony the District Court disregarded without explanation. Thus, the District Court erred when it improperly discounted Plaintiff's evidence demonstrating that his harassment was based on age.

III. The District Court erred in granting summary judgment on Count II—harassment by improperly weighing evidence meant for the jury and misapplying Iowa law as to the severity and pervasiveness of the harassment.

Defendants do not engage any of the pervasiveness arguments made in Plaintiff's opening brief. In his brief, Plaintiff identified several critical flaws in the District Court's analysis on this issue: (1) the District Court analyzed each incident of harassment individually; (2) the Court failed to account for the short period of time in which the instances of harassment occurred; and (3) the Court ignored case law regarding egregiousness of supervisor harassment. (Appellant Br. pp.64–66). Plaintiff refers this Court to his brief for discussion of those issues.

Rather than address these errors, Defendants' Brief repeats them. Like the District Court's analysis, Defendants dissect each individual instance of harassment without regard to the broader picture. Defendants also ignore how

Defendants' harassment fits a larger pattern of harassment against older employees—patterns not present in the cases upon which Defendants rely. This distinction is critical. To be sure, "occasional criticism of an employee's work performance by a supervisor . . . does not amount to [age-based-harassment," "absent references or another nexus" to the protected status. *Farmland Foods*, 672 N.W.3d at 745. As explained above, just such a nexus is present here.

Defendants again attempt to evade liability by asserting the *Faragher-Ellerth* affirmative defense. The District Court did not decide this issue, and Defendants renewed argument contains the same critical holes. First, the defense does not apply in this case. Second, even if it did, Defendants still would have the burden to prove this affirmative defense, and Defendants cannot do so given the facts of this case. At minimum, the defense turns on factual questions that must be left to a jury.

The *Faragher-Ellerth* affirmative defense allows an employer to avoid liability "[w]hen a supervisor perpetrates the harassment, but no tangible employment action occurred." *Farmland Foods*, 672 N.W.2d at 744 (emphasis added).

Defendants attempt to avoid this roadblock by reading an additional requirement into Iowa law. Defendants take an Eighth Circuit statement that

"no affirmative defense is available to an employer when a supervisor's harassment culminates in a tangible employment action such as discharge, demotion or undesirable assignment." *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 & n.6 (8th Cir. 1998). Defendants then use that sentence to impose a Fourth Circuit requirement that there be "some nexus between the harassment and the tangible employment action." *Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 332 (4th Cir. 2012).

Neither Iowa nor the Eighth Circuit have adopted this additional requirement. Indeed, in *Phillips*, the *Faragher-Ellerth* defense applied not because the harassment did not "culminate in termination"; it applied because Plaintiff was not terminated at all, she quit. *Phillips*, 156 F.3d at 889 & n.6 ("Phillips was not constructively discharged, nor did she suffer any other tangible detrimental employment action.").

The Iowa Supreme Court's adoption of *Faragher-Ellerth* is straightforward: "If a plaintiff establishes a supervisor effected a tangible work action against the plaintiff, the defendant employer or corporate entity is liable for the harassment." *Farmland Foods*, 672 N.W.2d at 744 n.2. The Court then listed several such tangible work actions, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*

Even if Iowa had adopted the Fourth Circuit's "nexus" requirement, it still would prevent Defendants from asserting the defense. As the Fourth Circuit explained in *Dulaney*, the nexus requirement is used to determine whether the *Faragher-Ellerth* defense applies when "someone other than the harasser takes the tangible employment action." *Phillips*, 673 F.3d at 332. Here, Plaintiff's harassers—Defendants Mulgrew and Carl—were decisionmakers in his termination. (*See* Appellant Br. pp.68–70).

This problem alone is enough to doom Defendants' attempt to invoke the defense. Assuming arguendo this Court were to conclude that the *Faragher-Ellerth* applies, Defendants cannot satisfy their burden of proof given the facts of this case.

In *Phillips*, the employer also "maintained a written sexual harassment policy, which was posted at all stores and which all employees including [plaintiff] reviewed and signed, indicating an understanding of the policy's contents. Whether this is sufficient to satisfy this portion of the affirmative defense is best left to the finder of fact." *Phillips*, 156 F.3d at 889.

Furthermore, Plaintiff reasonably chose not do so because he knew it would be futile. (J.A. p.409). Plaintiff had seen past employees terminated, harassed, isolated, demoted, or forced out after making complaints using these channels. (J.A. p.409); (J.A. pp.158–59, Feeback Tr. 75:21–76:7). In

approximately 2005, one past manager, Dean Whelden, had been demoted after making a complaint. (J.A. p.409). Plaintiff had seen other managers terminated for making complaints. (J.A. p.409). Plaintiff believed that he would lose his job if he made a complaint to using official channels. (J.A. p.409). Plaintiff believed that if he called the hotline, Defendants would find a way to terminate his employment or argue that his job performance had slipped. (J.A. p.409).

The case law upon which Defendants rely provides little support to the contrary. (Appellee Br. pp.62–63). Here, however, Plaintiff's fear of retaliation was far from nebulous. Appellant had seen other employees terminated, demoted, or ostracized for making complaints.

Harassment in this case was perpetrated by Carl and Mulgrew, two of Plaintiff's supervisors. Futility "Excuses [Plaintiff's] failure to complain about the harassment to his supervisors." *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 n.5 (8th Cir. 1997) (citing *Briones v. Runyon*, 101 F.3d 287, 291–29 (2d Cir. 1996)). This is because "[t]here would be little point in going to one's supervisors to challenge the [hostile] atmosphere when it is those same supervisors who are creating and perpetrating it." *Id.* Indeed, it would be unreasonable to insist that a Plaintiff do otherwise as Defendants attempt to do in this case. Mulgrew's comments

that Plaintiff was "Fucking around" in the bathroom and that Plaintiff should "fuck" a woman on a company pheasant hunting trip, are beyond "boorish" and "immature." They are "patently offensive and no one, certainly not a supervisor, should need to be told as much." *Id. Faragher-Ellerth* does not save Defendants on Plaintiff's harassment claim.

IV. The district court erred in granting summary judgment on Count IV—wrongful termination in violation of public policy by making improper credibility determinations and by improperly disregarding evidence related to Plaintiff's termination and safety complaints.

Defendants cite only two Iowa cases to support their erroneous assertion that "the lack of temporal proximity destroys Feeback's claim that his comments were the reason he was terminated." (Appellee Br. pp.65–66) (citing *Hulme v. Barrett*, 480 N.W.2d 40 (Iowa 1989); *Newkirk v. State*, 2003 WL 21459704 (Iowa Ct. App. June 25, 2003)).

First, Defendants overstate the holding in *Hulme* as the Court only stated there must be a connection for the termination. *Hulme*, 480 N.W.2d at 42–43. That is not the case here. Here, Plaintiff made a complaint about safety, relations with his supervisor then became contentious, and the final straw came after a *safety meeting* that was halted by Feeback's supervisors. *Hulme*, therefore, does not apply.[1]

[1] It also should be noted that *Hulme* used the "substantial factor" test and is no longer good law in light of the Court's decisions in *Hawkins* and

Newkirk, which was decided after a trial *not* at summary judgment, the court said *one way* to show causation is through temporal proximity. *See Newkirk*, 2003 WL 21459704, at *3 (explaining that temporal proximity is one "factor that *can generate a jury question*" in a retaliatory discharge case). However, Defendants and the District Court here attempt to take this statement one step further. They seem to believe that if temporal proximity does not exist, as a matter of law the plaintiff cannot go forward. Iowa law has not said this. In fact, the Court of Appeals has rejected Defendants' argument, stating:

> [W]e have considered the State's contention that the temporal relationship between the claimed protected conduct and [plaintiff's] discharge is so attenuated that the causation element is defeated as a matter of law. *See Butts v. Univ. of Osteopathic Med. & Health Scis.*, 561 N.W.2d 838, 842 (Iowa Ct. App. 1997) ….. While this significant lapse of time may ultimately be dispositive, [plaintiff] has a right to present to the factfinder evidence of ongoing disciplinary actions during that time period and evidence that these actions were taken in reprisal for his allegations.

Tekippe v. State, 798 N.W.2d 736 (Table), 2011 WL 768659, at *4 (Iowa Ct. App. March 7, 2011). (citations omitted)

Defendants also incorrectly assert that Mr. Charboneau was the

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Haskenhoff. Thus, Defendants' reliance on *Hulme* is, at best, problematic.

decisionmaker not Defendants Carl and Mulgrew. This is incorrect. (Appellant Br. pp.68–71). Witness credibility, however, is the ultimate fact issue and is to be made by the jury. *See Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W. 772, 776 (Iowa 2010).

Plaintiff presented evidence of a text message exchange saying that "Feeback not allowed to work" that received the response "Amen." (*See* Appellant Br. pp.69). In fact, this text exchange was still on Defendant Mulgrew's phone and disclosed during his deposition. Following this exchange, there was a meeting before investigation. The meeting was then followed by an "investigation" that did little more than rubber stamp the decision Defendants' Carl and Mulgrew made during their text exchange.

Defendants gloss over the Iowa Supreme Court's unambiguous statement that "[t]he lack of a legitimate business justification is not an element of the claim that the plaintiff must prove." *Rivera*, 865 N.W.2d at 898. (Appellant Br. p.74).

As *Rivera* makes clear, the burden does not fall to the *Plaintiff* to persuade a *judge* at *summary judgment* that there was *no* overriding business justification. The burden falls to the *Defendant* to persuade a *jury* at *trial* that there *was*. This was for policy reasons, not for legal reasons.

In sum, Defendants made a decision to terminate Feeback prior to

investigation and the "investigation" that did occur was nothing but a sham in which the "investigator" admitted that "no, I did not" do anything to determine whether Plaintiff was telling the truth. Defendants try to inoculate themselves, but in this case, the inoculation was tainted.

CONCLUSION

The District Court Erred when granted Summary Judgment in favor of Defendants on Plaintiff's Age Discrimination, Harassment, and Wrongful Termination Claims. Plaintiff respectfully asks this Court to reverse the District Court's ruling and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,993 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

/s/ Bruce H. Stoltze, Jr.

CERTIFICATE OF SERVICE

I, Bruce H. Stoltze, Jr., member of the Bar of Iowa, hereby certify that on the 13th day of May, 2021, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a), this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/s/ Bruce H. Stoltze, Jr.

CERTIFICATE OF FILING

I hereby certify that on the 13th day of May, 2021, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a) this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/s/ Bruce H. Stoltze, Jr.

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Appellant's Final Reply Brief and Request for Oral Argument was $0.00.

/s/ Bruce H. Stoltze, Jr.