IN THE IOWA SUPREME COURT

NO. 20-1467 (March 30, 2022)

DAVID ALAN FEEBACK,

Plaintiff/Appellant,

vs.

SWIFT PORK COMPANY, TROY MULGREW, and TODD CARL,

Defendants/Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
HON. BETHANY CURRIE
MARSHALL COUNTY NO. LACL009957

PLAINTIFF/APPELLANT'S RESISTANCE AND BRIEF AS TO DEFENDANTS'/APPELLEES' APPLICATION FOR FURTHER REVIEW

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RESISTANCE TO APPLICATION FOR FURTHER REVIEW

COMES NOW the Plaintiff/Appellant, David Alan Feeback ("Feeback"), and resists the Application for Further Review filed herein by the Defendants/Appellees, Swift Pork Company, Troy Mulgrew, and Todd Carl (collectively "Defendants"). n support of this Resistance, Feeback states that the Court of Appeals did not commit errors of law in this employment discrimination matter. As shown in its opinion, dated March 30, 2022, the he Court of Appeals did properly reverse the District Court's October 12, 2020, grant of summary judgment in favor of Defendants on Plaintiff's age discrimination claim. Defendants' Application for Further Review does not satisfy any of the grounds for review set forth in the Iowa Rules *See* Iowa Rule App. P. 61103(1)(b). This is because Court of Appeals is consistent with the decisions of this Court and the Court of Appeals and does not contain any issues that require this Court's determination. The Application for Further Review filed herein by the Defendants/Appellees, Swift Pork Company, Troy Mulgrew, and Todd Carl, should be denied.

ISSUE I—THE COURT OF APPEALS DID NOT ERR IN CONSIDERING THE ALLEGATIONS CONTAINED IN FEEBACK'S AFFIDAVIT.

In support of his claims, Plaintiff submitted an affidavit to the District Court detailing his observations regarding his decades at Swift Pork. (JA405). In his affidavit, "[h]e describes nine management-level employees who were 'forced out after reaching age fifty-six.' He also notes Swift's 'high management turnover rate and low retirement rate.'" (Appeals Decision at 10). The affidavit also identifies "over seventy-five instances when younger employees swore 'at or in front of supervisors.'" (Appeals Decision at 8).

The Court of Appeals found that "Feeback's affidavit contains 'competent evidence even if it is not the strongest evidence.'" (Appeals Decision at 11) (citing *Cap. One Bank (USA), N.A. v. Taylor*, No. 13-2043, 2015 WL 7567398, at *6 (Iowa Ct. App. Nov. 25, 2015) (quoting definition of competence in *Black's Law Dictionary* (10th ed. 2014) as "a basic or minimal ability to do something; adequate qualification, esp[ecially] to testify")). Thus, the Court explained:

> A jury could find this evidence persuasive on his discrimination claim. We conclude Feeback's affidavit set forth specific facts, based on his personal knowledge of events in his workplace,

> showing there is a genuine issue of material fact for trial, as required to defeat a motion for summary judgment. *See* Iowa R. Civ. P. 1.981(5).

Throughout this case, however, Defendants' have made multiple efforts to discredit Mr. Feeback's affidavit. Indeed, Defendants' devote much of their Application for Further Review to these arguments. (App. for Review at 11–20). However, these arguments either were not properly preserved for appeal or misunderstand basic rules of evidence. Further, none of Defendants' arguments establish proper grounds for further review. As such, Defendants' Application for Further Review should be denied.

A. Defendants did not argue the "contradictory affidavit rule" before the District Court, so did not preserve the issue for appeal.

One of Defendants' main arguments is that the Court of Appeals improper considered Mr. Feeback's affidavit because "consideration of such evidence is in conflict with *Estate of Gray ex rel. Gray v. Baldi*, 880 N.W.2d 451 (Iowa 2016), wherein this Court adopted the contrary affidavit rule." (App. for Review at 7). There is one key flaw in Defendants' argument: they did not raise it in the District Court.

"Upon an application for further review from the court of appeals, we

may consider all issues properly preserved and raised in the original briefs." *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995) (citing *Bokhoven v. Klinker*, 474 N.W.2d 553, 557 (Iowa 1991)).

However, "[i]t is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). "The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue 'without the benefit of a full record or lower court determination.'" *Meier*, 641 N.W.2d at 537 (citing *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992)). "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Lamasters*, 821 N.W.2d at 862 (quoting *Meier*, 641 N.w.2d at 537).

"An issue is raised at the district court level if 'the nature of the error has been timely brought to the attention of the district court.'" *State v. Christensen* 792 N.W.2d 685 (Table), at *2 (Iowa 2010) (quoting *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006)). Appellate review only is

warranted "when the record indicates that the grounds for a motion [are] obvious and understood by the trial court and counsel." *Id.* (quoting *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005)).

As Plaintiff pointed out in his Reply Brief before the Court of appeals, Defendants *did not* preserve this argument for appeal. They did not argue the "contradictory evidence rule" before the District Court, and nothing in the record indicates that the argument was "obvious and understood by the trial court and counsel." *See Christiansen*, 792 N.W.2d at *2 To be sure, Defendants' summary judgment briefs twice hint at comparisons between Mr. Feeback's affidavit and his deposition testimony. However, these discussions concern Plaintiff's credibility and personal knowledge. A true reading of Defendant's District Court briefs shows that Defendants' did not alert that court to the "contradictory affidavit rule." In fact, if Defendants' had properly raised this issue in the District Court, one would expect to see at least one legal authority referring to the rule. Yet, there are none. Instead, Defendants' argument that Mr. Feeback's affidavit violates the "contradictory affidavit rule"—along with the case law behind that argument—appeared for the first time in their Court of Appeals brief.

Even if it had been properly preserved, further review nonetheless should be denied because Mr. Feeback's affidavit does not violate the "contradictory affidavit rule" or the case law that supports it. "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 *Baldi*, 880 N.W. 2d at 464) (emphasis added). 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)). That 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).

These Courts routinely have 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 still does not justify further review because it does not apply.

Indeed, Defendants' failure to preserve the issue explains why no Court

in this matter has addressed the issue. It is because it was not raised in the District Court and was not decided by the Court of Appeals.

B. Feeback's allegations regarding the swearing of other employees do not concern the truth of the matter asserted, so are not hearsay.

In their Application for further review, Defendants' again assert—with little legal authority—that Plaintiff's allegations "undoubtedly constitute[] inadmissible hearsay." (App. for Review at 16). This argument, in addition to being legally incorrect, does not set forth proper grounds for further review.

Defendants' raised this argument in front of the District Court and the Court of Appeals, and no Court in this matter has agreed with their interpretation of hearsay. *See* (D. Ct. Order at 11 ("As Mr. Feeback points out, [the allegations] are not hearsay because he is not offering the statements for the truth of their assertions, but rather, to demonstrate the statements were made.")); (Appeals Decision at 8 n.6 ("Hearsay first, we agree with the district court: the statements aren't offered for their truth. Instead, Feeback offers them to show that the cursing happened. *See* Iowa R. of Evid. 5.801(c).")). This is perhaps the case because Defendants misunderstands evidence law.

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. The one case that Defendants cite does not save their argument. In *Wusk v. Evangelical Retirement Homes, Inc.*, 876 N.W.2d 814 (Table), 2015 WL 9450914, at *4 (Iowa Ct. App. Dec. 23, 2015), Plaintiff offered statements that retaliation had occurred to prove that retaliation had occurred. In other words, in *Wusk*, Individual "X" said statement "Y" to show that "Y" in fact occurred. Here, Feeback's affidavit alleges that (1) Individual "X" uttered obscenity "Y"; (2) Individual "X" is younger than

Plaintiff; (3) Individual "X" was not terminated. The truth of obscenity "Y" is irrelevant. The first example is hearsay. The other—the example in this case—is not. Accordingly, even if Defendants' hearsay argument did set forth proper grounds for further review (which it does not), further review still would not be proper because Defendants' argument is legally incorrect.

C. Feeback's allegations were based on personal knowledge resulting from his supervisory position.

Defendants' argument that Feeback's allegations are "based upon sheer suspicion, speculation, and conjecture" are likewise incorrect. (And likewise, do not set forth proper grounds for further review). As with Issue I.A, Defendants again assert that Feeback "undeniably has no personal knowledge of the actual reasoning" behind the alleged employment action. (App. for Review at 18).

However, as the Court of Appeals correctly explained, "Feeback's awareness of what was happening in his workplace offered more than conjecture." (Appeals Decision at 11). Rarther, "Feeback's affidavit contains "competent evidence even if it is not the strongest evidence." (Appeals Decision at 11) (citing *Cap. One Bank (USA), N.A. v. Taylor*, No. 13-2043, 2015 WL 7567398, at *6 (Iowa Ct. App. Nov. 25, 2015) (quoting definition of

competence in *Black's Law Dictionary* (10th ed. 2014) as "a basic or minimal ability to do something; adequate qualification, esp[ecially] to testify")).

This is true because, Iowa courts—including *Taylor*, which was cited by the Court of Appeals—have concluded personal knowledge may be reasonably inferred from an affiant's position within a corporation. *See 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); *see also Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1317 (8th Cir. 1996) (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").

Thus, based on Iowa case law, "Feeback's affidavit set forth specific facts, based on his personal knowledge of events in his workplace, showing there is a genuine issue of material fact for trial, as required to defeat a motion for summary judgment. *See* Iowa R. Civ. P. 1.981(5)." (Appeals Decision at 11). Thus, the Court's decision is consistent with this Court's decision in *Godfrey v. State*, 962 N.W.2d 84, 98 (Iowa 2021), because unlike in *Godfey*,

Mr. Feeback's allegations were based on personal knowledge obtained as a supervisor. Therefore, further review is improper.

ISSUE II—THE COURT OF APPEALS DID NOT ERR IN CONSIDERING COMPARATOR EVIDENCE

Defendants contend that further review is necessary because Plaintiff did not show that the other, younger employees who swore at their supervisors yet were not terminated were similarly situated for him. Defendants urge the Iowa Supreme Court to adopt Eighth Circuit precedent on the issue.

However, the Court of Appeals properly examined and rejected these issues. First, the Court explained that the fact that these younger employees did not swear at Defendant Mulgrew "may not be dispositive." (Appeals Decision at 8 n.6). Second, the Eighth Circuit test for comparators "may be more malleable than Swift suggests. *See, e.g.*, *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1085 (8th Cir. 2013) (testing for 'comparable seriousness,' not a 'clone')". (Appeals Decision at 8 n.6). Third, and perhaps most importantly, the Court of Appeals declined to address the test for comparators for three reasons: "First, we see this as workplace culture, not comparator evidence. Second, the district court did not decide this issue. And third, missing a similarly situated employee isn't fatal to a discrimination claim." (Appeals Decision at 8 n.6).

Defendants do not address most of these arguments, let alone explain

how they provide proper grounds for further review. Instead, they state only that "[t]he Court of Appeals erred in finding such evidence could be considered as 'workplace culture evidence.'" Most importantly, Defendants ignore that the Court of Appeals "decline[d] to decide this issue." (Appeals Decision at 8 n.6).

Indeed, even *Caldwell v. Casey's Gen. Stores, Inc.*, No. 21-0775, 2022 WL 610362 (Iowa Ct. App. Mar. 2, 2022), upon which Defendants rely, recognizes "the proposition that the determination of whether an employee is similarly situated is 'usually a question for the factfinder.'" *Caldwell*, 2022 WL 610362, at *4 (quoting *Wyngarden v. State Judicial Branch*, No. 13-0863, 2014 WL 4230192, at *9 (Iowa Ct. App. Aug. 27, 2014)).

Finally, Defendants fail to explain how the reasoning of the Court of Appeals meets this Court's standard for further review. Indeed, it does not meet the standards set forth in Rule 6.1103(1)(b). As such, further review is not proper on this issue.

ISSUE III—THE COURT OF APPEALS DID NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMPANY

Defendants incorrectly assert that the Court of Appeals "probed into the wisdom of the Company's investigation," "substitut[ing] its judgment for that of the Company." (App. for Review at 23). Defendants' argument misstates the Court of Appeals decision and Plaintiff's argument.

The Court of Appeals agreed that sending a profane text message to a superior is a legitimate business reason to terminate an employee. "No doubt, insubordination could prompt a termination." (Appeals Decision at 7). Rather, the Court concluded that "a reasonable jury—considering the workplace norms, Feeback's ambiguous intent, and the lack of investigation—could find the quick termination was pretextual." (Appeals Decision at 8). By its very definition, pretext asks a jury to determine whether "defendant's stated reason for its decision is [] the real reason" for the decision, rather than "pretext to hide [] discrimination." *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 9–10 (Iowa 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)). Thus, the Court of Appeals took Defendants' stated reason for termination and examined whether "a reasonable jury may have credited Feeback's version when presented with Swift's hasty response." (Appeals Decision at 8). Contrary to Defendants' assertions, this inquiry did not "disturb the Company's business judgment." (App. for Review at 26). Rather, the Court engaged in the pretext inquiry required under Iowa law. As the Court explained: "Rather than investigate a possible miscommunication, Charboneau suspended Feeback on the spot. And within days he was fired. Considering Feeback's decades with the company, the ax fell with surprising speed."

(Appeals Decision at 8).

The Court concluded, "[a] contrived reason for termination is a sign of discrimination. *See Smidt v. Porter*, 695 N.W.2d 9, 16 (Iowa 2005)." (Appeals Decision at 9). This is because under Iowa law, "[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." (Appeals Decision at 10) (quoting *Smidt*, 695 N.W.2d at 16 (quoting *Reeves*, 530 U.S. at 147–48)). In sum, the Court did not disregard Defendants' stated reason for termination, it simply applied Iowa law and concluded that a reasonable jury could find the stated reason lacked credence. As stated above, this conclusion is consistent with Iowa Supreme Court and Court of Appeals decisions on pretext. Under Defendants' characterization of the law, however, any finding of pretext would "disturb the Company's business judgment." (App. for Review at 26). If accepted, that standard would, in fact, conflict with Iowa law.

In sum, the Court of Appeals accepted Defendant's stated reason for termination, but held that a reasonable jury could find that stated reason lacked credence so was not the real reason behind Plaintiff's termination. Because the Court of Appeals pretext analysis is consistent with Iowa law, there are no

grounds for further review.

ISSUE IV—THE CAUSATION STANDARD FOR ICRA CASES AT SUMMARY JUDGMENT WOULD NOT HAVE AFFECTED THE COURT OF APPEALS DECISION, WHICH REACHED THE SAME CONCLUSION UNDER BOTH STANDARDS

Finally, Defendants urge this Court "resolve the ambiguity of the appropriate standard applied at the summary judgment stage on ICRA cases" (App. for Review at 28). However, this request makes little sense in light of Defendants' own admission that the Court of Appeals concluded that Swift Pork was not entitled to summary judgment on Feeback's age discrimination claim "regardless of the applicable standard." (App. for Review at 30). In other words, the Court of Appeals decision did not turn on whether the *McDonnell Douglas* burden-shifting framework or the motivating factor standard applied. The Court "consider[ed] both tests" and concluded there were issues of material fact under both tests. (Appeals Decision at 6, 11, 12). Accordingly, Defendants fail to explain why this case is the proper vehicle to resolve this ambiguity. Given that the relevant causation standard did not affect the Court of Appeals decision, Plaintiff contends that it is not.

CONCLUSION

Feeback contends that the Court of Appeals is correct and this

Application for Further Review should be denied.

Respectfully submitted,

By: */s/Bruce H. Stoltze, Jr.*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) and 6.1103(4) because this brief contains 3,487 words, excluding the parts of the Resistance and Brief exempted by Iowa R. App. P. 6.1103(4).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they 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.

/s/Bruce H. Stoltze, Jr.
Bruce H. Stoltze, Jr.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 9th day of May, 2022, the foregoing was filed electronically via Iowa Judicial Branch Electronic Document Management System, which sent notification of such filing to all parties of record.

/s/Bruce H. Stoltze, Jr.
Bruce H. Stoltze, Jr.

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Plaintiff/Appellant's Resistance and Brief as to Application for Further Review was $0.00.

/s/Bruce H. Stoltze, Jr.
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