ELECTRONICALLY FILED JAN 30, 2024 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
No. 23-0605

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
SUMMARY JUDGMENT ORDER DATED JANUARY 20, 2023
AND ORDER DATED APRIL 18, 2023

THE HONORABLE VALERIE CLAY,
DISTRICT COURT JUDGE

DEFENDANT-APPELLANT CITY OF MARION'S AND JOSEPH MCHALE'S BRIEF

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ROUTING STATEMENT

This case involves substantial issues of first impression and fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(c)-(d) (2023). While some of the issues include claims of established Iowa law, like the issues of the admissibility of certain evidence, application of the *Faragher-Ellerth* affirmative defense, and the liabilities of the defendants for alleged retaliation, other issues have not yet been addressed by this Court. These latter issues include application of a purported retaliatory hostile work environment claim, which has not yet been recognized in Iowa by this Court. Recognition of a retaliatory hostile work environment claim would be a change to established law in Iowa and an issue of first impression. Further, this new claim would have broad public importance as employment law matters like this one touch the lives of every employee and employer. For these reasons, and pursuant to the guidelines of Iowa Rule of Appellate Procedure 6.1101, the Court should retain this case.

STATEMENT OF THE CASE

The Appellee-Plaintiff, Valerie Rheeder ("Ms. Rheeder") filed a petition in Linn County District Court against Appellant-Defendants City of Marion ("the City"), Douglas Slagle ("Mr. Slagle") and Shellene Gray ("Ms.

Gray"), which she amended January 21, 2020 in order to add Defendant Joseph McHale ("Mr. McHale"). (Hereinafter collectively "the Defendants.") (App. 4-12; 15-24.) The undersigned represents the City and Mr. McHale. (App. 13-14; 38.)

Ms. Rheeder's Amended Petition asserts claims of sexual harassment, on both the theory of vicarious liability and negligence, retaliation, and constructive discharge against the Defendants during a period of her employment in January through May 2019. (App. 15-24.) All Defendants deny these claims. (App. 25-37; 39-47; 48-34.) The City and Mr. McHale asserted in their Answer to Amended Petition, January 23, 2020, the *Faragher-Ellerth* affirmative defenses. (App. 46.)

On September 30, 2023, Defendants moved for summary judgment on all claims. (App. 65-70.) On January 20, 2023, the District Court issued a ruling denying Defendants motions for summary judgment on all grounds except Ms. Rheeder's claims of constructive discharge. (App. 691-723.) Inexplicably, the District Court found the Defendants had established that Ms. Rheeder had failed to assert any genuine issues of material fact supporting her claim for constructive discharge, while at the same time finding Ms. Rheeder had asserted genuine issues of material fact establishing that her resignation could be an adverse employment action. (App. 722.) In denying Defendants'

motions for summary judgment on Ms. Rheeder's sexual harassment and retaliation claims, the District Court relied on inadmissible evidence; found that the City failed to establish the *Faragher-Ellerth* defense; found the City failed to take remedial measures that ended the alleged harassment within a reasonable time; found that a "training memo" could be an adverse employment action establishing a viable retaliation claim; and found that the City could be vicariously liable for discrete acts of allegedly retaliatory conduct by individuals. Each of these findings is unsupported by the undisputed record and/or erroneous as a matter of law.

The January 20, 2023 Ruling also erroneously held the City had not moved for summary judgment on Ms. Rheeder's sexual harassment claim on the theory of negligence. (App. 691-723.) However, the City filed an additional motion for summary judgment explicitly moving on Ms. Rheeder's sexual harassment claim on the theory of negligence on January 30, 2023. (App. 724-725.)

All Defendants filed Rule 1.904(2) Motions on February 6 and 8, 2023. (App. 760-785.) On April 3, 2023, the District Court issued an order denying the City's Motion for Summary Judgment on Ms. Rheeder's sexual harassment claim on the theory of negligence and all of Defendants' 1.904(2) motions. (App. 827-840). In the April 3, 2023 Ruling, the Court also sua

sponte granted Ms. Rheeder leave to file an amended petition to file an additional claim for a retaliatory hostile work environment claim eight weeks before trial. (App. 839.)

All Defendants timely filed Applications for Interlocutory Appeal requesting review of the District Court's January 20 and April 3, 2023 Orders. On May 16, 2023, the District Court granted Defendants' Renewed Motion for Stay of Proceedings Pending Interlocutory Appeal. (App. 1021-1022.)

Although a single Justice denied the Application for Interlocutory Appeal on September 1, 2023, upon motion for Reconsideration filed September 13, 2023, a panel of Justices granted the City and Mr. McHale's Application for Interlocutory Appeal on September 28, 2023. (App. 1033-1035.)

STATEMENT OF THE FACTS

The **City** employed the parties in this matter. (App. 726.) The City employed **Joseph McHale** as police chief from December 2016 through May 2019. (App. 726.) **Jeff Hartwig** is a sergeant with the Marion Police Department. In 2019, Sergeant Hartwig was assigned to the Office of Professional Standards. (App. 729.) The City employed **Shellene Gray** from 1997 until 2020. Ms. Gray worked in administrative positions in the Police Department that entire time. (App. 728.) Ms. Gray approved and denied Ms.

Rheeder's time off requests. (App. 728.) From 2018-2020 Ms. Gray directly supervised Mr. Kula in her role as Administrative Manager. (App. 728.) The City hired **Douglas Slagle** as a police officer in March 1992. (App. 728.) Mr. Slagle resigned as the deputy police chief on May 3, 2019 effective July 5, 2019. (App. 729.) **Michael Kula** was a custodian for the City's Police Department. (App. 727.)

Lon Pluckhahn was the City Manager for the City (the chief operating officer). (App. 727.) **Jennifer Ketelsen** worked for the City in Human Resources. (App. 729.)

The Plaintiff, **Valerie Rheeder**, worked as a part-time custodian in the police department from August 6, 2018 through August 31, 2019. (App. 727.)

Frances Haas is an attorney hired by the City to do an independent, external investigation in April 2019. (App. 729.)

The City and the Police Department had sexual harassment policies at the time of Ms. Rheeder's complaint. (App. 730.) During Chief McHale's tenure Marion Police Department conducted sexual harassment training for its employees. (App. 730.) Mr. Kula was Ms. Rheeder's supervisor. (App. 727.)

In October 2018, Ms. Rheeder and Mr. Slagle exchanged phone numbers. (App. 730.) Ms. Rheeder generally found Mr. Slagle interesting and enjoyed talking with Mr. Slagle about deep subjects. (App. 731.)

Around January 7 or 8, 2019, Ms. Rheeder alleges that Mr. Slagle told her that he thought about her often and wanted to communicate with her. (App. 731.) He allegedly asked her to tell him what she wanted to do with him, and he would tell her what he wanted to do to her and asked her to send him a picture of her smiling face. (App. 731.) This is the first time Ms. Rheeder perceived there were interactions of a sexual nature between her and Mr. Slagle. (App. 732.)

On January 9, 2019, Mr. Slagle initiated a text exchange with Ms. Rheeder. (App. 732.) The messages from January 9, 2019, were as follows:

Sender	**Time**	**Message Content**
Slagle	9:31 a.m.	Hey you! Haven't seen you today!
Rheeder	9:32 a.m.	[emoji of smiling sun]
Slagle	9:35 a.m.	I better see you. You are no stranger, at least I don't want you to be.
Rheeder	9:36 a.m.	Hi! I have to keep my stranger title [emoji sideways smile] lol. Jokes.
Slagle	9:36 a.m.	I will be a stranger to you?
Rheeder	9:36 a.m.	Will check in.
Slagle	9:37 a.m.	Haha-let's go with special and amazing.
Rheeder	9:38 a.m.	U will.
Slagle	9:38 a.m.	Yes. Amazing. Simply. Naturally.
Rheeder	9:38 a.m.	Ok. I will work on stranger think. Maybe just "strange"? [emoji sideways smile]
		No. I certainly hope not!

	9:39 a.m.	Lol. Ok. Yes. That does sound better. But really?!
Slagle	9:40 a.m.	I will take it!
Rheeder	9:43 a.m.	Ooooooo. Thank you Doug! I will give you a fist bump for that one [emoji of smiley face and fist bump]
		Now I know why you make me nervous. Brilliant.
Slagle	9:57 a.m.	Well…….
	10:11 a.m.	Ok. I shall be waiting…….
	10:12 a.m.	Deal
Rheeder	10:13 a.m.	[emoji of smiling sun]
		I need to mop some floors….
		Then….
		I will make my first attempt
		[emoji of smiling face]
Slagle	11:39 a.m.	Still waiting
		Yes.
	11:40 a.m.	Please share
Rheeder	11:40 a.m.	[smiling sun emoji]
Slagle	11:40 a.m.	[emoji of tongue sticking out and winking face]
		Then...
Rheeder	11:41 a.m.	Question….if it takes me a dew text messages….
		Few
	11:42 a.m.	Okay [sideways smiling emoji face]
Slagle	11:43 a.m.	Yes. Why
Rheeder	11:43 a.m.	[smiling face emoji]
Slagle	11:43 a.m.	Oh boy
Rheeder	11:43 a.m.	Ok.
		So why does Doug cause me to feel nervous? [thinking emoji face]
Slagle	11:45 a.m.	I get that. I understand.
		Ok. Want to talk in person more?
Rheeder	11:45 a.m.	Well….this is multi-sided
Slagle	11:45 a.m.	Next
		What's next
		Anytime
		Name it
	11:46 a.m.	Or you can share now
		Ok. So……

Rheeder	11:47 a.m.	You are deputy Chief of Police Department. I know you don't mean to be intimidating ….but it just is.
		Lol.
		Gosh this would [sic] be easier in a conversation!
Slagle	11:47 a.m.	See me tomorrow and we will figure out when and where you want to meet
		Think of what is best for you. When and where
Rheeder	11:47 a.m.	Ok. So point one covered [smiling face emoji]
Slagle	11:47 a.m.	Deal?!
Rheeder	11:47 a.m.	Yes please
Slagle	11:47 a.m.	Ok. Alone? At work?
	11:48 a.m.	When and where
Rheeder	11:48 a.m.	Really?
Slagle	11:48 a.m.	See you tomorrow!
Rheeder	11:48 a.m.	Well…i do not wish to leave you with incomplete answer…
		But it would be easier.
		So when can I chat with Doug?
Slagle	11:49 a.m.	[smiling emoji with heart eyes]
Rheeder	11:49 a.m.	Ok
		Deal….we will chat.
	11:50 a.m.	Sorry bad word
		Ok. We figure out what is best time.
		Yes. See you tomorrow!
		[three smiling sun emoji]

(App. 732-733.) These text messages were the entirety of the January 9, 2022, communications between Mr. Slagle and Ms. Rheeder. (App. 734.)

On January 10, 2022, the text messages resumed as follows:

Slagle	10:15 a.m.	Share
Rheeder	10:16 a.m.	I very much want to
		BUT I need to ask u some questions
		What does your afternoon lool [sic] like
		Look
Slagle	10:17 a.m.	Share

		Tell me one thing u want to do with me
Rheeder	10:17 a.m.	Lol
		Nope
		[smiling face emoji]
Slagle	10:17 a.m.	What time are you thinking and where
Rheeder	10:18 a.m.	I will be busy till 1:15…
		Then against form 3-3:15…
		Library
		Park
Slagle	10:19 a.m.	I have a 2:30 meeting
Rheeder	10:20 a.m.	So 1:15 or 1:30?
Slagle	10:20 a.m.	I have a 1-pm meeting also today
		How about next week
Rheeder	10:20 a.m.	As u wish
Slagle	10:21 a.m.	I wish u tell me. Give me something then I will know if what I want is what u want
Rheeder	10:22 a.m.	Then u tell me something
Slagle	10:23 a.m.	Yes
Rheeder	10:23 a.m.	U tell me something first
		[smiley face emoji]
Slagle	10:24 a.m.	No. U first
Rheeder	10:25 a.m.	Doug…I know little about you…only ehat [sic] i see here
	10:26 a.m.	Sorry about my typos
	10:27 a.m.	I can say that I am not like most people.
Slagle	10:47 a.m.	What does that mean. Please share
Rheeder	10:53 a.m.	Good question [indecipherable emoji]
Slagle	10:54 a.m.	And….
Rheeder	10:54 a.m.	Oh gosh. How long is you meeting
Slagle	10:54 a.m.	Give me something……like what
Rheeder	10:55 a.m.	I am not flippant
		I am not easy
		Two things [smiling face emoji]
Slagle	10:56 a.m.	Not easy?
Rheeder	11:03 a.m.	Lol. That word can go so many ways.
Slagle	11:03 a.m.	So. Please explain
		So I don't think bad things
Rheeder	11:03 a.m.	Pls don't think bad things about me.
		Are u at city hall?

Slagle	11:04 a.m.	Yes
Rheeder	11:04 a.m.	Are you finishing up?
Slagle	11:05 a.m.	Soon. Why
Rheeder	11:06 a.m.	O a
Slagle	11:06 a.m.	Share which bad are u
Rheeder	11:06 a.m.	Ops
		I am the good bad
Slagle	11:06 a.m.	What's that
Rheeder	11:07 a.m.	I don't think u want that
Slagle	11:07 a.m.	I want you as you are
Rheeder	11:07 a.m.	But i am not bad
Slagle	11:08 a.m.	Ok. I enjoy u
		Got to go. Find me tomorrow
Rheeder	11:09 a.m.	Mmm. ok.
	11:16 a.m.	I will find my words
Slagle	11:17 a.m.	I hope so!!!!
Rheeder	11:17 a.m.	If you have a few moments at work…..then i give you the words….
		[smiling face emoji]
Slagle	11:17 a.m.	Yes. Find me tomorrow please. I enjoy you!
Rheeder	11:18 a.m.	Ok. I will. But please tell me if timing bad.
Slagle	11:19 a.m.	I shall & never
Rheeder	11:20 a.m.	Like the way you said that [smiling face emoji]
Slagle	11:23 a.m.	True

(App. 734-735.) These text messages were the entirety of the January 10, 2022, communications between Mr. Slagle and Ms. Rheeder. (App. 735.)

On January 11, 2022, the text messages resumed as follows:

Rheeder	8:32 a.m.	Good morning. Are u in meetings all morning?
Slagle	8:33 a.m.	I am in my office awaiting your friendly smile
Rheeder	8:39 a.m.	Lol. Ok. In a bit
Slagle	8:40 a.m.	Ok

(App. 735-736.) After those initial January 11, 2022 text messages and sometime between 8:40 a.m. and 9:40 a.m. Ms. Rheeder went to Mr. Slagle's

office to meet with him. (App. 736.) Ms. Rheeder alleges that she communicated to Mr. Slagle her impression that Mr. Slagle was proposing something that "could ruin [their] lives" and she did not want to have a romantic relationship with him. (App. 736.) According to Ms. Rheeder, Mr. Slagle replied that he was happily married and wanted to be friends. (App. 736.) Both Ms. Rheeder and Mr. Slagle agreed that Mr. Slagle apologized to Ms. Rheeder repeatedly. (App. 736.) Ms. Rheeder reported to her counselor that "[Mr. Slagle] said [Ms. Rheeder] was right he shouldn't have hurt her like that" and that she felt "very strong after standing up to the officer." (App. 737.)

At 9:40 a.m. on January 11, 2022, the text communication between Mr. Slagle and Ms. Rheeder resumed and affirmed the parties wanted to be friends. (App. 737-738.) This is the final text exchange between Mr. Slagle and Ms. Rheeder. (App. 738.)

Sometime during the week of January 14-18, 2019, Ms. Rheeder alleges that Mr. Slagle shook Ms. Rheeder's hand, leaned in, and put his right cheek against her cheek. (App. 739.) This was the last alleged physical contact Ms. Rheeder ever had with Mr. Slagle. (App. 739.) Ms. Rheeder does not know if she forgot or simply did not share this event with the subsequent

investigator, but the event does not appear in the thirty-six-page investigation report. (App. 739.)

On January 17, 2019, Ms. Rheeder met with Mr. Slagle in person and said she was still uncomfortable and wanted to make sure that he understood that she did not like what he said to her and what he was doing. (App. 739.)

Ms. Rheeder reported a complaint about Mr. Slagle to the Marion Police Department's Office of Professional Standards by and through Sergeant Hartwig on January 18, 2019. (App. 740.) Ms. Rheeder felt Mr. Slagle was "sexually proposing something to her." (App. 740.) Ms. Rheeder did not use the words sexual harassment when she reported concerns about Mr. Slagle to Sergeant Hartwig. (App. 740.)

Sergeant Hartwig immediately took Ms. Rheeder's complaint to Chief McHale. (App. 740.) Sergeant Hartwig called Ms. Rheeder on the afternoon of January 18, 2019, and told her he had spoken with Chief McHale and that they would meet with her about her complaint on Monday, January 21, 2019. (App. 740.)

The following Monday, January 21, 2019, Chief McHale and Sergeant Hartwig met with Ms. Rheeder. (App. 740.) Ms. Rheeder admits that she told Chief McHale and Sergeant Hartwig that she was concerned about getting Mr. Slagle into trouble. (App. 740-741.)

Following the meeting, Chief McHale performed an "informal inquiry" pursuant to Iowa Code section 80F.1. (App. 741.) Chief McHale was the assigned investigator to the informal inquiry. (App. 741.) Chief McHale assigned some of the fact gathering duties to Sergeant Hartwig. (App. 741.) Chief McHale had a conversation with Mr. Slagle about Ms. Rheeder's complaint as part of the investigation. (App. 741.) Sergeant Hartwig completed fact gathering with Ms. Rheeder. (App. 741.) Ms. Rheeder admits that Sergeant Hartwig did not cut Ms. Rheeder off from reporting what she wanted to report, that he took pictures of her text messages, and that she gave him notes. (App. 741.)

After meeting with Ms. Rheeder, Chief McHale prepared the recommendation and summary of the investigation. (App. 741.) Chief McHale reviewed the materials Sergeant Hartwig gathered as part of his fact gathering for the investigation. (App. 741.) Chief McHale did not find Mr. Slagle engaged in sexual harassment. (App. 741.) Chief McHale characterized the interactions as very "grade school-ish" on both parties' sides with innuendo back and forth between two adults. (App. 742.) Ms. Rheeder admits that her communications like "LOL" and smiley faces could give the impression that she wanted to participate in the conversation with Mr. Slagle. (App. 742.)

Chief McHale determined that the appropriate remedial measure to prevent these interactions between Ms. Rheeder and Mr. Slagle from occurring again was counseling and training for both employees. (App. 742.) On January 21, 2019, Chief McHale verbally directed Mr. Slagle to have no further contact with Ms. Rheeder unless it was in the performance of her duties in a situation that was not being managed by her direct supervisor. (App. 742.) Mr. Slagle also received a January 22, 2019 training memo issued by Chief McHale stating that Ms. Rheeder's complaint was not substantiated and that the two should have no further communication outside the performance of their official duties. (App. 742-743.)

On January 22, 2019, Sergeant Hartwig issued a training memo to Ms. Rheeder advising her that her sexual harassment complaint was unsubstantiated and that she and Mr. Slagle should have no further communication or contact outside the performance of each of their official duties. (App. 742).

Following January 17, 2022, and Chief McHale's prompt remedial measures, Ms. Rheeder admits that the conduct she perceived to be harassing, stopped. (App. 743.)

Ms. Rheeder alleges that the first instance of retaliation she experienced occurred on January 23, 2019, when she was inside cleaning the front lobby

area of the building while other police officers were shoveling the sidewalks outside. (App. 743.) Ms. Rheeder alleges Ms. Gray said shoveling was her job and that she needed to prioritize clearing the snow and Ms. Rheeder agreed. (App. 744.)

Ms. Rheeder alleges that Ms. Gray then asked to talk to her by the elevator in the front lobby and Ms. Rheeder agreed. (App. 744.) Ms. Rheeder alleges Ms. Gray then placed her hands on her shoulders and said that Ms. Rheeder should have come to her about Mr. Slagle, that she was the last to know about the complaint, that it should not have been that way, and that Chief McHale was upset with Ms. Gray because Ms. Gray did not handle the complaint. (App. 744.) Ms. Rheeder further alleges that Ms. Gray removed her hands from her shoulders and told Ms. Rheeder that Ms. Rheeder was there to work, not to "speak to people," to which Ms. Rheeder replied, "that will make a very dry workplace." (App. 744.) Ms. Rheeder additionally alleges that Ms. Gray told her that she is never to speak about "this" again and walked away. (App. 744.)

This is the retaliation Ms. Rheeder alleges occurred on January 23, 2019. (App. 745.)

Ms. Rheeder alleges a second instance of retaliation on January 24, 2019 when Ms. Gray stated she needed to talk with her while she cleaned the

Chief's office. (App. 745.) Ms. Rheeder alleges that Ms. Gray asked her who she told in the Police Department about her sexual harassment complaint. (App. 745.)

Ms. Rheeder disclosed that she had told Mr. Kula, and two female employees (Renee Fenchel and Judy Ward). (App. 745.) Ms. Rheeder alleges Ms. Gray then stated that when Ms. Rheeder's sexual harassment complaint "gets out" she will know who to come after and that if anyone speaks, she "will get them." (App. 745.)

Ms. Rheeder did not try to leave during this conversation. (App. 745.) Ms. Gray did not touch Ms. Rheeder during this conversation. (App. 745.)

After this, none of the identified employees experienced any change in pay, benefits, or any other changes to their jobs. (App. 746.)

Mr. Kula claims Ms. Gray told him not to speak about Ms. Rheeder's complaint but that did not stop Mr. Kula from talking about the complaint with others, including Ms. Haas. (App. 746).

Ms. Rheeder admits she did not experience a change in pay or benefits, a change in hours, a worse job assignment, or any denials of her time off requests following her sexual harassment complaint in January 2019, even though Ms. Rheeder had to submit time off requests to Ms. Gray. (App. 746.) Ms. Gray's alleged direction not to speak about the complaint also did not

dissuade Ms. Rheeder from speaking about her complaint with multiple employees in the Police Department and to Ms. Haas. (App. 746-747.)

Between January 25, 2019, and April 2019, Ms. Rheeder was worried about what ***might*** happen with Mr. Slagle, Ms. Gray, Chief McHale, and anyone else that was an officer of some rank that did not like that she made a complaint. (App. 747.) However, Ms. Rheeder admits that no member of command staff did or said anything during that time that made her feel threatened or insecure in the workplace. (App. 747.)

In late March or early April 2019, the Marion Fire Chief told Mr. Pluckhahn that she had concerns about ongoing sexual harassment in the Police Department. (App. 747.) Upon receipt of the concerns, Mr. Pluckhahn conferred with Ms. Ketelsen. (App. 747.) Mr. Pluckhahn and Ms. Ketelsen reviewed the January 2019 investigation file and determined they would move forward with a new investigation. (App. 747.)

The City hired Ms. Haas to perform an independent, external investigation (the "April 2019 Investigation"). (App. 747.) Ms. Haas conducted the April 2019 investigation, which included interviewing Ms. Rheeder, Mr. Slagle, Ms. Gray, Mr. Kula and reviewing various text messages and documents. (App. 748.) Ms. Rheeder admits that Ms. Haas allowed her a full opportunity to report her concerns with Mr. Slagle and Ms. Gray's

behavior and even asked her if there was anything additional she wanted to share. (App. 748.) Ms. Rheeder was placed on a paid leave during the investigation at her request. (App. 749.)

Ms. Haas issued a report to the City on April 24, 2019. (App. 748.) Ms. Haas's report substantiated Ms. Rheeder's complaint against Mr. Slagle as a violation of City policy, but concluded the harassing conduct stopped on January 11, 2019. (App. 748.) Ms. Haas found that Ms. Rheeder experienced retaliation by Ms. Gray in January 2019. (App. 748.) But Ms. Rheeder was not dissuaded from reporting her claims to multiple co-workers, and Ms. Ketelsen, or Ms. Haas after January 24, 2019. (App. 749.)

Following the April 2019 investigation, Ms. Rheeder returned to work on May 6, 2019, but was told she reported to Mr. Kula, not Ms. Gray. (App. 751.)

On May 9, 2022, Ms. Gray asked Ms. Rheeder to attend a meeting with her and Mr. McHale. (App. 751.) During the meeting, Mr. McHale told Ms. Rheeder that Mr. Slagle no longer worked for the City, that she should feel safe and welcome, and he asked if she had any questions. (App. 752.) Ms. Rheeder told Mr. McHale that she was not comfortable working with Ms. Gray. (App. 752.) Immediately upon that statement Mr. McHale told Ms. Rheeder she did not have to work with Ms. Gray anymore. (App. 752.) Ms.

Rheeder admits she was not dissuaded from telling then Chief McHale, in front of Ms. Gray, that she was not comfortable working with Ms. Gray. (App. 752.) Ms. Rheeder did not experience a change in pay, benefits or hours after this meeting. (App. 752.)

Ms. Rheeder alleges retaliation as follows: On May 6 or 7, 2019, Ms. Gray came into the kitchen breakroom to fill her water bottle. (App 753.) On May 13, 2019, Ms. Rheeder was vacuuming near the second-floor elevator at the Police Department. (App. 753.) Ms. Rheeder alleges that while she was vacuuming, Ms. Gray walked through the area twice, once she claims Ms. Gray was "walking straight at [her]" and Ms. Rheeder speculated that if she had not moved, Ms. Gray would have walked into her. (App. 753-754.) Ms. Rheeder admits that Ms. Gray did not walk into her. (App. 754.) Later, Ms. Rheeder described to Mr. Kula that she was uncomfortable with Ms. Gray passing her. (App. 754.) However, Ms. Rheeder worked her shifts on May 13, 14, and 15, 2019. (App. 753.)

On May 17, 2019, Ms. Rheeder contacted Ms. Ketelsen and alleged she was continuing to have issues with Ms. Gray. (App. 754.) That same day, Ms. Ketelsen authorized Ms. Rheeder to take more time off. (App. 754.)

Ms. Rheeder submitted a complaint to the City on May 20, 2019, about the incidents previously investigated by Ms. Haas and the alleged May 13,

2019 incident. (App. 754.) The City authorized Ms. Rheeder to take paid administrative leave until the conclusion of the investigation. (App. 755.)

Ms. Ketelsen and Mr. Pluckhahn investigated Ms. Rheeder's May 20, 2019 complaint (the "May 2019 Investigation".) (App. 755.) Ms. Rheeder admitted she had a full and fair opportunity to respond to questions during her interview and had Mr. Kula attend. (App. 755.)

On June 4, 2019, Ms. Ketelsen sent Ms. Rheeder a letter that she had received her complaint, investigated it, and concluded the retaliation complaint was not substantiated. (App. 755.) Ms. Ketelsen assured Ms. Rheeder that the City "respects [her] concerns and has taken steps to address them." (App. 755.) Ms. Ketelsen encouraged Ms. Rheeder to return to work and offered the chance to explore other employment with the City. (App. 755.)

On May 23, 2019, Ms. Rheeder's physician provided the City with documentation stating that Ms. Rheeder would be incapacitated due to a medical condition through June 30, 2019. (App. 756.) The City authorized an unpaid leave. (App. 756.)

On June 21, 2019, Ms. Ketelsen wrote to Ms. Rheeder, "[p]lease let us know if there is anything we can do to ensure that you have a safe/comfortable return to work. We will work with you as best we can." (App. 756.) Ms.

Rheeder's physician released her to work on August 1, 2019. (App. 756.) The City authorized the unpaid leave. (App. 756.)

On July 9, 2019, the City offered that Ms. Rheeder could return to work at another location if she preferred not to return to the Police Department. (App. 756). Ms. Rheeder was released to return to work on September 1, 2019. (App. 756). The City continued to authorize the unpaid leave. (App. 756).

Ms. Rheeder resigned her employment with the City through her attorney on August 21, 2019. (App. 756.) Ms. Rheeder has no evidence that they recommended she resign. (App. 757.)

STANDARD OF REVIEW

The City Defendants appeal the District Court's denial of their motions for summary judgment. The appellate court reviews district court summary judgment rulings for the correction of errors at law. *Cote v. Derby, Insurance Agency*, 908 N.W.2d 861, 864 (Iowa 2018) (internal citations omitted).

The City Defendants also appeal evidentiary findings made by the District Court in its January 20, 2023 and April 3, 2023 Rulings. The appellate court reviews evidentiary rulings by the district court for abuse of discretion and will "reverse the district court's admission as an abuse of discretion when the grounds of admission were 'clearly untenable or clearly unreasonable.'"

Kindig v. Newman, 966 N.W.2d. at 317 *citing State v. Donahue*, 957 N.W.2d 1, 6 (Iowa 2021).

Finally, the City Defendants appeal the District Court's sua sponte ruling allowing Ms. Rheeder to amend her petition to add a new claim eight weeks prior to the trial date. The appellate court reviews district court rulings on motions for leave to amend pleadings for abuse of discretion. *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 766 (Iowa 2002). While the District Court granted Ms. Rheeder leave to amend her petition sua sponte, the City Defendants contend the same standard of review applies. *See Kindig v. Newman*, 966 N.W.2d 310, 316 (Iowa 2021). This Court finds an "abuse of discretion when the court bases its decision on clearly untenable grounds or to the extent clearly unreasonable." *Rife*, 641 N.W.2d at 766 (citing *McElroy v. State*, 637 N.W.2d 488, 495 (Iowa 2001)); *Kindig*, 966 N.W.2d at 316.

ARGUMENT

I. THE IOWA DISTRICT COURT ERRED IN DENYING THE CITY DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. "[T]he burden of showing the lack of a genuine issue of material fact is on the moving party." *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 542 (Iowa

2006) (citing *Fischer v. UNIPAC Serv. Corp.*, 519 N.W.2d 793, 796 (Iowa 1994)). "A fact is material if it will affect the outcome of the suit, given the applicable law." *Parish*, 719 N.W.2d at 543. "An issue of fact is 'genuine' if the evidence is such that a reasonable finder of fact could return a verdict or decision for the nonmoving party." *Id.* (citing *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988)). The nonmoving party "must set forth specific facts showing the existence of a genuine issue for trial." *Hlubek v. Pelecky*, 701 N.W.2d 93, 95–96 (Iowa 2005). "Speculation is not sufficient to generate a genuine issue of fact." *Id.* (citing *Walls v. Jacob N. Printing Co.*, 618 N.W.2d 282, 284 (Iowa 2000)). Further, conclusory statements are insufficient to resist a motion for summary judgment. *See* Iowa R. Civ. P. 1.981(5); *Schulte v. Mauer*, 219 N.W.2d 496, 500–01 (Iowa 1974). "A factual issue does not arise simply from the claim that one exists." *Gilbride v. Trunnelle*, 620 N.W.2d 244, 252 (Iowa 2000) (citing *Humphries v. Methodist Episcopal Church*, 566 N.W.2d 869, 872–73 (Iowa 1997)).

"Summary judgment is not a dress rehearsal or practice run, it is the put up or shut up moment in a lawsuit, when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accept its version of events." *Feeback v. Swift Pork Co*., 988 N.W.2d 340, (Iowa 2023) (internal citations omitted.) In *Feeback*, this Court affirmed that a plaintiff's resistance

to a summary judgment motion must "*go beyond generalities*" with the purpose of weeding out paper cases and defenses in order to make way for litigation which does have something to it. *Id.* (emphasis supplied) (citing *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019)). As this Court's decision in *Feeback* supports, Ms. Rheeder's resistance to the City Appellants' motions for summary judgment failed to meet that burden, and instead relied on inadmissible generalities and rumors, from which the District Court erroneously found created a genuine issue of material fact, when denying summary judgment.

A. THE IOWA DISTRICT COURT ERRED BY RELYING ON INADMISSIBLE EVIDENCE TO DENY SUMMARY JUDGMENT ON MS. RHEEDER'S SEXUAL HARASSMENT CLAIMS.

The City (and Mr. Slagle) have argued that the District Court's reliance on inadmissible evidence, including decades old rumors and innuendo about Mr. Slagle's prior consensual relationships with persons who did not work with him, to deny summary judgment on the harassment claims against the City Defendants was an error. (App. 829.) Motions for summary judgment must be decided on admissible evidence. *Estate of Grove v. Clinic Building Co., Inc.*, 992 N.W.2d 234, 2023 WL 2148253, at *4 (Iowa Ct. App. Feb. 22, 2023) (citing *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 106 (Iowa 2012)). The District Court justified its reliance on these materials by citing

Kindig v. Newman, 966 N.W.2d 310, 322 (Iowa Ct. App. 2021) and its holding that evidence need not be in an admissible form at the summary judgment stage, but that its content must be admissible. (App. 828.) However, the District Court did not analyze how the content of the rumor-based, stale, irrelevant, and hearsay evidence on which it relied to deny the City's motion for summary judgment would be admissible at trial.

In *Kindig*, the evidence at issue (repeating what someone else told you happened, also referred to as "a rumor") was "inadmissible hearsay." *Id*. at 323. Because the plaintiff in *Kindig* could not testify at trial about those statements, "they could not provide a basis to avoid summary judgment." *Id*; s*ee also Feeback*, WL 2717158 at *5 ("[T]o survive summary judgment, Feeback had to show he had admissible evidence to establish Swift's proffered reason was a pretext for age discrimination and his age was a motivating factor for his termination.") This holding was affirmed by the Court of Appeals this year in *Estate of Grove v. Clinic Building Company, Inc*. 992 N.W.2d 234, 2023 WL 2148253, at *4 (Iowa Ct. App. Feb. 22, 2023). There, the Court of Appeals held that unless a hearsay statement fell within an exception to the hearsay rule, the statements were inadmissible hearsay and could not provide a basis to avoid summary judgment. *Id.*

In the District Court's April 3, 2023 Ruling upholding its denial of Defendants' Motion for Summary Judgment, the District Court erroneously found the following:

1. By "consistently disput[ing] whether Mr. Slagle's prior [behaviors] were consensual," Ms. Rheeder created a genuine issue of material fact on whether "Mr. Slagle's prior sexual encounters and sexually explicit communications were consensual." (App. 829.)
2. The City "had actual or constructive knowledge of Slagle's past conduct" for purposes of the harassment claim. (Id.)
3. Evidence 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 the Defendants other than Slagle." (Id.)

The genuine issues of material "fact" that Ms. Rheeder apparently generated are entirely unsupported by any admissible evidence in the record. The evidence on which the District Court relied to create these fact questions was hearsay, stale, and unsubstantiated.

Evidence of Mr. Slagle's alleged prior behaviors in the workplace was not based on any individuals' personal knowledge. Rather, it was based on

rumors repeated by city employees. (App. 399.) This is exactly the type of hearsay that the Court of Appeals in *Kindig* and *Estate of Grove* held failed to provide a basis for the plaintiff to avoid summary judgment. *Kindig v. Newman*, 966 N.W.2d 310, 322; *Estate of Grove v. Clinic Building Co., Inc.* at *4. Therefore, the District Court's reliance on these rumors was in error.

In addition, Ms. Rheeder failed to plead admissible "me too" evidence. For this evidence, the District Court relied on long past, consensual relationships with non-employees. Courts have allowed "me too" evidence to prove a defendant's motive or intent. *Quinonez-Castellanos v. Performance Contractors, Inc.*, No. C16-4097-LTS, 2017 WL 6519033 (N.D. Iowa Dec. 20, 2017). "This evidence is typically presented in the form of testimony from other employees and is neither *per se* admissible nor *per se* inadmissible." *Id.* "Factors to consider include: (1) whether past discriminatory or retaliatory behavior is close in time to the events at issue in the case, (2) whether the same decisionmaker was involved, (3) whether the witness and plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated." *Id.* (internal quotation marks omitted); *see also Valdez v. W. Des Moines Comm. Schs.*, 992 N.W.2d 613, 640 (Iowa 2023). With respect to the past consensual relationships identified by Ms. Rheeder, including past e-mail communications with non-employees and an admittedly

pre-employment consensual sexual relationship, Ms. Rheeder has failed to identify any of the factors that would weigh in favor of admitting her "me too" evidence.

In analyzing the *Valdez* factors: the events are not "close in time" to Ms. Rheeder's claims. In the case of Ms. Wilson, she alleges that she and Mr. Slagle engaged in consensual sex in the late 1990's, and then that he allegedly harassed her through inappropriate comments, and on one occasion allegedly touching her. (App. 394, 403.) However, Ms. Rheeder produced no evidence Ms. Wilson complained of these incidents. And, if these incidents occurred, they predated Chief McHale (hired December 2016).[1]

When Ms. Wilson complained in 2017, the City investigated utilizing an independent, third-party investigator. (App. 758.) In that investigation record, Ms. Wilson explicitly informed the investigator ***that Mr. Slagle had never harassed her***. (App. 758.)

The allegations regarding Mr. Slagle's treatment of Ms. Rheeder, if true, are not the same as the consensual sexual relationship he had with Ms. Wilson in the late 1990's. Ms. Rheeder alleges that Mr. Slagle tried to strike

[1] The only "me too" evidence Ms. Rheeder provides involving the same decision maker is generic testimony from two City employees that Chief McHale treated women differently and cultivated a "good ol' boys type of atmosphere." (App. 401.)

up a romantic or sexual relationship with her over the course of three days of text messaging. Ms. Wilson's allegations, if true, involve a consensual relationship with a non-employee.

Finally, Ms. Rheeder and Ms. Wilson were not otherwise similarly situated. Their employment did not even overlap—Ms. Wilson had retired from police work before Ms. Rheeder started her employment. (App. 727.) Ms. Wilson and Ms. Rheeder had different jobs and different chains of command and supervisors. For all of these reasons, the "me too" evidence Ms. Rheeder relies on involving Ms. Wilson is inadmissible.

Similarly, police officer Adam Cirkl alleged two stray comments by Mr. Slagle, one involving a homophobic slur and another inquiring about Mr. Cirkl's relationship with his girlfriend from 2014 and earlier. (App. 757-758.) These stray comments occurred before Ms. Rheeder had been employed, and a different decision maker addressed the complaints with Mr. Slagle, ultimately disciplining him. (App. 727, 758.) The conduct was different and there is no evidence in the record to suggest that Mr. Slagle sought a relationship with Mr. Cirkl. Finally, Mr. Cirkl and Ms. Rheeder were not similarly situated in jobs. The only similarity with Ms. Rheeder's case is that when Mr. Cirkl complained, the matter was investigated and resolved. (App.

758.) Accordingly, the "me too" evidence" Ms. Rheeder relies on from Mr. Cirkl is inadmissible.

Finally, the 2007 investigation regarding Mr. Slagle's e-mail use, is not "close in time." The same decision makers were not involved. (App. 727, 728, 729.) While these consensual e-mails may be similar to Ms. Rheeder's text communications with Mr. Slagle, the non-employees are not similarly situated to Ms. Rheeder who was an employee at the time of her complaint. As such, this "me too" evidence" Ms. Rheeder relies on is inadmissible.

Mr. Slagle argued these same legal issues in his November 14, 2022[2] Reply to Resistance to Motion for Summary Judgment but the District Court did not address these contentions. Instead, the District Court stated in the January 20, 2023 Ruling that it did not rely on some of this information in order to deny the Defendants' motions for summary judgment. (App. 693.)

However, the District Court nonetheless referred to Mr. Slagle's "reputation and alleged history of inappropriate behaviors in and around the workplace..." without identifying the admissible evidence which forms this characterization. (App. 693.) Finally, the District Court in its April 3, 2023 Ruling provided the blanket statement that "the evidence of prior complaints

[2] The City Appellant's join in and agreed with the Motions to Reconsider, Enlarge or Amend filed by Ms. Gray and Mr. Slagle. (App. 761-767.)

against Slagle and his reputation at the MPD are admissible against the City" without delineating between the admissible versus the inadmissible evidence. (App. 703.)

Accordingly, because the District Court erroneously relied on inadmissible evidence in finding disputed material facts and denying the City Defendants' motions for summary judgment, this Court should order that only admissible evidence be permitted in ruling on the City Defendants' motions for summary judgment and reverse the District Court's denial of summary judgment to the City Defendants.

B. THE IOWA DISTRICT COURT ERRED IN FINDING MS. RHEEDER GENERATED A FACT QUESTION ON THE FIRST ELEMENT OF THE FARAGHER-ELLERTH DEFENSE.

When harassment is alleged to have been committed by a supervisory employee, but no tangible employment action has occurred, an employer may be subject to vicarious liability. *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 571 (Iowa 2017), *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 744 (Iowa 2003). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Farmland Foods*, 672 N.W.2d at n. 2. An "employer defending a

vicarious liability claim may assert the *Faragher-Ellerth* affirmative defense by showing it: (1) exercised reasonable care to prevent and correct any harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer to avoid harm otherwise." *Haskenhoff*, 897 N.W.2d at 571 (Iowa 2017) (quoting *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d at 744 (Iowa 2003) (internal quotation marks omitted)); *see also Valdez v. W. Des Moines Comm. Schs.*, 992 N.W.2d 613, 632 (Iowa 2023) ("[A]lthough an employer can be vicariously liable for the actions of its supervisors through an agency analysis where the employer's liability is premised on the supervisor misusing a position of authority, . . . the employer can avoid vicarious liability if it can show it 'exercised reasonable care' to promptly correct or prevent the harassing behavior and the plaintiff failed to take advantage of the opportunities provided by the employer.") As this Court has recently held, under either a negligence or vicarious liability theory, the focus is on whether the employer allowed the harassment to continue to the point of creating an abusive working environment, rather than just the fact of the harassment itself. *Valdez*, 992 N.W.2d at 632. "The policy behind the affirmative defense is simple and direct. By offering a complete defense to vicarious liability, it encourages employers to prevent workplace

discrimination and harassment by adopting antidiscrimination policies and complaint procedures or by taking other suitable action." *Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235, 242 (Iowa 2018).

In its January 20, 2023 Ruling rejecting the City's *Faragher-Ellerth* defense, the Court found that the City did not meet the first element and therefore declined to evaluate the second element. The Court ruled that the City failed to meet the first element because (1) the Police Department had its own harassment policy that directed complainants to submit reports within the MPD rather than to Human Resources; (2) the City's allegedly "insufficient responses to prior incidents of harassment;" and (3) contradictions in the testimony of witnesses concerning whether McHale's investigative report was provided to the City's Human Resources Manager and whether McHale or the internal affairs investigations sergeant was lead in the investigation. (App. 833-834.) The Court held that the contradicting testimony "not only raise[d] the question of whether appropriate investigative and remedial measures were taken in response to Rheeder's complaint, . . . but whether any non-cursory investigation was performed in January 2019. **The cessation of the alleged harassment is not conclusive evidence that the MPD's remedial measures were effective and thus reasonable as a matter of law."** (App. 833-834.) (*Emphasis supplied.)*

First, the Court's findings about the department's policy are irrelevant because Ms. Rheeder signed an acknowledgment that she received a copy of the City's Policy and Procedure manual which said she should consult Human Resources with any questions. (App. 757.) Ms. Rheeder's claim to the contrary does not create a genuine issue of material fact for trial. See *Feeback*, 988 N.W.2d at 352. The Court's finding that the City failed to respond to prior harassment is not supported by any admissible evidence in the record. (See supra Section I(A) re: admissible evidence.) But, assuming arguendo that evidence is admissible, it demonstrates the City promptly responded to prior complaints of harassment. This included a prior Chief (a) disciplining Mr. Slagle in 2007 for using work email and time to engage in what appeared to be a consensual relationship with a non-employee; (b) disciplining Mr. Slagle in 2014 for one stray inappropriate comment to a male police officer; and (c) the City Manager and HR obtaining an independent investigation into a female employee's complaint about (among other things) a sexually hostile work environment, where she told the investigator that Mr. Slagle had *not* harassed her. (App. 758-759.)

The District Court's finding of a fact question related to its criticisms of the City's complaint procedures and investigation, is contrary to Iowa law. (See January 20, 2023 Ruling at p. 31-32 (App. 721-722) and April 3, 2023

Ruling at p. 7-8; App. 833-834.) In *Feeback*, the Court held "[t]he appropriate scope of an internal investigation is a business judgment, and we do not review the rationale behind such decision. Shortcomings in an investigation alone, moreover, are not enough to make a submissible case." *Feeback*, 988 N.W.2d at 350 (citing *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 966, 1002 (8th Cir. 2012) (internal quotation marks and citations omitted)).

The District Court held in its Rulings that contradictory testimony about who led the investigation and whether the investigation report was received by human resources, was sufficient to generate a fact question on the City's *Faragher-Ellerth* defense. (See January 20, 2023 Ruling at p. 31-32; App. 721-722; and April 3, 2023 Ruling at p. 7-8; App. 833-834.) These issues involve business judgments by the City regarding the scope of the investigation, and at most could be construed as shortcomings in the investigative process. *Feeback*, 988 N.W.2d at 350 ("Nor does the brevity of [] investigation support an inference of discrimination. 'The appropriate scope of an internal investigation . . . is a business judgment, and we do not review the rationale behind such a decision. Shortcomings in an investigation alone, moreover, are not enough to make a submissible case.'" (quoting *Pulczinski*, 691 F.3d at 1002). The District Court's holding that these are

"fact questions" on the reasonableness of the City's complaint procedures and the investigation is contrary to *Feeback* and should be reversed.

Finally, the undisputed facts show that the City met the second prong of the *Faragher-Ellerth* affirmative defense. While the District Court did not reach this issue in its January 20, 2023 Summary Judgment Order, this Court should find the City met its burden to prove the affirmative defense and grant summary judgment.

Ms. Rheeder reported the alleged sexual harassment she was experiencing, but she waited until it had already been remedied by her own request to Mr. Slagle that it stop. "Establishing that employees failed to avail themselves of a proper complaint procedure normally suffices to satisfy the employer's burden under the second element of the defense." *Crawford v. BNSF Ry. Co*., 665 F.3d 978, 985 (8th Cir. 2012) *cert. denied* 568 U.S. 818 (2012) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775 (1988) at 802) (internal quotation marks omitted). Ms. Rheeder chose to report the text messages because she did not feel they were appropriate, and she felt Mr. Slagle was "sexually proposing something to her." (App. 740.) However, she provided no explanation for why she waited to report these concerns. Further, once she reported the concerns, within a matter of days her employer investigated them and took prompt remedial action intended to stop any

further alleged harassment ***and*** which actually prevented any alleged further harassment. (App. 743.) This satisfies the second prong of the *Faragher-Ellerth* affirmative defense as a matter of law.

From January 18, 2019, through the second investigation in April 2019, Ms. Rheeder made no other reports of sexual harassment. However, when the Fire Chief told the City Manager that there was ongoing sexual harassment at the Police Department, the City hired Ms. Haas to investigate ***and*** took prompt remedial action. (App. 747.) While unnecessary to establish the *Faragher-Ellerth* affirmative defense, the City doubled down on its prompt remedial measures by engaging in this second investigation.

Based on the undisputed evidence, the District Court should have concluded the City had "'exercised reasonable care' to promptly correct or prevent the harassing behavior" and then analyzed the second element of *Faragher-Ellerth* in favor of the City Defendants. *Valdez*, 992 N.W.2d at 632. Accordingly, this Court should reverse the District Court's denial of summary judgment to the City Defendants on Ms. Rheeder's vicarious liability sexual harassment claim.

C. THE IOWA DISTRICT COURT ERRED IN FINDING THAT THE CITY FAILED TO TAKE REMEDIAL MEASURES THAT ENDED THE ALLEGED HARASSMENT WITHIN A REASONABLE TIME.

The District Court erred in finding that the City did not prove it was entitled to judgment as a matter of law on Ms. Rheeder's negligence claim. (App. 839.) To prove a negligence claim, the employee must establish that a reasonable employer knew or should have known of the harassment and failed to take reasonable action to stop it within a reasonable period of time. *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 601-02 (Iowa 2017). Like with a claim under a vicarious liability theory, the focus is on whether the employer allowed the "harassment to continue to the point of creating an abusive working environment rather than just the harassment itself." *Valdez v. W. Des Moines Comm. Schs.*, 992 N.W.2d 613, 632 (Iowa 2023) (internal quotation marks omitted.) 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. *Haskenhoff*, 897 N.W.2d at 575 (internal citations and quotations omitted.)

Here, the District Court stated that the following evidence led to the decision to find material factual issues existed and to deny the City's motion for summary judgment:

1. Evidence of "prior complaints against Slagle and his reputation at the [Marion Police Department] are admissible against the City…" allows the jury to conclude the City had actual or constructive knowledge of workplace sexual harassment. (App. 839.)

2. The City's "apparent failure to disseminate and ensure the enforcement of its updated policies constituted inadequate monitoring." (Id.)

3. 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 Rheeder's complaint and Rheeder's allegation that McHale pressured her into an informal resolution." (Id.)

4. The "apparent contradictions in the testimony of [Sergeant] Jeffrey Hartwig..., McHale, and [Human Resources'] Jennifer Ketelsen not only 'raise the question of whether appropriate investigative and remedial measures were taken in response to Rheeder's complaint...' but whether *any* non-cursory

investigation was performed in January 2019." (App. 833-834, emphasis in the original.)

5. The Marion Police Department's policy requiring Ms. Rheeder to submit her complaint internally. (App. 833.)

6. The cessation of the alleged harassment is not conclusive that the [Marion Police Department's] remedial measures were effective and thus reasonable as a matter of law. (App. 834.)

The District Court's findings on these issues are legally erroneous for the following reasons: First, the District Court relied on inadmissible evidence to determine a fact question on whether the City had "actual or constructive notice" of a sexually hostile work environment at the Police Department. (See Section I(B), supra.)

Second, the record clearly establishes that Ms. Rheeder herself signed an acknowledgement of the City's policies that forbid harassment and retaliation and explained employee's options for complaining about such conduct. (App. 757.) Having a policy which explains harassment and provides for a complaint procedure, (like workplace investigations) even if arguably imperfect, should not, as a matter of law, prevent an employer from obtaining summary judgment in a negligence harassment case. If this is the law, the District Courts will be sitting as "super personnel" departments

reviewing harassment policies for perfection–and by what standard? See, e.g., *Feeback*, No. 20-1467, 2023 WL 2718158 at*6 (internal citations omitted.)

Third, it is undisputed that the Police Department's harassment policy, which the District Court concluded forced employees to file internal complaints, expressly advises employees that if it is not practical to go to their supervisor they "may instead file a complaint with another supervisor, the Chief of Police, or when applicable, the City Manager." (App. 730, 82.)

Fourth, as argued above in Section I(C), the District Court's conclusion that there was either a flawed investigation into Ms. Rheeder's claims by Mr. McHale or no investigation does not comport with *Feeback's* holding regarding investigations which may have "shortcomings." *See Feeback*, 988 N.W.2d at 350.

Finally, the District Court's finding that the end of the alleged harassing conduct was not sufficient as a matter of law to find the City had taken prompt remedial action is in error. "Where an employer takes prompt remedial action that is reasonably calculated to stop the harassment, the employer is not liable...for the underlying sexual harassment." *Alvarez v. Des Moines Bolt Supply, Inc*., 626 F.3d 410, 419 (8th Cir. 2010) (internal citations and quotations omitted.) In that case, the Eighth Circuit Court of Appeals said that employer avoided liability by, following Alvarez's complaint,

investigating and concluding that both Alvarez and the respondent violated company policy. *Id*. at 421. The employer suspended the respondent and transferred him "and he never harassed Alverez again." *Id*.

Here, it is undisputed that Ms. Rheeder complained to Sergeant Hartwig on Friday, January 18, 2019, and met with him and Mr. McHale Monday, January 21, 2019. It is undisputed that Ms. Rheeder and Mr. Slagle received the same "training memo" directing the cessation of communications outside the performance of their official duties on January 22, 2019. It is undisputed that the conduct Ms. Rheeder perceived to be harassing did not continue after the issuance of the training memo to Mr. Slagle.

Nonetheless, without citing to any case law, the District Court concluded that Ms. Rheeder's discussion with Mr. Slagle in advance of her complaint to Sergeant Hartwig and Mr. McHale was the reason the conduct ended and that there was not "conclusive evidence" that the City 's remedial measures were effective or reasonable. (App. 834.)

The end of the complained of conduct is the ultimate goal of anti-discrimination laws, regardless of the Court's view of whether an investigation was "cursory" or could have been conducted "with greater sensitivity." *Fisher v. Electronic Data Sys.*, 278 F.Supp. 2d 980, 992 (S.D. Iowa 2003) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 80 (1988)

("the 'primary objective' of Title VII is 'not to provide redress but to avoid harm.'"). In *Fisher*, the employer separated the complainant and respondent, "cautioned about the consequences of a substantiated complaint," warned the respondent not to retaliate "and no further harassment occurred." *Id*. Penalizing an employer for actually ending "the harm" is contrary to the law and should be reversed.

The law does not require an employer to take a specific action, just that the action was reasonably calculated to end the harassment. *Pirie v. Conley Group, Inc*., 4:02-CV-40578, 2004 WL 180259 (S.D. Iowa 2004). It is wholly illogical that an employer cannot rely on the cessation of the harassing behavior as irrefutable evidence that the remedial measures taken were sufficient under the law. "The cases where the courts have found an employer's response to be negligent or the remedial response inadequate (or to raise a fact issue as to this question) **involve continued harassment by the same harasser**." *Sellars v. CRST Expedited, Inc*., 385 F.Supp. 3d 803, 834-35 (N.D. Iowa 2019) (string citation omitted) (emphasis supplied.)

Accordingly, this Court should reverse the District Court's holding denying summary judgment to the City Defendants on Ms. Rheeder's negligence sexual harassment claim.

D. THE IOWA DISTRICT COURT ERRED IN FINDING MR. MCHALE COULD BE INDIVIDUALLY LIABLE FOR RETALIATION FOR ISSUING A TRAINING MEMO TO MS. RHEEDER.

Under the Iowa Civil Rights Act ("ICRA"), a prima facie case of retaliation is the same as under federal law: the plaintiff engaged in a statutorily protected activity; was subjected to an adverse employment action and there is a causal nexus between the protected activity and the adverse employment action. *Rumsey v. Woodgrain Millwork, Inc*., 962 N.W.2d 9, 28 (Iowa 2021) and *Lewis v. Heartland Inns of Am. L.L.C*., 591 F.3d 1033, 1042 (8th Cir. 2010). The Iowa Supreme Court has "previously held that an adverse employment action is 'an action that detrimentally affects the terms, conditions, or privileges of employment. Changes in duties or working conditions that cause no materially significant disadvantage to the employees are not adverse employment actions.'" *Haskenhoff*, 897 N.W.2d at 587 (internal citations and quotations omitted.) The Iowa Supreme Court also relied on *Burlington N. & Santa Fe Ry. V. White*, 548 U.S. 53 (2006) for the standard that "materially adverse depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Id*. (internal citations and quotations omitted." However, under the ICRA, a

plaintiff must prove that the protected activity was a significant factor motivating the adverse action. *Haskenhoff*, 897 N.W.2d at 586.

In his September 30, 2022 motion for summary judgment, Mr. McHale asserted that a training memo he issued (through his Sergeant) to Ms. Rheeder did not qualify as a materially adverse employment action. But the District Court found that Ms. Rheeder generated a genuine issue of material fact about retaliation by Mr. McHale. (App. 717.) The Court noted that Ms. Rheeder subjectively viewed the training memo as a written warning, although those words appear nowhere on the face of the document. (Id.)

The District Court also found that the training memo warned of the possibility of (unspecified) disciplinary measures for violating the directive to cease communications with Mr. Slagle outside the course of normal duties would dissuade a reasonable person from making or support harassment complaints under the *Burlington Northern* standard. (App. 717.)

However, the District Court could have and should have decided as a matter of law that the training memo was not a materially adverse action by Mr. McHale for these reasons:

First, the training memo produced no actual "injury or harm that was sufficiently severe such that it would dissuade a reasonable person from making or supporting an allegation of discrimination or harassment" pursuant

to *Godfrey v. State*, 962 N.W.2d 84, 109-110 (Iowa 2021). It is undisputed Ms. Rheeder suffered no disciplinary consequences at any time after the issuance of the memo. (App. 746, 757.) She admitted she suffered no change in pay, benefits or other work conditions at any time. (App. 746, 752, 757.) Ms. Rheeder has failed to produce any evidence to support that she received a written warning, or that the training memo she did receive was disciplinary in nature or otherwise resulted in adverse employment action.

In *Haskenhoff*, 897 N.W.2d at 590, this Court, during a discussion of what is deemed a material adverse employment action under the ICRA, held that a performance plan "alone" did not qualify. The court noted that there was no material harm associated with the performance plan: "[the plaintiff] was never suspended with or without pay. Her work hours were not reduced, nor was her pay cut. The performance improvement plan did not affect her professional advancement. Her duties and status remained unchanged." *Haskenhoff*, 897 N.W.2d at 590. Instead, like in Ms. Rheeder's case, the *Haskenhoff* performance plan "only required [Plaintiff] to abide by rules applicable to others in her position." *Id*.

Second, and what makes Ms. Rheeder's case different, is that there is no need for a hypothetical "reasonable" person. Instead, we know that a reasonable person would not be dissuaded for reporting discrimination or

harassment based on the training memo because, as a matter of undisputed fact, the training memo ***did not*** dissuade Ms. Rheeder from thereafter reporting discrimination or harassment to various individuals at the Police Department, to the independent investigator, to Mr. McHale, and to Human Resources.

Here, the District Court concluded that Ms. Rheeder's retaliation claim against Mr. McHale should go to a jury because what Ms. Rheeder actually did in response to the training memo was "subjective" evidence, not objective evidence of what a reasonable person would do. (App. 716.) Requiring an employer to go to trial on this standard cannot be what was intended under *Haskenhoff* and *Godfrey*.

Accordingly, this Court should correct the District Court's error in finding that there is a genuine issue of material fact on whether the training memo qualifies as an adverse employment action, and reverse the District Court's denial of summary judgment of Ms. Rheeder's retaliation claims against Mr. McHale.

E. THE IOWA DISTRICT COURT ERRED IN FINDING THE CITY COULD BE VICARIOUSLY LIABLE FOR DISCRETE ACTS OF ALLEGED RETALIATORY CONDUCT BY MR. MCHALE AND MS. GRAY.

Relatedly, it follows that if the claim against Mr. McHale for one individual, discrete act of supposed retaliation is insufficient as a matter of

law to state a materially adverse employment action under the ICRA, then the City cannot be held vicariously liable for Mr. McHale's conduct.

The record establishes that the City joined in Ms. Gray's pleadings below. Ms. Gray has also argued that the discrete acts alleged by Ms. Rheeder did not state a materially adverse employment action that would "dissuade a reasonable person from making or supporting an allegation of discrimination or harassment" under *Godfrey*. (See January 20, 2023 Ruling at 26; App. 716.) The City continues to join in Ms. Gray's arguments on appeal.

In addition to those arguments made by Ms. Gray, the District Court erred in finding that a handful of interactions which did not actually dissuade Ms. Rheeder from reporting discrimination or harassment could be submitted to a jury to determine if a "reasonable person" would be dissuaded by them. (App. 716.) The District Court erred in finding that this undisputed evidence, as a matter of law, did not meet the "reasonable person" standard.

Thus, it follows that if the claim against Ms. Gray for individual discrete acts of retaliation is insufficient as a matter of law to state an adverse employment action under the ICRA, then the City cannot be held vicariously liable for Ms. Gray's conduct.

Accordingly, this Court should correct these errors with respect to the application of established case law on the sufficiency of evidence for materially adverse employment actions.

II. THE IOWA DISTRICT COURT ABUSED ITS DISCRETION BY RULING THAT EVIDENCE OF PRIOR COMPLAINTS AGAINST MR. SLAGLE AND EVIDENCE OF MR. SLAGLE'S "REPUTATION" ARE ADMISSIBLE AGAINST THE CITY AT TRIAL.

The City incorporates its arguments above in Section I(B) by reference. Aside from the admissibility of the evidence of prior complaints against and Mr. Slagle's "reputation" with respect to the denial of the City Defendants' Motions for Summary Judgment, the District Court appears to have used the summary judgment process to announce in its April 3, 2023 Ruling that this inadmissible evidence ***will be admitted at the trial*** against the City starting May 30, 2023. The Court's statements that lead to this conclusion are as follows:

1. "The Court concludes that evidence 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 the Defendants other than Slagle. However, much of this evidence is likely inadmissible for the purpose of proving Rheeder's claim against Slagle. If Defendants believe limiting and/or curative instructions cannot adequately protect against unfair prejudice to Slagle, the Court may bifurcate the issues." (App. 829.)

2. "If any party believes cautionary instructions would be insufficient in this case, that party may raise the issue and take a position on whether Rheeder's claim against Slagle should be bifurcated from the remaining issues during the status conference scheduled on April 14, 2023." (App. 830.)

3. "[T]he evidence of prior complaints against Slagle and his reputation at the [Marion Police Department] **are** admissible against the City. This evidence could allow a reasonable jury to conclude that the City had actual or constructive knowledge of workplace sexual harassment." (App. 839, emphasis supplied.)

The inadmissible evidence is not based on personal knowledge and is related to consensual relationships which are not relevant to the "distinct motivations and underlying conduct" of "unwelcome sexual harassment." *See Godfrey,* 962 N.W.2d at 106 (personal conclusory beliefs are insufficient as a matter of law to generate a fact question for the jury) and *Stephens v. Rheem Manufacturing Company*, 220 F.3d 882, 885 (8th Cir. 2000) (stating "...consensual affairs and unwelcome sexual harassment are entirely separate exploits, with distinct motivations and underlying conduct..."). Moreover, the inadmissible evidence identified above in Section I(B) has never been thoroughly analyzed by the Court for undue prejudice under Iowa R. Evid. 5.403. *See also, Stephens*, 220 F.3d at 885 (finding "the admittance of such salacious rumor-based evidence could have unduly prejudiced the jury against [the defendant employer], and that this damage of prejudice greatly

outweigh[s] the limited probative value of the evidence.") The Court's decision to admit this evidence without such analysis is not only contrary to the law, but is clearly unreasonable.

For the reasons previously stated, and for those reasons set forth in this section, this Court should reverse the District Court's order permitting inadmissible evidence at trial against the City.

III. THE IOWA DISTRICT COURT ABUSED ITS DISCRETION BY SUA SPONTE GRANTING MS. RHEEDER THE RIGHT TO AMEND HER PETITION TO STATE A RETALIATORY HOSTILE WORK ENVIRONMENT CLAIM.

The City Appellants object to the District Court's decision to sua sponte allow Ms. Rheeder to amend her petition adding a new and undefined claim eight weeks before trial. (App. 835.)

In its ruling, issued eight weeks before trial, the District Court announced, without any motion pending, that Ms. Rheeder "should be and is granted leave to file an amended petition specifying that she is pleading alternative theories under Count III." (Id.) Ms. Rheeder's First Amended Petition only includes discrete claims of retaliation pursuant to Iowa Code section 216.11 against Mr. McHale and Ms. Gray, and contends that the City is vicariously liable for those acts. With respect to Mr. McHale, discovery and the subsequent summary judgment pleadings have produced only one discrete act of alleged retaliation: a non-disciplinary training memo he

provided to Ms. Rheeder. Because of the District Court's April 3, 2023 Ruling, Mr. McHale, Ms. Gray, and the City found themselves defending an unknown and undefined claim after the close of pleadings and discovery.

The general rule is that a District Court should permit an amendment as long as the amendment does not substantially change the issue or defense of the case. *Kindig*, 966 N.W.2d at 316. However, this rule is limited in that motions to amend pleadings "should not be granted in close proximity to trial if it will substantially alter the issues." *Glenn v. Carlstrom*, 556 N.W.2d 800, 808 (Iowa 1996) (citing *Britt-Tech Corp. v. American Magnetics Corp.*, 487 N.W.2d 671, 674 (Iowa 1992); *Beneficial Fin. Co. v. Reed*, 212 N.W.2d 454, 456 (Iowa 1973)). An amendment that substantially changes the issues may be allowed ***if*** the opposing party is not prejudiced or unfairly surprised. *Kindig*, 966 N.W.2d at 316 (emphasis supplied).

The amendment of not only a new claim, but a claim that the District Court acknowledges is undefined under Iowa law, is prejudicial. (App. 712-713, 836.) Ms. Rheeder herself failed to articulate the claim in her initial and amended petitions, including throughout the discovery process. The City and Mr. McHale have no direction as to the elements of this claim under the ICRA, yet are now being forced to defend it. In addition to the prejudicial nature of the amendment, the City and Mr. McHale are unfairly surprised by the

amendment. Ms. Rheeder did not ask for the amendment; the City and Mr. McHale did not have the opportunity to resist the amendment. Adding to the unfair surprise, Ms. Rheeder did not exhaust her administrative remedies with respect to this claim by filing it with the Iowa Civil Rights Commission as required by Iowa Code § 216.15(13). The District Court's decision to allow Ms. Rheeder to amend the retaliation claim should be reversed.

Additionally, the District Court allowed the amended pleading eight weeks before trial and after the close of discovery and summary judgment deadlines passed. *See Allen v. Hon Indus., Inc.*, No. 00-2017, 2001 WL 1659240 (Iowa Ct. App. Dec. 28, 2001) (unreported) (finding no abuse of discretion where a district court refused to allow a party to amend their claims after summary judgment was filed). The District Court's sua sponte decision to allow Ms. Rheeder to add a new, undefined claim at this stage in the litigation robbed the City and Mr. McHale of their ability to conduct discovery related to the claim and file for summary judgment. This is not consistent with the Court's holding in *Feeback* emphasizing the importance of summary judgment in the litigation process. *Feeback*, 988 N.W.2d at 348.

If the Court affirms the District Court's decision to allow Ms. Rheeder to amend Count III of her Amended Petition, the Court should provide the City, Mr. McHale, and Ms. Gray with the appropriate legal standards so they

can meaningfully defend the claim. As the District Court acknowledged, it is not settled in Iowa law as to the elements of a retaliatory hostile work environment claim. (App. 713, 836.) In *Godfrey*, the Court never reached the issue of whether a "special type of retaliation claim based on a 'hostile work environment'" claim existed under the ICRA, because the plaintiff had dismissed his hostile work environment claims and pursued only discrete discrimination and retaliation claims. *Godfrey*, 962 N.W.2d 84, 110 (internal citations omitted). Furthermore, while there is federal case law interpreting a retaliatory hostile work environment claim under Title VII, this Court has not provided that guidance under the ICRA.

For the reasons previously stated, and for those reasons set forth in this Section, this Court should reverse the District Court's sua sponte decision permitting Ms. Rheeder to amend Count III of her Amended Petition to add a retaliatory hostile work environment claim, or in the alternative, provide the Defendants with the appropriate standard under which to defend such a claim.

JOINDER

The City Appellants expressly join in and agree with arguments in the briefing filed by Ms. Gray and Mr. Slagle for the reasons set forth their applications.

CONCLUSION

For the reasons stated above, the District Court erred when it denied the City Defendants' Motion for Summary Judgment; abused its discretion when it determined that inadmissible evidence could be used to deny the City Defendants' Motions for Summary Judgment and in sua sponte allowing Ms. Rheeder to amend her petition eight weeks prior to trial. Accordingly, the District Court's Orders should be reversed and summary judgment should be entered in favor of the City Defendants.

REQUEST FOR ORAL ARGUMENT

The City and Joseph McHale respectfully requests oral argument in the maximum amount of time allowed.

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or 2 because this brief contains **11,888 words**, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

Dated this 30th day of January, 2024.

/s/ Amy L. Reasner