IN THE SUPREME COURT OF IOWA

No. 23-0605
District Court No. LACV093892

VALERIE RHEEDER,
Plaintiff-Appellee,

vs.

CITY OF MARION, DOUGLAS SLAGLE, SHELLENE GRAY and JOSEPH MCHALE,
Defendants-Appellants.

ON APPEAL FROM THE IOWA DISTRICT COURT IN
LINN COUNTY CASE NO. LACV093892
ORDERS DATED JANUARY 20, 2023 AND APRIL 3, 2023

THE HONORABLE VALERIE L. CLAY
DISTRICT COURT JUDGE

PLAINTIFF-APPELLEE VALERIE RHEEDER'S FINAL BRIEF

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2) because it presents questions regarding elements of a cause of action that the District Court concluded had not yet been established and other significant issues relevant to statutory claims under the Iowa Civil Rights Act ("ICRA").

STATEMENT OF THE CASE

This case was originally filed on September 27, 2019, asserting claims under the ICRA arising out of the sexual harassment by former Deputy Chief of Police Defendant Douglas Slagle ("Slagle") of Plaintiff Valerie Rheeder ("Rheeder") while she was the part-time custodian at the Marion Police Department ("MPD") and the retaliation Rheeder faced following her report of harassment. Rheeder's claims arise under the ICRA, §§ 216.6 and 216.11. Count I is a claim against Slagle for sexual harassment; Count II is a claim against Defendant the City of Marion ("the City") for vicarious liability for the harassment by Slagle or, alternatively, negligence causing the harassment by Slagle; Count III is a claim against Defendants Joseph McHale ("McHale"), Shellene Gray ("Gray") and the City for retaliation in violation of Iowa Code § 216.11. (App. 1023-1032.)

Defendants moved for summary judgment on all of Rheeder's claims and on January 20, 2023 and April 3, 2023, the District Court denied Defendants' motions in large part, with the exception of dismissing Rheeder's claim for constructive discharge. (App. 691-723; 827-840.) The District Court made the following findings relevant to this appeal:

1) There are material disputes of fact precluding summary judgment on Rheeder's claim against Slagle, specifically disputes regarding whether the harassment was unwelcome and whether the harassment was sufficiently severe so as to affect a term or condition of Rheeder's employment. (App. 710–712; 837.)
2) There are material disputes of fact precluding summary judgment "as to whether the City took reasonable preventive and remedial care against workplace harassment" and therefore a jury will decide whether Defendants can prove the *Faragher-Ellerth* defense and whether Rheeder can prove the City was negligent. (App. 720–722; 832–834, 839.)
3) There are material disputes of fact precluding summary judgment on Rheeder's claim for retaliation, specifically whether Defendants' actions towards Rheeder in response to her complaint would

dissuade a reasonable employee from making a complaint. (App. 715–717; 834.)

4) Defendants McHale and Gray can be individually liable for retaliation because it was their conduct that is the basis of Rheeder's claim for retaliation. (App. 716; 835.)

5) Rheeder's Petition adequately put Defendants on notice that her claim was both a claim for discreet act retaliation and a claim for creation of a hostile work environment in retaliation and even if not adequately pled, Rheeder was entitled to amend to conform to the proof. (App. 717; 835.)

Defendants filed applications for interlocutory appeal asking this Court to review the above conclusions of the District Court and their applications were granted on September 28, 2023.

STATEMENT OF THE FACTS

Slagle began with the MPD in 1992. (App. 691.) Throughout his career, he frequently repeated the mantra "the badge will get you pussy but in the end the pussy will get your badge" and appeared to act according to his motto. (App. 439.) It is well documented that throughout his employment, Slagle exhibited a pattern of behavior that consisted of becoming flirtatious with women he met through his employment, quickly transitioning to requesting

sexual favors, becoming more and more persistent and demanding until the female victims either gave into his demands or told his boss. (App. 394–399 at ¶¶ 1–29; 436–442; 538–541; 561–591; 704; 838–839.) Voluminous evidence of Slagle's history of sexual misconduct and harassment, and the City's knowledge of Slagle's conduct, was presented at the summary judgment stage and is summarized below. (App. 394–399 at ¶¶ 1–29; 436–442; 538–541; 561–591; 696–697, 704; 838–839.)

From approximately 1996 to 1998, while on duty, in his squad car and while wearing his uniform, Slagle aggressively and persistently propositioned Andrea Wilson, a teenage civilian who had expressed an interest in becoming a police officer. In 1998, after years of pressure and at the age of 20, Andrea Wilson gave in and had a single sexual encounter with Slagle. In 2002, Andrea Wilson was hired as a patrol officer with the MPD. Throughout her entire 15-year career, Slagle continually sexually harassed her including talking about her breasts, physically forcing her to touch him, smelling her, asking her to describe masturbating and bringing up the prior sexual encounter. This harassment was known by command staff and often occurred in front of other officers. (App. 394–396 at ¶¶ 1–9; 436–442; 704; 833, 838–839.)

In 2007, Chief of Police Harry Daugherty instituted an internal affairs investigation into allegations that Slagle was sending sexually explicit emails

to women he had met through his employment using his work email and was also leaving work while on duty to meet with women. (App. 396 at ¶10; 462–467; 539–540.) Gray has testified that the investigation was instituted because one of the women, an employee of Linn County Emergency Management, had contacted the MPD to request that Slagle's contact stop. (App. 791–793.) There is no admissible evidence in this case that the women Slagle was contacting consented to the contact. (App. 704; 833, 838–839.)

Later in 2007, the owner of the insurance agency used by the MPD filed a complaint against Slagle on behalf of one of her employees and asking that Slagle stop communicating with the employee. The investigation revealed that Slagle had originally contacted the employee on behalf of the MPD but had then began flirting with her and then aggressively propositioning her for sex, going so far as to look up personal information using various police databases and using that information in his communication with her. The female employee became so alarmed that she reported the conduct to a co-worker and her boss, who then reported the conduct to then Chief of Police Harry Daugherty. Slagle received a five-day suspension from work following the investigation. (App. 582–589; 621–642; 397–399 at ¶¶ 18–24; 704; 838–839.)

Throughout his employment with the MPD, Slagle often commented on women's bodies, referred to women as hot and leered at women, often in

front of other female officers. Most people working within the MPD knew of and had witnessed Slagle's inappropriate comments regarding women and knew that he often came onto women while on duty. Nearly every witness in this case has testified that they were not surprised to learn of Slagle's sexual harassment of Rheeder because it was consistent with the prior conduct and reputation of Slagle throughout the MPD. (App. 399 at ¶¶ 25–29; 408 at ¶ 79; 411 at ¶¶ 96–98; 437–440; 448; 513; 518–519; 535; 563–565; 696–697, 704; 838–839.)

Slagle was promoted multiple times within the MPD despite these documented incidents of sexual harassment and his reputation within the MPD until he became the Deputy Chief of Police—the second highest ranking officer in the MPD. (App. 696–697; 837.)

There are multiple other instances of sexual harassment within the MPD that went completely uninvestigated and for which no discipline was issued. These instances range from comments about female officer's breasts, statements that female officers would do good work on their knees, attempts to kiss female officers by their senior and supervising officers and much more. Many employees witnessed this harassment and witnessed that no discipline was ever issued to the men (often higher-ranking officers) who committed the

harassment. (App. 400–401 at ¶¶ 30–42; 438–439; 449–452; 457–459; 468; 523; 559–562; 704; 833, 838–839.)

In 2016, Lon Pluckhahn, the City Manager, received a letter from Adam Cirkl, a Marion police officer, advising him that Slagle created an atmosphere ripe with sexual harassment within the MPD. Officer Cirkl feared he would be subjected to retaliation as a result of his letter but felt compelled to notify the City Manager of Slagle's ongoing conduct. There was no investigation or follow-up regarding Cirkl's notification that Slagle created an atmosphere of sexual harassment within the MPD, and no actions were taken to make any changes at the MPD. (App. 402 at ¶¶ 43–46; 451–452; 490–491; 566; 704; 833, 838–839.)

When McHale was hired as the Police Chief, Jen Ketelsen, the Human Resources Manager at the City, met with him and advised him that they had been notified of prior issues with Slagle, including that he created an atmosphere of sexual harassment. (App. 403 at ¶ 47; 490–491; 833.)

In 2016, Officer Andrea Wilson, then an investigator with the MPD, attempted to report the mistreatment of female officers to City management but was ignored. In 2017, three female officers attempted to report ongoing sexual harassment within the MPD but were ignored by Slagle and McHale,

the two highest ranking officers in the department. (App. 403 at ¶¶ 48–49; 440; 704; 838–839.)

For years the only person who officers were permitted to report sexual harassment to was Slagle. Not only was Slagle a known harasser himself, but employees of the MPD also feared Slagle and were not comfortable sharing any complaints with him. McHale and Slagle repeatedly discouraged employees of the MPD from making complaints to the Marion Human Resources Department even though they had repeatedly been told that Human Resources should be handling employee complaints. There was no formal sexual harassment training at the MPD. There was a short video about sexual harassment that was available to employees to watch but employees were not required to watch the video and many employees were not even aware of the video. (App. 408–409 at ¶¶ 79–83; 437–438; 444; 552; 721–722; 833–834.)

Ketelsen, the Human Resources Manager, learned of ongoing sexual harassment and gender-based discrimination at the MPD from multiple female police officers as well as through Cirkl's 2016 letter. Ketelsen made multiple attempts to address sexual harassment within the MPD, but those efforts were repeatedly thwarted by the Chief of Police, the City Manager and outside counsel for the MPD. (App. 403–405 at ¶¶ 50-55; 407 at ¶ 68–69; 408 at ¶¶

74–76; 420–421 at ¶¶ 139–142; 441-444; 487-488; 493; 496–499; 556–558; 704; 838–839.)

In 2017, Officer Wilson went to Ketelsen on multiple occasions and reported that female police officers were repeatedly being sexually harassed at the MPD, that nothing was ever done in response to the harassment and that the issue had repeatedly been swept under the rug. The City's policies required that Ketelsen, as the Human Resources Manager, handle all sexual harassment complaints regardless of department; however, Defendants all objected to Ketelsen's involvement in investigating the MPD and repeatedly attempted to intimidate her and obstruct her investigation into the MPD. (App. 403–405 at ¶¶ 50–55; 487–490; 556–558; 704; 838–839.)

The City then hired an outside consultant specializing in executive coaching to conduct an investigation into Officer Wilson's allegations that there was widespread sexual harassment within the MPD. Ketelsen advised the consultant that they were aware of Slagle's history of sexual harassment and Officer Wilson also provided the consultant with numerous examples of severe harassment and of women officers' attempts to report the harassment, including recent attempts. No investigation or action was taken in response to this complaint of widespread sexual harassment at the MPD. McHale and Slagle retaliated against Officer Wilson for making her complaint by sharing

personal medical information with other officers, cleaning out her office, accusing her of stealing police property and launching an unfounded internal affairs investigation. (App. 405–407 at ¶¶ 56-70; 441–442; 490–494; 528; 532; 559–562; 839.)

Rheeder was hired by the MPD in 2018 as a part-time custodian. Rheeder believed that the custodian position at the MPD was a good fit for her because she was a single mother of two children and the position provided the income she needed in order to support her family and also allowed her to be home after school hours to care for her children. Rheeder was interviewed for the position by Slagle, Gray and Mike Kula. (App. 409 at ¶ 85; 517; 692.)

During the interview, Rheeder disclosed that she had been a victim of very serious physical abuse by her ex-husband that had required police intervention of multiple Marion police officers who she would now potentially work with at the police station. Rheeder was concerned that it may create issues for her employment. Slagle took it upon himself during the interview process to assure Rheeder that he would personally protect her, a comment both Rheeder and Mike Kula found over the top and strange. (App. 409 at ¶¶ 86–87; 517; 691–692.)

Rheeder did not receive a copy of the MPD's sexual harassment policy at the time that she was hired or at any time until after being sexually harassed

and making a complaint. Additionally, Rheeder was not informed of the existence of any sexual harassment policy at the time of hire. (App. 409 at ¶¶ 82–83; 552; 691, 721–722.)

Rheeder reported directly to Mike Kula, the maintenance supervisor, and indirectly to Gray, Kula's direct boss. When Rheeder came to the MPD to complete her pre-employment paperwork, she met with Gray. At this time, Gray asked Rheeder if she was "a police groupie." Gray went on to state that there were many women who just wanted to sleep with police officers and warned Rheeder that most of the men working at the MPD were married and that if Rheeder "gave an inch they would take a mile." Gray further went on to tell Rheeder that she needed to remember that she was just there to work, not to meet men. Rheeder was offended by the suggestion that she had taken the position for anything other than to work. (App. 409–410 at ¶ 88; 546; 692.) It is undisputed that Rheeder came to work, was a reliable employee who worked hard, performed her job well and was friendly to everyone with whom she worked at the MPD. (App. 692.)

It is clear that Slagle, from the moment that he hired Rheeder, had identified her as a potential victim. In October 2018, Slagle asked Rheeder for her phone number and provided her with his phone number. Rheeder never asked for Slagle's phone number; however, Slagle provided it under the guise

that she may need to reach him in order to access certain areas of the police station or supplies, a claim that turned out to be false. (App. 410 at ¶ 89; 549; 692.)

Rheeder became friends with many of the employees at the MPD and had conversations with those employees about growing up in South Africa, children and life outside of work. Rheeder had similar conversations with Slagle; however, during a few of these conversations, Rheeder felt that Slagle stood too close, lingered too long or touched her hand in a way that made her feel uncomfortable. (App. 692.)

Beginning in November 2018, Slagle began making statements to Rheeder that she found odd and uncomfortable. Around Thanksgiving of 2018, Slagle pulled up near Rheeder while she was taking out the trash and said, "Why don't you hop in the car and we'll take a trip." Rheeder jokingly responded, "Oh we'll have an adventure." In response, Slagle stated, "Oh we'll have an adventure" in a suggestive way. Slagle also told Rheeder that he could teach her everything she needed to know about the police station and that she would not get in trouble for anything as long as she was with him. Rheeder found this comment intimidating because she was hired to be the custodian, there was no reason for her to know everything about the MPD and

Slagle was stating he had largely unlimited power within the MPD. (App. 692.)

In January 2019, Slagle invited Rheeder into his office to talk and during this conversation, stated to Rheeder that he had missed her over the Christmas break, thought about her often and probably thought about her too much. Slagle asked Rheeder to send him a picture of herself, to which she was non-committal. He then, out of nowhere, said to Rheeder, "I want you to tell me what you want to do to me and I will tell you what I want to do to you so that we can see if it's the same thing." In response, Rheeder put her hands up indicating stop and stated, "Woah." She then attempted to change the subject and left Slagle's office. (App. 410 at ¶ 90; 550; 554; 693.)

The following day on January 9, 2019, Slagle began texting Rheeder unsolicited. Rheeder had never sent a single text to Slagle before he initiated this text exchange. Slagle initiated this texting conversation by stating, "Hey you! Haven't seen you today!" In response, Rheeder sent an emoji of a smiling sun. In response, Slagle messaged, "I better see you. You are no stranger, at least I don't want you to be!" Rheeder responded by saying, "Hi! I have to keep my stranger title [emoji] lol. Jokes." Slagle complimented Rheeder stating she was "Amazing. Simply. Naturally." Rheeder responded to him by thanking him for the compliment but stating that now she knew why he made

her nervous. Slagle then asked Rheeder to tell him why he made her nervous and Rheeder would not respond and instead stated that she needed to go mop some floors. (App. 410 at ¶¶ 91–93; 693, 703–704.)

Over an hour later Slagle initiated another text exchange in which he began more persistently insisting that Rheeder share with him. Rheeder understood these texts as a follow-up from his previous statement that he had made in his office that he wanted her to tell him what she wanted to do with him, and he would tell her what he wanted to do with her. Rheeder felt that Slagle was demanding that she provide examples of sexual contact or activity that she wanted to perform on or with him. Slagle continued to pressure Rheeder via text to share with him to which she responded, "You are the deputy Chief of police department. I know you don't mean to be intimidating…but it just is. Lol Gosh this would be easier in conversation!" Slagle then responded that he would see her tomorrow in person. (App. 410–411 at ¶¶ 92–97; 694, 703–704.)

The following day Slagle again initiated a text exchange with Rheeder, becoming more demanding in his request that she share with him. He then texted, "Tell me one thing u want to do with me" to which Rheeder responded, "Lol Nope." Slagle became more and more demanding of Rheeder in his text

messages stating, "Give me something," "[p]lease explain," and "[s]hare which bad are u." (App. 410–411 at ¶¶ 92–97; 695–696, 703–704.)

On January 10, 2019, Rheeder went to Slagle's office to try to speak with him about her concerns with his requests; however, she was unable to do so because Slagle was interrupted by another member of the MPD. Because they were unable to arrange a time for Rheeder to express her concerns to Slagle, she joked that he could just pull her over and in response he stated, "Yeah, that would be great, I will put you in handcuffs and pat you down," to which Rheeder responded, "No that wasn't what I had in mind." (App. 696.)

Rheeder then went to Judy Ward, a dispatcher from the MPD who was both Valerie's neighbor and friend. Rheeder reported Slagle's sexual harassment to Ward who advised Rheeder that she had heard that Slagle had made other advances toward women that were inappropriate. Rheeder also spoke with Renee Fenchel, the MPD records clerk and another employee with whom Rheeder had developed a friendship. Rheeder described to Fenchel Slagle's sexual harassment. Fenchel observed that Rheeder was scared to death, that she did not seem like herself and that she was very distraught about the communication that she was receiving from Slagle. Fenchel also told Rheeder that her description of her interactions with Slagle was not uncommon for Slagle. (App. 411 at ¶¶ 94, 97–98; 535; 608; 696–697, 704.)

On January 11, 2019, Rheeder met with Slagle in his office and told him that his conduct was unwanted, that it made her feel uncomfortable and what he was suggesting could ruin their lives. Following the meeting, Slagle again initiated a text exchange with Rheeder. Also following the meeting, Slagle, while shaking Rheeder's hand, leaned in and put his cheek against hers. On January 17, because Rheeder believed that Slagle had misunderstood her, Rheeder met with Slagle again and told him his conduct was unwanted and asked him to stop. (App. 697–698.)

On January 18, 2019, Rheeder went to Sergeant Jeff Hartwig to report the sexual harassment by Slagle. Rheeder provided text messages and identified witnesses who had seen how upset she was after the sexually harassing communication from Slagle. Hartwig and McHale initially stated that it was during this initial meeting that the two of them decided that no sexual harassment had occurred despite not speaking with any witnesses. (App. 699; 833–834.)

The following Monday, McHale, Hartwig and Rheeder met to discuss Rheeder's complaint and Rheeder provided detailed notes of the harassment by Slagle. During this meeting, McHale aggressively urged Rheeder to simply allow McHale to handle the investigation and not to make a formal report to Human Resources. This is consistent with the Chief's prior conduct

demonstrating that he disapproved of Human Resources conducting any investigation into MPD employees. (App. 412–413 at ¶¶ 103-105; 426–427 at ¶¶ 168-174; 551; 699–700.)

McHale testified that Hartwig conducted the investigation and Hartwig testified that McHale conducted the investigation into Rheeder's complaint. McHale determined that no harassment occurred because McHale believed that in order for Slagle to have sexually harassed Rheeder, he would have had to agree to provide an employment benefit in exchange for sexual favors. McHale testified that unsolicited sexual advances by a supervisor towards a subordinate would never be sexual harassment. (App. 413–414 at ¶¶ 106-110; 480; 482, 484; 507–508; 700–701.)

McHale did not review Slagle's employment file to determine if there had been previous complaints of similar conduct or sexual harassment, despite Rheeder's statement to him that she had been advised that there had been prior complaints and Ketelsen's prior warning to him that they had reports of sexual harassment by Slagle. McHale did not interview any witnesses as part of his investigation and concluded that Rheeder and Slagle were equally to blame. (App. 414 at ¶ 111; 506; 700–701; 833–834.)

Slagle testified that McHale never interviewed him with regards to Rheeder's complaint, never discussed the text messages with him and, in fact,

never discussed the complaint at all. Both Rheeder and Slagle were given written warnings as a result of this "investigation." (App. 414–416 at ¶¶ 111-116, 119; 472; 506, 508; 591–594; 620; 700–701.)

On January 23, 2019, two days after Rheeder made her complaint of sexual harassment against Slagle, Rheeder was inside the MPD cleaning while two police officers were out in front of the department shoveling snow. Gray approached Rheeder and told her that she should be clearing the snow and not the officers to which Rheeder agreed she would begin clearing the snow. Gray then asked Rheeder to come and speak with her near the elevators within the police station. Gray then placed her hands on Rheeder's shoulders and gripped her. Gray was shaking and visibly angry. She then said to Rheeder that Rheeder should have come to her with her complaint of sexual harassment and that McHale was very angry with Gray because he had to deal with the complaint. Gray then told Rheeder that she had warned her when she started about men working in the MPD and reiterated that Rheeder was there to work and not to speak with any other employees. Gray then told Rheeder she was never to speak about the sexual harassment by Slagle again. Gray went on to state she had told Rheeder that "if you give them an inch they may take a mile" and that Rheeder should have been more careful because, as Gray told her, many of the male employees in the MPD were married. Gray concluded by

stating to Rheeder that "the attention must have been nice" but that Rheeder was there to work and not speak with men of the MPD. Only then did Gray release Rheeder from her grip. Rheeder took Gray's statements as threats and further interpreted the statements as blame for being sexually harassed by Slagle. (App. 416–417 at ¶¶ 121–122; 545–546; 701.)

Immediately following this encounter with Gray, Rheeder spoke with Fenchel, the records clerk whose office was near where the encounter occurred. Fenchel reported that after the confrontation with Gray that Rheeder "was incredibly shaky. She was shaking like a leaf. She was visibly upset. Her eyes were watery. She acted as though she had just been scared half to death." Rheeder reported to Fenchel at that time that Gray had pulled her aside and was getting onto her about something to do with Slagle and that Gray put her hands on Rheeder's shoulders and shook her. (App. 417 at ¶ 124; 535; 702.)

The next day, on January 24, 2019, Gray again approached Rheeder while Rheeder was cleaning the Chief's bathroom in his office. Gray stood in front of the door, preventing Rheeder from leaving and demanded that Rheeder tell Gray everyone whom she had told about Slagle's sexual harassment. Rheeder was very reluctant to share that information with Gray but as Gray persisted, Rheeder eventually told her that she told Kula, Fenchel and Ward. Gray stated to Rheeder that "nothing actually happened, nothing

occurred since there was no consummation and not touching. So you are never to speak about this to anyone anymore. You should never have spoken to anyone in the first place." Gray concluded by stating that if it ever got out that Slagle had sexually harassed Rheeder whether in a month or two years that Gray would know exactly who to come after and that she would "get them." Shortly after the second threatening encounter, Rheeder shared details of the encounter with Kula who described Valerie as visibly upset, scared and intimidated. (App. 8; 20; 417–418 at ¶¶ 125–128; 519; 546; 701–702.)

After Gray learned that Rheeder had told Kula about the harassment, Gray, who was Kula's boss, threatened Kula by telling him that if he told anyone about the harassment he could be terminated. After the written warning by McHale and threats from Gray, Rheeder made no further complaint until contacted by an outside investigator in April. (App. 418 at ¶¶ 127-129; 519; 548–553; 599; 701–702.)

In April 2019, Fire Chief Deb Krebill met with Pluckhahn, the City Manager, and reported to him that she had learned from multiple women police officers that women police officers were being treated unfairly and that Slagle had sexually harassed a "janitor" and that the harassment had been swept under the rug. Chief Krebill, who was only the second female fire chief in Iowa, had herself experienced discrimination from MPD leadership stating

that McHale was "a good ol' boys' club kinda guy and maybe women weren't his standard as leaders." (App. 419–420 at ¶¶ 136–137; 457–458; 702.)

This report by Fire Chief Krebill was the first time that the Human Resources Department learned that Rheeder had made a complaint of sexual harassment against Slagle even though the City's policies required that Human Resources—and not the Chief of Police—conduct investigations into sexual harassment complaints. Human Resources Manager, Jen Ketelsen, then requested and received a copy of the file from Hartwig that included the text messages, the warnings issued and no evidence of any investigation. Ketelsen, in reviewing the text messages, found that Slagle's texts had not been welcome, and that Slagle had harassed Rheeder. The City then retained Attorney Fran Haas from the Nyemaster Goode law firm to investigate Rheeder's complaint of sexual harassment. This was approximately three months after Rheeder complained of the harassment. (App. 420–421 at ¶¶ 138–143; 496–499; 702.)

Despite retaining an outside investigator, the City continued to withhold vital information and documents from that investigator, including documents relating to prior instances of sexual harassment by Slagle. Attorney Haas reached the following conclusions as a result of her investigation: 1) Slagle sexually harassed Rheeder, 2) Gray retaliated against Rheeder, and 3)

Slagle had been untruthful throughout the course of the investigation. (App. 421–425 at ¶¶ 145–161; 477–480; 498; 520–555; 703–704.)

Despite Attorney Haas's conclusion that Slagle had committed sexual harassment and despite his long-known history of sexual harassment, Slagle still was not subjected to any discipline and voluntarily resigned to pursue other employment. Despite Haas's conclusion that Gray had committed prohibited retaliation, she also was not subjected to any discipline. (App. 425–428 at ¶¶ 162–178; 473; 498–503; 510; 543; 557–561; 611; 705.)

After learning of the abhorrent conduct by McHale, Slagle and Gray, the Marion Policeman's Protective Association issued a vote of no confidence in McHale, Slagle and Gray and submitted it to the City. The City ignored the vote of no confidence by the Police Officer's Union and did not take any further action to investigate or otherwise discipline McHale, Slagle and Gray. (App. 428–429 at ¶¶ 179-182; 445–446; 453; 525.)

After the commencement of this case, McHale created a falsified investigative report and produced it in an effort to support his claim that he had conducted an investigation into Rheeder's complaint of sexual harassment. There is overwhelming evidence that this report is false and was drafted for the purpose of defending this case. No one had ever seen the report before this case, including the attorney investigator and all of the people

McHale claimed to have given the report at the time he claims to have drafted it. (App. 429–431 at ¶¶ 183-194; 471–472; 495; 507; 509; 520–555; 615–629; 647.)

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THERE ARE MATERIAL DISPUTES OF FACT PRECLUDING SUMMARY JUDGMENT ON RHEEDER'S CLAIM THAT SLAGLE SEXUALLY HARASSED HER AND THAT THE JURY SHOULD DECIDE THIS CLAIM

The Supreme Court should review the District Court's denial of summary judgment to Slagle for errors at law. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995). Defendants carry a heavy burden to show there is no dispute of material fact and Rheeder is entitled to all reasonable inferences from the evidence. *Id*.

It is undisputed that the District Court applied the appropriate legal standards in this case. The District Court concluded that in order to prove her claim for sexual harassment at trial, Rheeder must prove "(1) he or she belongs to a protected group; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; and (4) the harassment affected a term, condition, or privilege of employment." (App. 709 citing to *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553 (Iowa 2017); *Boyle v. Alum-Line, Inc*., 710 N.W.2d 741 (Iowa 2006); and

Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n, 672 N.W.2d 733 (Iowa 2003)). Slagle, in his motion for summary judgment, challenged only two of the elements of Rheeder's claim as the parties concede that Rheeder is a member of a protected class and that the harassment by Slagle was based on that characteristic.

The District Court concluded there were material disputes of fact regarding the two challenged elements of Rheeder's claim that preclude summary judgment in Slagle's favor. With regard to the first challenged element—whether Slagle's advances were unwelcome—the District Court stated:

> Viewing the evidence in the light most favorable to Rheeder, the Court finds she has created a genuine question of material fact with respect to this element. As Haas noted, Rheeder repeatedly denied and attempted to deflect Slagle's sexual solicitations during their text exchanges. Rheeder's alleged verbal responses to Slagle's sexually-charged comments are consistent with her responses to Slagle's text messages. A reasonable person could conclude that Rheeder was setting boundaries while maintaining a friendly demeanor in order to avoid angering Slagle, a man with a high position in the chain of command.
> (App. 710.)

With regard to the second challenged element—whether the harassment affected a term, condition or privilege of employment—the District Court correctly noted that Rheeder can prove this element of her claim at trial by proving the existence of a sexually hostile work environment. It is undisputed

the District Court applied the appropriate legal standard. "A hostile work environment based on underlying sexual harassment is actionable when the sexual harassment is so severe or pervasive as to alter the conditions of employment and create an abusive working environment." (App. 709 citing to *State v. Watkins*, 914 N.W.2d 827 (Iowa 2018); and *McElroy v. State*, 637 N.W.2d 488, 499 (Iowa 2001)).

The District Court, citing to *Farmland Foods*, correctly identified the appropriate standard for Rheeder's hostile work environment claim stating, "When bringing an ICRA hostile work environment claim, 'the plaintiff must establish that he or she subjectively perceived the conduct as abusive, [and] that a reasonable person would also find the conduct to be abusive or hostile.'" (App. 711 citing to *Farmland Foods*, 672 N.W.2d at 74 and *Watkins*, 914 N.W.2d at 844.) As to whether the conduct was subjectively abusive the Court stated:

> Upon reviewing the evidence, the Court does not find any serious dispute that Rheeder subjectively perceived Slagle's conduct as abusive. She has been consistent in her descriptions of the emotional and physical symptoms she experienced as a result of Slagle's conduct. Multiple MPD employees testified to having perceived Rheeder's distress and the changes in her behavior. (App. 712.)

The District Court went on to state that in determining whether the conduct was objectively hostile or abusive, the Court would apply the totality

of the circumstances test considering factors including "(1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct was physically threatening or humiliating or whether it was merely offensive, and (4) whether the conduct unreasonably interfered with the employee's job performance." (App. 712.) Considering the totality of the circumstances, the District Court concluded:

> Slagle's inappropriate conduct occurred frequently, albeit over a very short period of time in January 2019. Arguably, Slagle's behavior after he and Rheeder agreed to be friends—leaning in to place his check against hers while shaking her hand—could reasonably be perceived as physically intimidating, if not outright threatening, particularly given Slagle's knowledge about Rheeder's history as a domestic violence victim. The severity of his conduct was amplified by the power disparity between Rheeder and Slagle, which is the key factor in the Court's holding. Had Slagle been a coworker or a low-ranking officer, his behavior would have been less impactful. The record reflects that Slagle's conduct was the but-for cause of interference with Rheeder's job performance. For these reasons, the Court finds that Rheeder has generated a jury question with respect to her claim against Slagle.
> (App. 712.)

Slagle does not challenge the legal standard the District Court applied and instead asks this Court to second guess the District Court's determination that a jury could find Slagle's conduct objectively abusive or hostile based on the evidence in the record.

Several of the factual determinations challenged by Slagle on appeal were also addressed again and, in some instances, clarified by the District

Court in its ruling on Slagle's motion to reconsider. The District Court stated in relevant part:

> The Court acknowledges it used inartful language on page 22 of the January Ruling in referring to the power disparity between Rheeder and Slagle as *the key factor* in the Court's holding. The Court merely meant to convey that, while the conduct itself may not appear particularly severe if between two equal coworkers, a power disparity will likely result in a greater impact on a plaintiff. The power disparity is one factor to consider among the totality of the circumstances. Further, in order to avoid confusion, the Court strikes its statement that Slagle's conduct was the "but-for cause" of interference with Rheeder's job performance. Viewed in the light most favorable to Rheeder, the evidence reflects that, as a result of Slagle's alleged conduct towards her, Rheeder experienced emotional distress severe enough to cause physical illness, missed work, and outward changes in her behavior.
> (App. 837.)
>
> The Court believes that Slagle's *knowledge* of Rheeder's history [of domestic abuse] brings this factor into the objective inquiry. A reasonable jury could find that Slagle's conduct was objectively hostile or abusive because he was aware of her history when he allegedly harassed her. The Court declines to reconsider the inclusion of this factor in its January Ruling.
> (App. 837.)
>
> Finally, the Court concluded,
>
> To the extent the Court compared the Eighth Circuit's standard for severe and/or pervasive conduct to Iowa's standard, the Court strikes that language from the January Ruling, as any difference between the two in the requisite prima facie showing of sexual harassment does not appreciably impact the outcome. Based on the totality of the circumstances, the Court affirms its finding that Rheeder's sexual harassment claim against Slagle survives summary judgment under Iowa and Eighth Circuit precedent.
> (App. 837.)

The District Court's conclusion that the jury should be left to determine whether Slagle's conduct was objectively hostile is in line with many cases and should not be overturned on appeal. "Determination of whether or not an environment was objectively hostile is a fact-intensive inquiry." *Steck v. Francis*, 365 F. Supp. 2d 951, 964 (N.D. Iowa 2005). It requires consideration of the totality of the circumstances and there is no per se rule that a single incident of harassment cannot be sufficient to create an objectively hostile work environment. *Id*. "This is not, and by its nature cannot be, a mathematically precise test." *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 22 (1993). The cases relied upon by Slagle "merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable." *Id*.

The Supreme Court has explained:

> The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances…. that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.
> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (emphasis added).

Both Slagle's position of power over Rheeder and his awareness of her history of physical abuse are appropriate circumstances to be considered in

determining whether Slagle's conduct was objectively severe enough to constitute sexual harassment.

Each case of sexual harassment presents different facts that give rise to different considerations. Courts have identified potential factors to consider but have routinely stated that examination of these factors is not necessary in every case and the facts of each case need to be considered under a totality of the circumstances. In *Harris*, Justice Scalia concurred separately only to point out that the Court had not announced any clear test as to what constitutes hostile or abusive conduct but that the Court had no choice but to adopt vague language and that the result of the ruling in *Harris* would be that juries would be left in most cases to determine what conduct is abusive or hostile. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Scalia in concurrence).

Multiple courts have focused on whether the harasser was a supervisor in determining whether the environment was objectively hostile. In *Steck v. Francis*, 365 F. Supp. 2d 951 (N.D. Iowa 2005), Judge Bennett extensively discussed the power differential between the harasser and the victim, and this power differential was determinative for the Court in concluding that the harassment created an objectively hostile environment. *Steck* involved four comments that were offensive, "immature, unprofessional, rude, and unpleasant" that were made over the course of two years by the acting chief

of police to an officer in the investigation department. *Id*. The Court noted that these comments would not have created an objectively hostile environment except for the fact that there was a significant power difference between the harasser and the victim. *Id*. at 974-975. This was a factor in the court's decision to submit the case to the jury.

Additionally, Slagle's status as the second in command at the MPD is highly relevant in considering the totality of the circumstances. "As the harasser moves higher in the hierarchy of the employer, incidents of harassment become proportionally more severe…because the higher the harasser is in the employer's hierarchy, the more the harasser's status carries with it the power and authority of the office." *Id*. at 973.

Multiple other courts have similarly held that conduct that may not be sufficiently severe if committed by a co-worker was sufficiently severe to create an objectively hostile environment when committed by a superior or high-ranking employee. *Taylor v. Metzger*, 505, 706 A.2d 685, 692 (N.J. Sup. Ct. 1998) (where the sheriff directed a racial slur to a subordinate officer there was sufficient evidence to submit the issue of objective hostility to the jury even though it was only a single incident. The determinative factor for the court was the position of power the harasser held both within the department and over the plaintiff); *Nadeau v. Rainbow Rugs, Inc.*, 675 A.2d 973, 976 (Me.

1996) (holding that a single incident during which the plaintiff's supervisor propositioned plaintiff for sex was sufficiently severe to submit the issue of objective hostility to the jury because of his position as her supervisor); *Quantock v. Shared Mktg. Servs., Inc*., 312 F.3d 899, 904 (7th Cir. 2002) (holding that sexual harassment was sufficiently severe to submit to the jury where the conduct was a single incident of sexual solicitation because of the harassers "significant position of authority at the company.").

"Whether the conduct is so severe as to cause the environment to become hostile or abusive can be determined only by considering all the circumstances, and this determination is left to the trier of fact." *Nadeau v. Rainbow Rugs, Inc.*, 675 A.2d 973, 976 (Me. 1996). In this case, the jury will be instructed that it should consider a number of factors to determine whether a reasonable person in Rheeder's position would find that Slagle's conduct created a hostile work environment. Those factors include, but are not limited to, the severity of the conduct, the frequency of the conduct, Slagle's position of power over Rheeder and at the MPD and multiple other factors that may be relevant in this case after the evidence is presented in its entirety. The District Court, applying the correct legal standards, concluded that there are sufficient facts in this record to allow the jury to weigh the evidence and determine whether Slagle's conduct toward Rheeder was objectively reasonable.

II. THE DISTRICT COURT CORRECTLY RULED THAT THE CITY HAD NOT PROVED THE FARAGHER-ELLERTH DEFENSE AS A MATTER OF LAW AND THAT THE JURY SHOULD DECIDE WHETHER THE CITY HAS PROVEN THE DEFENSE

The District Court's conclusion that the City has failed to prove a *Faragher-Ellerth* defense conclusively as a matter of law to allow it to avoid liability in this case should be reviewed for errors at law with all reasonable inferences given to Rheeder. *Red Giant*, 528 N.W.2d at 528. The City carries the burden of proving this affirmative defense. *Haskenhoff*, 897 N.W.2d at 575 ("The Faragher–Ellerth affirmative defense, with the burden of proof on the employer, applies only to claims of vicarious liability."). "To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law." *Griglione v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994). The argument that the City has proven both elements of their defense as a matter of law, with the evidence that is in the record in this case, is ridiculous.[1]

[1]The District Court's denial of the City's motion for summary judgment on Rheeder's negligence claim is also reviewed for errors at law. The fact issues for Rheeder's claim of negligence and City's *Faragher-Ellerth* defense are the same, only the burden of proof changes. *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 579 (Iowa 2017). There are fact issues precluding summary judgment on whether the City took reasonable steps to prevent and promptly remedy the sexual harassment by Slagle.

The parties did not dispute that Slagle was Rheeder's supervisor and did not dispute that the City is vicariously liable for Slagle's harassment but is entitled to assert a *Faragher-Ellerth* defense to vicarious liability under the ICRA. (App. 720.) *Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n*, 672 N.W.2d 733, 744 (Iowa 2003). The District Court correctly cited the elements of the *Faragher-Ellerth* defense stating, "First, the employer must show reasonable care was exercised to prevent and correct promptly any . . . harassing behavior. Second, the employer must show the claimant employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." (App. 720 (citations omitted)). The first element of the defense requires the City to prove both that it exercised reasonable care to prevent the harassment and it took reasonable care to promptly correct the harassment. The District Court concluded that there were material disputes of facts regarding whether the City satisfied the first element of the defense because there were factual disputes regarding both the preventative measures and the corrective measures taken by the City. The District Court stated:

> The contradictory deposition testimony of Hartwig and McHale, as well as Slagle's testimony that he was never interviewed about Rheeder's complaint, raise the question of whether appropriate investigative and remedial measures were taken in response to Rheeder's complaint. Ketelsen's deposition testimony raises additional questions: whether the City meaningfully monitored

> the implementation of its revised policy, and whether McHale notified the City of Rheeder's complaint in January 2019. Because the City and McHale have not established that the first element of the *Faragher-Ellerth* affirmative defense is satisfied as a matter of law, the Court denies their joint Motion for Summary Judgment.
> (App. 721–722.)

The purpose of allowing the defense is "not to provide redress but to avoid harm" and to motivate employers to take all steps necessary to prevent sexual harassment from occurring, including establish a complaint procedure "designed to encourage victims of harassment to come forward." *Faragher*, 524 U.S. at 805–806. The defense is intended to provide employers with an incentive and is only available to employers who take affirmative action to prevent sexual harassment from occurring in the workplace. *Id.* The City does not qualify for the defense having taken virtually no action to end sexual harassment.

Slagle had been utilizing his position in the MPD to sexually harass women for nearly 30 years. The MPD had been notified of Slagle's conduct multiple times. The MPD not only failed to take action, but it also promoted Slagle multiple times until he was the Deputy Chief of Police. He received more and more power and continued to prey on women.

The MPD was rife with sexual harassment, largely committed by members of the command staff and the MPD did nothing. Women were being

groped, asked for sexual favors, and were subjected to the most vulgar of comments. Their breasts were discussed daily, and they routinely were forced to witness leaders of the MPD comment on the bodies of other women. The MPD did nothing. When women officers attempted to report ongoing sexual harassment to McHale, he ignored them and physically walked away from them, dismissing their complaints as unimportant. The City had every opportunity to do something to end sexual harassment at the MPD before Rheeder was victimized. The District Court correctly stated:

> A reasonable jury could find that the City's apparent failure to disseminate and ensure the enforcement of its updated policies constituted inadequate monitoring. A rational factfinder could also determine that the MPD, and therefore the City, failed to maintain a functional system for registering complaints and effectively discouraged employees from reporting complaints, considering the contradictory deposition testimony regarding McHale's investigation and report of Rheeder's complaint and Rheeder's allegation that McHale pressured her into an informal resolution.
> (App. 839.)

Given the facts of this case, the City cannot show that as a matter of law it exercised reasonable care to prevent sexual harassment from occurring. Multiple courts have held that an employer did not act reasonably in preventing sexual harassment based on far fewer examples of neglect than in this case. The U.S. Supreme Court has held that an employer who failed to disseminate a sexual harassment policy and failed to document and record

complaints of sexual harassment could not, as a matter of law, be found to have "exercised reasonable care to prevent supervisors' harassing conduct." *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).[2] *See also Dinkins v. Charoen Pokphand USA, Inc*., 133 F. Supp. 2d 1254, 1268 (M.D. Ala. 2001) (holding employer did not act with reasonable care to prevent sexual harassment when the harassment policy was not consistently disseminated and was not consistently enforced).

> It is not unforeseeable that in some work environments certain employees will engage in sexual harassment, and it is even more predictable in a male bastion such as a police department. Indeed, the need for a vigilant and responsive approach to sexual harassment ought to be more obvious to managers in such environments than it might be to managers of more refined or gender-integrated workforces.
> *Hurley v. Atl. City Police Dep't*, 933 F. Supp. 396, 422 (D.N.J. 1996), aff'd, 174 F.3d 95 (3d Cir. 1999).

In order to act reasonably to prevent sexual harassment, employers not only need to have a thorough and well disseminated policy, but they also have to demonstrate that the policy is consistently enforced. *Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997).

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[2] While *Faragher* involved a claim of vicarious liability and an affirmative defense and not a negligence claim, the standard is the same, only who bears the burden of proof changes. The question is still whether the City exercised reasonable care to prevent sexual harassment.

While the MPD had a written harassment and discrimination policy, the policy itself was inadequate. First, the policy could reasonably be read to only prohibit sexual harassment in the form of quid pro quo harassment—a request for sexual favors in exchange for some sort of job benefit. In fact, McHale determined that the policy **only** applied to quid pro quo harassment. *Stricker v. Cessford Const. Co*., 179 F. Supp. 2d 987, 1009 (N.D. Iowa 2001) (a sexual harassment policy that does not adequately define sexual harassment is not a sufficient means of preventing sexual harassment to satisfy an employer's duty); *see also Smith v. First Union Nat. Bank*, 202 F.3d 234, 245 (4th Cir. 2000) (a policy with a limited definition of sexual harassment to only requests for sexual favors was not adequate to show an employer acted reasonably). An adequate policy also has to provide for sexual harassment training of supervisors and others responsible for investigating claims in order to be considered adequate. *Soto v. John Morrell & Co*., 285 F. Supp. 2d 1146, 1162 (N.D. Iowa 2003).

The policy was not disseminated, which is evidence that the policy was not effective. Rheeder never received a copy of the sexual harassment policy. The City's sexual harassment training and dissemination of its policy was sporadic at best and was, as some employees have described it, "a joke." Where a plaintiff has not been provided a copy of the sexual harassment

policy, there is a question of fact regarding whether the policy was widely disseminated. *Soto v. John Morrell & Co*., 285 F. Supp. 2d 1146, 1164 (N.D. Iowa 2003).

To the extent a sexual harassment policy existed, it was never enforced. Known sexual harassers were not adequately disciplined and instead were promoted. When complaints were made, nothing was done, and complainants were retaliated against. MPD leadership witnessed and even participated in many other acts of sexual harassment.

Even an effective and well disseminated policy (which is not the case here), does not insulate an employer from liability if it is shown to be ineffective by widespread or unchecked harassment. *E.E.O.C. v. Mgmt. Hosp. of Racine, Inc*., 666 F.3d 422, 435 (7th Cir. 2012) (holding that a reasonable jury could conclude that the employer did not act reasonably despite having a written sexual harassment policy because the evidence showed the policy was not enforced in an effective manner. This evidence included that other supervisors had committed harassment without any consequence and those prior reports of harassment had not been adequately investigated). "[T]he mere existence of a grievance procedure and a policy against discrimination does not insulate an employer from liability." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (citations omitted); *see also Lopez v. Aramark*

Unif. & Career Apparel, Inc., 426 F. Supp. 2d 914, 964 (N.D. Iowa 2006) (holding that punitive damages against employer were warranted (a more exacting standard) where the evidence showed that the employer only sporadically disseminated the policy, rarely enforced the policy and did not take sexual harassment training seriously). Evidence that an employer "failed to respond to complaints" supports a showing that an employer did not act reasonably to prevent sexual harassment. *Vance v. Ball State Univ.*, 570 U.S. 421, 449 (2013).

Additionally, there is substantial evidence that the City effectively discouraged complaints by retaliating against officers who made complaints. Officers Hotz, Cirkl, Martens and Wilson all have offered testimony that they did not make complaints because they feared retaliation within the MPD. Even former City Manager Pluckhahn stated that MPD leadership was hostile to any oversight by the City of employee complaints. *E.E.O.C. v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 438 (7th Cir. 2012) (an employer did not act reasonably when the employer discouraged employees from making complaints). Again, evidence that an employer effectively discouraged complaints shows an employer did not act reasonably to prevent complaints. *Vance*, 570 U.S. at 449; *see also Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (employer could only show it was not negligent in failing to

prevent sexual harassment where its procedures "encourage victims of harassment to come forward."). "We must consider not only the written policy, but also its implementation because a policy's efficacy depends upon the effectiveness of those who are designated to implement it." *Shields v. Fed. Exp. Customer Info. Servs. Inc.*, 499 F. App'x 473, 479 (6th Cir. 2012).

Finally, the City put Slagle into a position of power. He used this position to prey on women. He went as far as using MPD databases to look up personal information about women and then use that personal information to effectively threaten women by telling them he knew where they were and knew things about them. In Rheeder's case, Slagle repeatedly touted his power in his efforts to get Rheeder to acquiesce to his requests. Slagle told Rheeder he could teach her everything he knew about the MPD and went on to advise her that she could not be disciplined for spending time with him because of his position of power. It was also clear that his position of power allowed him to continue harassing women without consequence. "[T]he nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." *Vance v. Ball State Univ.*, 570 U.S. at 445–46. There are questions of fact precluding summary judgment regarding whether the City acted reasonably to prevent sexual harassment.

In addition to failing to take reasonable steps to prevent harassment, the City also failed to adequately respond to Rheeder's complaint. "The promptness and adequacy of an employer's response will often be a question of fact for the fact-finder to resolve." *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1179 (N.D. Iowa 2000).

> [I]f the employer fails to take proper remedial action, then it may be culpable for harassment to which it did not adequately respond, on the theory that the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy.
> *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1123–24 (8th Cir. 2007).

When Rheeder made her complaint of sexual harassment against Slagle to McHale and Hartwig, there was no investigation into the complaint. McHale and Hartwig dispute which of them even conducted the alleged investigation and Slagle and other witnesses were never interviewed. Instead, McHale blamed Rheeder for being victimized, issued her a written warning and required her to continue working in close proximity to Slagle. Gray also retaliated against Rheeder by threatening her and her co-workers with retribution if they ever told anyone about Slagle's harassment. Slagle also received a written warning but otherwise went unchecked. This was despite his extensive history of harassment, which Ketelsen had expressly warned McHale about. After reporting the harassment and suffering the

consequences, Rheeder continued to work with both Slagle and the officials who had retaliated against her. Multiple co-workers witnessed her become withdrawn, teary and visibly afraid of seeing Slagle. Similar conduct has been found to generate a jury question on whether the employer acted reasonably to promptly correct harassment. *Smith v. First Union Nat. Bank*, 202 F.3d 234, 246 (4th Cir. 2000) ("Given [employer]'s inadequate investigation and its insistence on keeping [plaintiff] working in close proximity to [the harasser], a jury could find that [employer] did not act with reasonable care to correct promptly [the harasser]'s harassing behavior."). "It is not a remedy for the employer to do nothing simply because the coworker denies that the harassment occurred." *Hathaway v. Runyon*, 132 F.3d 1214, 1224 (8th Cir. 1997).

Only after the Fire Chief contacted the City Manager was any investigation conducted. Despite retaining an outside investigator, the City continued to withhold information and documents from that investigator, specifically documents relating to Slagle's history of harassment and the City's notice of his prior conduct. Attorney Haas was not provided or told of Cirkl's 2016 letter stating that Slagle created an atmosphere of sexual harassment or Seda's prior investigation into widespread sexual harassment at the MPD. McHale, Pluckhahn and counsel for the City who was the contact

for the investigator, all knew of these previous complaints. A reasonable jury could conclude that the City has failed to prove that it took prompt remedial action and therefore failed to prove its affirmative defense. *E.E.O.C. v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 436 (7th Cir. 2012) (jury could find employer negligent where investigation occurred months after initial complaint and only when the employer learned a third party was investigating the complaint).

Even after Attorney Haas concluded that Slagle had sexually harassed Rheeder and lied during the investigation and that Gray had retaliated against Rheeder, the City took no disciplinary action. Human Resources was never even permitted to review a copy of the Haas report. Slagle voluntarily resigned from his position and Gray suffered no consequence. It is for the jury to decide whether the City took prompt and appropriate remedial action. *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 577–78 (Iowa 2017) (holding that while employer "took action to stop the harassment … [i]t was for the jury to determine, under proper instructions, whether [the employer's] responses were adequate.").

The City relies heavily on the fact that the harassment from Slagle stopped after Rheeder complained. The City claims that this alone proves its affirmative defense. But "an employer that takes unreasonable or ineffective

remedial measures cannot avoid liability even if the harassment stops for other reasons." *Perez v. Superior Ct. of Guam*, 2009 WL 4823856, at *2 (D. Guam Dec. 7, 2009) and *Fuller v. City of Oakland, Cal*., 47 F.3d 1522, 1528 (9th Cir. 1995), as amended (Apr. 24, 1995) ("Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment—by the same offender or others.").

Perhaps the most tenuous argument advanced by Defendants on appeal is that *Feeback v. Swift Pork Co., et al.*, No. 20-1467, 2023 WL 2717158 (Iowa Mar. 31, 2023) somehow impacts the issues in this case. *Feeback* addresses none of the issues raised by any of the parties in summary judgment and Defendants have grossly misrepresented the holding of the case. As this Court is well aware, *Feeback* was an age discrimination case where the issue on appeal was whether the plaintiff in the case had presented sufficient evidence of causation under the *McDonnell-Douglas* burden shifting framework to survive summary judgment. Causation is not in dispute in any of Rheeder's claims. There is absolutely no reason for this Court to consider *Feeback's* holdings about the required proof of causation because the parties have stipulated to causation.

The Court's statements about the employer's investigation in *Feeback* have no applicability to this case. In *Feeback*, the employer claimed to have

terminated an employee for insubordination after the employee texted his supervisor "Fuck You!" The employee claimed that the lack of investigation by the employer into the complaint of insubordination was evidence that the employer was simply using a claim of insubordination as pretext for age discrimination. This Court noted that the brevity of the employer's investigation was not sufficient evidence of pretext stating that the employer "did not have much to investigate" because the investigation revealed the employee did in fact send his boss a message that stated, "Fuck You," and that any rational employer would conclude that was insubordination. This Court concluded that the brevity of the employer's investigation was not sufficient evidence of pretext (an issue that is not even presented in this case). This holding has no application to the District Court's conclusion that the City's lack of investigation creates a material dispute of fact regarding whether Defendants met their obligation to prevent and promptly address sexual harassment.

Rheeder's resistance included hundreds of pages of evidence and the deposition testimony of 14 witnesses, along with affidavits from two additional witnesses Defendants chose not to depose. Rheeder identified at least four instances of detailed complaints of sexual harassment at the MPD that were almost entirely ignored before Rheeder was harassed—three of the

complaints involved Slagle. The atmosphere at the MPD for women was so dire that the Fire Chief felt compelled to report it to the City Manager. Rheeder has certainly "put up" at the summary judgment stage and the District Court relied on the extensive admissible evidence presented in denying Defendants' motion for summary judgment on their affirmative defense.

The City must prove both elements of the *Faragher-Ellerth* defense and the City has offered no evidence that Rheeder failed to utilize the City's procedure for reporting sexual harassment. Rheeder adequately and appropriately reported the harassment. She reported the harassment to her direct supervisor. She then reported the harassment to the Internal Affairs Officer and finally, she reported the harassment to the Chief of Police. There is no evidence that Rheeder unreasonably failed to report the sexual harassment.

The District Court applied the correct legal standard and there are certainly sufficient facts in this record to allow the jury to decide whether the City has proven its affirmative defense.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT SOME EVIDENCE OF PRIOR SEXUAL HARASSMENT WILL BE ADMITTED AT TRIAL TO DISPROVE THE CITY'S AFFIRMATIVE DEFENSE

The standard of review for the District Court's evidentiary rulings is for abuse of discretion. *Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d

664, 684 (Iowa 2020). In this case, the District Court has not made any final evidentiary rulings, yet Defendants seek an advisory opinion from this Court on the admissibility of certain evidence. The Supreme Court does not typically issue advisory opinions on evidentiary issues. *Linn v. Montgomery*, 903 N.W.2d 337, 344 (Iowa 2017).

> The District Court, in denying Slagle's motion to reconsider, stated,
>
> > With respect to the City, the evidence is not being offered as propensity evidence to prove Slagle sexually harassed Rheeder, it is being offered to prove the City had actual or constructive knowledge of Slagle's past conduct, as well as well as to show how the City responded to prior complaints at the Marion Police Department.
> > (App. 829.)

The Court went on to state, "[E]vidence regarding Slagle's reputation and alleged history of inappropriate sexual behaviors in and around the workplace is admissible (at least in part) with respect to Defendants *other than* Slagle." *Id*. The District Court did not abuse its discretion. "Whatever particular factors a court uses to guide its analysis, the admission of testimony regarding similar acts is a question of trial court discretion….[one party] disagrees but does not show that the district court's reasoning is untenable." *Valdez v. W. Des Moines Cmty. Sch.*, 992 N.W.2d 613, 640 (Iowa 2023), as amended (Aug. 31, 2023) (citations omitted).

Evidence of prior harassment, complaints, employer response to complaints and a general workplace culture are routinely admitted in sexual harassment cases where the employer's vicarious liability or negligence is at issue. Defendants' flawed analysis regarding "me too" evidence relates only to claims of intentional discrimination, where the employer is always liable and the employer's duty to prevent and correct behavior is not an element of any claim or defense. The Supreme Court has explained this distinction between harassment and discrimination cases:

> [W]hen a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did.
> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986).[3]

The cases cited by Defendants in support of their claim that evidence of other acts of harassment are inadmissible are cases involving discrimination or retaliation and **not** cases involving employer liability for sexual harassment. That is a key difference because in sexual harassment cases, a plaintiff either has to show negligence (non-supervisory perpetrator) or disprove a defendant's affirmative defense (supervisory perpetrator) in

[3] Notably, "me too" evidence is often admitted in discrimination cases as well to prove intent. *See, e.g.*, *Dindinger v. Allsteel, Inc*., 853 F.3d 414, 426 (8th Cir. 2017).

order for an employer to be liable for harassment by an employee. *Haskenhoff*, 897 N.W.2d at 573.

The challenged evidence is directly relevant to the City's *Faragher-Ellerth* defense. "The first element of the affirmative defense imposes two requirements on employers, they must have (1) exercised reasonable care to prevent sexual harassment (the 'prevention prong') and (2) promptly corrected any sexual harassment that did occur (the 'correction prong')." *Weger v. City of Ladue*, 500 F.3d 710, 719 (8th Cir. 2007). The evidence at issue is directly relevant to whether the City exercised reasonable care to prevent the harassment of Rheeder that is at issue in this case. "Relevance and prejudice … are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008). In discrimination cases, unlike sexual harassment cases, other instances of discrimination are generally offered to show discriminatory intent or pretext and so the evidence's relevance is measured by how likely that evidence is to show that an employer acted with discriminatory motive in a specific case. *Id*.

Alternatively, in cases of sexual harassment, evidence of other acts of sexual harassment are "highly probative of the type of workplace environment [a victim] was subjected to, and whether a reasonable employer should have

discovered the sexual harassment. When judging the severity and pervasiveness of workplace sexual harassment, this court has long held harassment directed towards other female employees is relevant and must be considered." *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009). *See also Williams v. ConAgra Poultry Co*., 378 F.3d 790, 794 (8th Cir. 2004).

A brief review of the evidence at issue demonstrates it is highly relevant. In 2007, an internal affairs investigation into Slagle revealed that Slagle was sending sexually explicit email to four women who he had met through his employment at the MPD and that he was leaving the police station while on duty and in his assigned squad car to meet with women. There is evidence that this complaint was prompted by a complaint from one of the women. Slagle received a written warning as a result of the investigation.

After the internal affairs investigation, the owner of the MPD's insurance agency filed a complaint against Slagle on behalf of one of her employees whom Slagle had been aggressively propositioning for sex to the point that she no longer wanted to communicate with him. Slagle was briefly suspended and the materials relating to this second investigation were kept at the MPD. Slagle was a lieutenant at the time and was subsequently promoted to Captain and Deputy Chief of Police. Both of these investigations provided

the City with notice that Slagle acted inappropriately towards women, illegally accessed police databases in order to obtain personal information about women and that he aggressively sexually propositioned women who he met through his employment.

In a nearly identical case, evidence of prior sexual misconduct by a police officer directed at civilians, as opposed to employees of the police department, was admitted because officials at the department were aware of the conduct or could have been if they had reviewed the harasser's file. *Herndon v. City of Manchester*, 284 S.W.3d 682, 689 (Mo. Ct. App. 2009). In *Herndon*, the court rejected the employer's claim "that [harasser]'s prior acts of misconduct are irrelevant because they are remote in time and because they were not directed toward co-workers." *Id*. at 688. The court concluded that the evidence was admissible over the employer's objection because the employer knew about some of the sexual misconduct by the officer through a civilian complaint and could have known of other misconduct if the employer had conducted an investigation. The evidence was held to be admissible because it was relevant to the issue of whether the employer acted reasonably to prevent harassment as required for a *Faragher-Ellerth* defense and the remoteness in time and the fact that the victims were civilians and not co-

workers went to the weight of the evidence and not the admissibility of the evidence.

In addition to this evidence relating to two internal investigations, Officer Wilson provided an affidavit and will testify that Slagle sexually harassed her throughout her 15-year career at the MPD. She will also testify that some of this harassment was specifically witnessed by other employees of the MPD and that it was common knowledge within the department that she was being harassed by Slagle. This harassment is relevant to whether the City had constructive notice of Slagle's rampant harassment. When the harasser holds a position of power at the employer such that the harasser themselves is empowered to remedy sexual harassment, the employer is deemed to have actual or constructive knowledge of the harassment. *Gray v. Koch Foods, Inc.*, 580 F. Supp. 3d 1087, 1115–16 (M.D. Ala. 2022) (holding that because one of the harassers was a supervisor empowered to end harassment, that was "sufficient to impute liability to [employer], even if [victim] never reported the harassment to other proper supervisors."). *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1279 (11th Cir. 2002) (employer is deemed to have notice of harassment committed by or witnessed by upper management). Additionally, Rheeder is entitled to prove that the harassment was sufficiently pervasive that the City had constructive notice of the

harassment. *Id*. Rheeder "may prove constructive knowledge by showing harassment was so open and pervasive that, in the exercise of reasonable care, it should have been discovered by management-level employees." *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 581 (Iowa 2017).

"Evidence of prior sexual harassment allegations or claims may be relevant to show an employer's notice when the allegations or claims are communicated to the employer or the employer had reason to be aware of them." *Lopez v. City of Albuquerque*, 2010 WL 11590684, at *2 (D.N.M. Oct. 5, 2010). "An employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct." *Paroline v. Unisys Corp*., 879 F.2d 100, 107 (4th Cir. 1989) (emphasis supplied). *See also Yates v. Avco Corp*., 819 F.2d 630, 636 (6th Cir. 1987) (evidence that long time supervisor had been harassing women during the entirety of his employment was admissible to show that the employer was negligent in failing to prevent the harassment at issue in the case).

Defendants certainly will point to their policies prohibiting sexual harassment in support of their affirmative defenses and Rheeder is entitled to prove that the policies were not effective and were ignored. "[A] policy must

be found ineffective when company practice indicates a tolerance towards harassment or discrimination." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1280 (11th Cir. 2002). Defendants can challenge, through their own evidence, whether leadership at the MPD was aware of the prior harassment and can even challenge whether the harassment occurred. It will be for the jury to weigh the evidence to determine whether there is sufficient evidence to impute liability on the City.

Additionally, the evidence is relevant to whether the City acted reasonably in response to Rheeder's complaint. McHale had access to this information yet did not review it as part of any alleged investigation and instead concluded that Rheeder was equally to blame for the harassment and issued her a written warning. Slagle's history of aggressively using his position of power to proposition women for sex is relevant to determining whether McHale's response to Rheeder's complaint in January 2019 was reasonable.

Defendants repeatedly argue throughout their motion that evidence of prior harassment is unduly prejudicial; however, the fact that certain facts favor one party over the other does make those facts "unduly prejudicial."

> Virtually all evidence is prejudicial to one party or another. To justify exclusion under Rule 403, the prejudice must be unfair. Unfair prejudice arises when the evidence prompts the jury to make a decision on an improper basis, often an emotional one.

> The adverse effect of relevant evidence due to its probative value is not unfair prejudice. …[P]rejudice does not simply mean damage to the opponent's cause—for that can be a sign of probative value, not prejudice… from facts that arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence.
> *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 158–59 (Iowa 2004) (citations omitted).

Evidence of prior acts of harassment and of inaction in response to that harassment is incredibly relevant. It is this evidence Rheeder will offer to show that the MPD did not act reasonably to prevent the harassment of Rheeder.

"Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant." *Vance v. Ball State Univ.*, 570 U.S. 421, 449 (2013).

Evidence of prior claims of sexual harassment goes to whether the City had an effective sexual harassment policy in place and whether the City effectively enforced the policy. *E.E.O.C. v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 435 (7th Cir. 2012) (evidence that other supervisors had committed harassment without consequence was admitted and showed that the employer did not effectively enforce the sexual harassment policy). Evidence that this widespread harassment was tolerated is admissible. "Evidence of widespread toleration of racial harassment and disparate treatment condoned by

management was relevant ….” *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 794 (8th Cir. 2004). In *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 803 (8th Cir. 2009), the Eighth Circuit held that evidence of widespread sexual harassment was admissible because “it is highly relevant to prove the sexual harassment was severe and pervasive and that [employer] had constructive notice.”

The evidence of widespread sexual harassment is also admissible in support of Plaintiff’s claims for retaliation. “[A]n atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation for complaints in individual cases. [P]laintiff is entitled to present evidence of such an atmosphere.” *Hawkins v. Hennepin Tech. Ctr.*, 900 F.2d 153, 156 (8th Cir. 1990). In *Hawkins*, the Eight Circuit concluded that the plaintiff was entitled to present evidence that included 1) the details of the prior harassment, 2) all prior complaints, and 3) the response by the employer to the complaint including retaliation and inaction. *Id*.

The cases cited by Defendants do not support the exclusion of the evidence at issue in this case. In *Salami v. Von Maur, Inc.*, 838 N.W.2d 680 (Iowa Ct. App. 2013), a race discrimination case relied on by Defendants, the court noted that the evidence at issue was being offered to show discriminatory motive (causation) not notice to the employer. The Iowa Court

of Appeals found that some of the "me too" evidence should have been admitted at trial *but* because the District Court has "broad discretion" in making evidentiary rulings, the Court of Appeals would not overturn the District Court's exclusion of the evidence at issue. The District Court in this case has the same "broad discretion" to make evidentiary rulings and should not be reversed on appeal, especially interlocutory appeal. Additionally, the evidence in this case is being offered for a different purpose and is highly relevant.

In *Sprint/United Mgmt. Co.*, 552 U.S. at 388, the U.S. Supreme Court held that instances of other discrimination were relevant and that the district court should be left to determine admissibility of such evidence on a case-by-case basis.

In *Scott v. City of Sioux City, Iowa*, 96 F. Supp. 3d 876, 884 (N.D. Iowa 2015), a retaliation case, the District Court excluded evidence of a prior sexual relationship of the plaintiff because such evidence is routinely excluded in the same manner that prior relationships of victims of sexual assault are excluded. Defendants were offering the evidence as relevant to witness credibility and the court rejected this. The evidence was not being offered, as here, to show notice and inaction by an employer.

In *Hughes v. Goodrich Corp.*, 2010 WL 3746598, at *15 (S.D. Ohio Sept. 21, 2010), the Court concluded that evidence of a sexual relationship with a co-worker was not admissible because the plaintiff was offering the evidence against the harasser specifically for the purpose of proving action in conformity with prior bad acts, an impermissible purpose. The court in *Hughes* went on to note that evidence of widespread sexual jokes that pre-dated harassment of the plaintiff was admissible to prove employer negligence.

In an effort to mischaracterize the evidence in this case, Defendants continually refer to the evidence as relating to the "consensual relationships," but there is no evidence of consent. While Slagle consented to the contact, that does not end the inquiry. The question of whether the women consented is unanswered and Defendants have not identified any of the women as witnesses. Testimony from Slagle regarding these women's consent is inadmissible hearsay. The only admissible evidence shows that at least two of the women asked for the communication to stop and that the City had notice of Slagle's unwelcome sexual advances toward two vendors of the MPD.

This evidence is admissible to disprove the City's affirmative defense or, alternatively, to prove the City was negligent.

IV. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION IN CONCLUDING THAT RHEEDER APPROPRIATELY PLED A RETALIATORY HOSTILE WORK ENVIRONMENT CLAIM OR IN PERMITTING RHEEDER TO AMEND HER PETITION

The District Court's conclusion that Rheeder appropriately pled a retaliatory hostile work environment claim and the Court's decision to permit amendment "for clarity" are reviewed for abuse of discretion. *Townsend v. Mid-Am. Pipeline Co.*, 168 N.W.2d 30, 37 (Iowa 1969). Defendants' repeated assertions in their briefing that the District Court has allowed Rheeder to pursue a "new claim" is false. The District Court simply set forth the parameters of one element of Rheeder's claim for retaliation in response to extensive briefing on this issue from the parties.

The District Court, instead, held that certain acts by Defendant, when considered as discreet acts of retaliation, are sufficiently severe to submit to the jury to determine whether they are materially adverse and that the jury should also be permitted to consider whether these actions, in combination, were sufficiently severe to create a hostile work environment. Defendants were not unfairly surprised by this issue and submitted arguments on the issue to the District Court in their initial summary judgment brief who ruled on the issue.

Consideration of the cumulative effect of multiple retaliatory actions to create a hostile work environment is not new or novel. Since the U.S. Supreme Court's decision in *Burlington Northern*, the Eighth Circuit has recognized that creation of a hostile work environment is an adverse employment action giving rise to a claim of retaliation. *Stewart v. Indep. Sch. Dist. No. 196*, 481 F.3d 1034, 1042 (8th Cir. 2007) ("In Burlington Northern, the Court expressly held that retaliation claims under Title VII could be based on a hostile work environment and need not be based solely on discrete adverse employment actions that affect the terms or conditions of employment."). As the District Court concluded in its ruling, this Court has recognized that following the adoption of the *Burlington Northern* standard for materiality under the ICRA, "[a] plaintiff may bring a special type of retaliation claim based on a 'hostile work environment' by alleging a series of 'individual acts that may not be actionable on [their] own but become actionable due to their cumulative effect.'" *Godfrey v. State*, 962 N.W.2d 84, 110 (Iowa 2021).

Gray is not prejudiced by the District Court's conclusion that Rheeder adequately pled creation of a hostile work environment claim as a materially adverse action. The District Court, in ruling on Gray's motion to reconsider, stated that Gray had:

> (1) clear notice of all the underlying retaliatory acts; (2) an express dispute as to whether the acts should be considered

> individually or cumulatively; and (3) an express dispute as to whether Rheeder had stated a claim for retaliatory hostile work environment.
> (App. 835.)

The District Court went on to state that while amendment was unnecessary, "for purposes of clarity, Rheeder should be and is granted leave to file an amended petition specifying that she is pleading alternative theories under Count III. For the reasons mentioned, the Court is not persuaded that permitting Rheeder to file an amended petition would be unfairly prejudicial to Gray." (App. 835.)

Under Iowa's notice pleading rules, Rheeder was certainly not expressly required to state in her Petition that the cumulative impact of Gray's actions should be considered in order to determine if they were materially adverse.

> Our rules, and the cases under them, evidence a liberal view of pleading [and] requires only that a petition include a short and plain statement of the claim showing that the pleader is entitled to relief. This rule has been interpreted to turn on the reasonableness of the notice conveyed by the petition. The rule does not require the identification of a specific theory of recovery if it advises the defendant of the incident out of which the claim arises and gives fair notice of the general nature of the claim.
> *Davis v. Ottumwa Young Men's Christian Ass'n*, 438 N.W.2d 10, 13 (Iowa 1989).

The Petition details Defendants' conduct giving rise to Rheeder's claim. (App. 19–20 at ¶¶ 23–24, 27.) The Petition also advises Defendants

that Rheeder's claim is brought pursuant to Iowa Code § 216.11, the provision of the ICRA prohibiting retaliation, and identifies the conduct that Rheeder asserts is retaliatory. (App. 23 at ¶¶ 43–44.) Gray had ample notice of Rheeder's claim against Gray and moved for summary judgment on that claim.

The District Court's decision to allow an amendment for "purposes of clarity" should not be overturned. "This rule instructs district courts to freely grant leave to amend when required by the interests of justice. Generally, a party may amend a pleading at any time before a decision is rendered, even after the close of the presentation of the evidence." *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 767 (Iowa 2002) (citations omitted).

Additionally, the District Court has broad discretion in granting leave to amend. "A decision granting leave to amend to conform to the proof rests in the sound discretion of the trial court, reversible on appeal only when a clear abuse of discretion is established. Abuse may be demonstrated by proof that the court's decision rested on clearly untenable or unreasonable grounds." *Scott v. Grinnell Mut. Reinsurance Co.*, 653 N.W.2d 556, 561 (Iowa 2002).

V. THE DISTRICT COURT CORRECTLY CONCLUDED THAT WHETHER DEFENDANTS' POST-COMPLAINT CONDUCT TOWARDS RHEEDER COULD DISSUADE A REASONABLE EMPLOYEE FROM MAKING A COMPLAINT OF HARASSMENT WAS A QUESTION TO BE RESOLVED BY THE JURY

This Court should review the District Court's determination that there are factual disputes precluding summary judgment as to whether McHale and Gray's conduct towards Rheeder is a material adverse action giving rise to claim of retaliation for errors at law. *Red Giant*, 528 N.W.2d at 528. The evidence needs to be viewed in the light most favorable to Rheeder with all reasonable inferences made in her favor. *Slaughter v. Des Moines Univ. Coll. Of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019) (citation omitted). It is undisputed that the District Court correctly applied the law in this case.

The District Court stated, "the standard is 'that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (App. 708–709 citing to *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61 (2006)). The District Court correctly recited that the Iowa Supreme Court had adopted the *Burlington Northern* standard for materially adverse action in *Haskenhoff.* (App. 709.) In applying the law to the facts of this case, the District Court stated as to Gray:

> The Court holds that the incidents on January 23 and 24, if true, would be individually actionable. …, a jury could objectively find that Gray's alleged actions would dissuade a reasonable person from reporting complaints of discrimination or harassment. The issue of credibility is for the jury to decide.
> (App. 717.)

The District Court went on to state as to McHale:

> The question is whether the written document issued to Rheeder by Hartwig, acting on behalf of McHale, amounts to an adverse employment action under the *Burlington Northern* standard. As stated above, Rheeder views this document as a retaliatory written warning, and Defendants describe it as a non-disciplinary training memorandum. The document was indisputably issued within the scope of employment and on its face conveyed it was an official act sanctioned by the MPD and the City. It further provided an explicit warning of the possibility of disciplinary measures. Reviewing the record, the Court finds that Rheeder has created a genuine issue of material fact regarding whether the circumstances surrounding the issuance of the document would dissuade a reasonable person from making future complaints. Determination of this issue is a question of fact best left to the jury.
> (App. 717.)

Defendants repeatedly argue that these acts of retaliation must be considered separately but the District Court held that the above acts, even when considered separately, generate a jury question on the issue. The District Court also found that, consistent with *Godfrey*, the jury will be tasked with determining whether the above acts taken together created a hostile work environment, which can also be a material adverse action. (App. 717 and *Godfrey v. State*, 962 N.W.2d 84, 110 (Iowa 2021) (citations omitted) ("[a]

plaintiff may bring a special type of retaliation claim based on a hostile work environment by alleging a series of individual acts that may not be actionable on their own but become actionable due to their cumulative effect.")).

Contrary to Defendants' claims, there are not bright-line rules about what conduct is and is not materially adverse and instead the District Court is charged with considering the totality of the circumstances and determining whether a reasonable jury could conclude Gray and McHale's conduct would dissuade a reasonable worker from making a complaint of sexual harassment. *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 587 (Iowa 2017).

Gray's description of her conduct as simply placing her hands on Rheeder's shoulders is a misrepresentation of the facts of this case. In the first instance, Gray grabbed Rheeder, held her in place and made several offensive comments blaming Rheeder for being victimized by Slagle and chastising her for making a complaint. In the second instance, Gray cornered Rheeder, threatened to "get" her and her friends and continued making offensive comments towards Rheeder including warning her to never speak of the harassment again. Multiple witnesses saw that Rheeder was visibly scared by Gray. Rheeder continued to be scared by Gray months later when she was interviewed by Haas. A reasonable jury could find that this conduct would

dissuade an employee from making a complaint. Furthermore, a reasonable jury could consider each of these instances separately and conclude that either one of them, alone, satisfies the standard.

Similarly, there is a dispute of fact regarding the written warning issued to Rheeder. Defendants cannot simply characterize it as a training memo and avoid liability. The entire circumstances should be considered, including that disciplinary action was threatened, the victim of the harassment was blamed for the harassment in writing, that Rheeder's complaint had not even been investigated and the warning came from the chief of police. This is an issue to be resolved by the jury.

Gray's claim that a reasonable jury could not conclude that Gray's actions were materially adverse are undermined by the fact that both the attorney investigator retained by the City and the City's own human resources manager found in their investigation that Gray's conduct was materially adverse because it could dissuade a reasonable employee from making a complaint of harassment.

The District Court's conclusion that a fact dispute exists and should be resolved by the jury should not be overturned on interlocutory appeal. "Because of its contextual nature, whether a particular adverse action satisfies

the materiality threshold is generally a jury question in retaliation cases." *Godfrey v. State*, 962 N.W.2d 84, 134 (Iowa 2021) (citations omitted).

Defendants repeatedly misstate the record in this case claiming that their actions did not dissuade Rheeder from making a complaint. Once McHale issued a written warning to Rheeder and Gray assaulted and threatened Rheeder, Plaintiff never told another person about the harassment that she suffered or Gray's actions toward her. Months later the Marion Fire Chief reported the sexual harassment because she was concerned that it had been "swept under the rug." Rheeder then responded to the inquiries of the attorney investigator who noted that Rheeder "expressed sincere concern about me speaking with Gray about the incident because Rheeder was fearful of what Gray might do, or that Gray might think it was Rheeder who had initiated this investigation." Regardless, as the District Court correctly noted, the test of materiality is objective. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) ("We refer to reactions of a reasonable employee because we believe that the provision's standard for judging harm must be objective.").

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little

> difference to many workers, but may matter enormously to a young mother with school-age children."
> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006).

Defendants' actions in this case were not trivial harms and the District Court correctly concluded that the issue of materiality should be resolved by the jury. "Because of its contextual nature, whether a particular adverse action satisfies the materiality threshold is generally a jury question in retaliation cases." *Godfrey v. State*, 962 N.W.2d 84, 134 (Iowa 2021) (citations omitted).

VI. THE DISTRICT COURT CORRECTLY CONCLUDED THAT GRAY AND MCHALE COMMITTED THE RETALIATORY ACTS GENERATING RHEEDER'S CLAIM AND THEREFORE COULD BE PERSONALLY LIABLE FOR RETALIATION UNDER APPLICABLE PRECEDENT

The standard of review for the District Court's conclusion that Gray and McHale can be individually liable for retaliatory acts is reviewed for correction of errors at law. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995).

The Iowa Supreme Court has been abundantly clear regarding the standard for individual liability for prohibited retaliation under the Iowa Civil Rights Act. So much so that Defendants can only bring themselves to characterize their argument on appeal as an attempt to "harmonize" a "perceived tension." As detailed above, since 2017, Iowa has recognized that retaliatory acts generating a claim under the ICRA include non-employment

actions if they are materially adverse, meaning they would dissuade a reasonable employee from making a complaint of harassment or discrimination. *Haskenhoff*, 897 N.W.2d at 588.

In *Rumsey v. Woodgrain Millwork, Inc.*, 962 N.W.2d 9 (Iowa 2021) the Court confirmed that individuals and not just employers can be liable for retaliation if they violate Iowa Code § 216.11 stating, "[T]he Iowa general assembly's 'use of the words 'person' and 'employer' in section 216.6(1), and throughout the chapter, indicates a clear intent to hold a 'person' subject to liability separately and apart from the liability imposed on an 'employer.'" *Id*. at 34.

The parties dispute whether McHale and Gray were Rheeder's supervisor, but resolution of this issue is unnecessary because the Court unequivocally stated in *Rumsey*, "We reject the defendants' attempt to limit individual liability to supervisors. The 'any person' language is not limited by title. While a supervisor may have the ability to alter the terms of a subordinate's employment, that is neither sufficient **nor necessary** to create liability." *Id*. at 35. The Court went on to state, "[w]ith respect to the retaliation claim, the individuals … must have engaged in retaliatory conduct, in response to the plaintiff's protected activity, that materially and adversely

injured or harmed the plaintiff." *Id*. at 35 (citing to *Haskenhoff*) (emphasis supplied). The question raised on appeal by Defendants has been answered.

Vroegh v. Iowa Dep't of Corr., 972 N.W.2d 686 (Iowa 2022) does not create the ambiguity argued by Defendants. In *Vroegh*, the claim was prohibited discrimination under Iowa Code § 216.6. The Defendants recognize that a materially adverse action giving rise to a discrimination claim is different from a materially adverse action giving rise to a retaliation claim. Gray Proof Brief p. 20.

Gray and McHale committed the acts giving rise to Rheeder's retaliation claim and if the jury determines those acts were materially adverse, Gray and McHale can be held individually liable.

CONCLUSION

For the above reasons, Plaintiff-Appellee, Valerie Rheeder, respectfully requests that Defendants' appeals be denied and that this case be remanded to the District Court for trial.

REQUEST FOR ORAL ARGUMENT

Pursuant to Iowa R. App. P. 6.903(2)(i) and Rule 6.908, Plaintiff-Appellee respectfully requests that the Court set this matter for oral argument.

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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 16,211 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the typestyle requirements of Iowa R. App. P. 6.903(1)(f) because This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14.

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STATEMENT OF COSTS

The undersigned certifies that the cost for printing and duplicating paper copies of this brief was $0.00.

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 26, 2024, I filed this Brief with the Clerk of the Supreme Court using the EDMS system which will serve a notice of electronic filing to all registered counsel of record pursuant to Iowa R. App. P. 6.702(2).

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