IN THE IOWA SUPREME COURT
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 ORDERS DATED JANUARY 20, 20230 AND APRIL 3, 2023

THE HONORABLE VALERIE L. CLAY,
DISTRICT COURT JUDGE

DEFENDANT-APPELLANT SHELLENE GRAY'S FINAL BRIEF

(TRIAL DATE - PENDING)

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(b) & (c) this matter is appropriately retained by the Iowa Supreme Court as it presents substantial issues in which there appears to be a conflict between published decisions of the supreme court of substantial issues of first impression.

STATEMENT OF THE CASE

The Appellee-Plaintiff, Valerie Rheeder ("Rheeder") filed a petition in Linn County District Court against Appellants-Defendants City of Marion ("the City"), Douglas Slagle ("Slagle") and Shellene Gray ("Gray"), which Rheeder amended January 21, 2020 in order to add Defendant Joseph McHale ("McHale") (hereinafter collectively "the Defendants."). (App. 4, Petition; App. 15, First Amended Petition). The undersigned represents Defendant Gray. (App. 8; Gray's Answer to Amended Petition). Gray is no longer employed at the City.

Rheeder's first amended petition asserted a claim of retaliation against Gray during a period of her employment: January 2019 through May 2019. (App. 15; First Amended Petition). Defendant Gray answered and denied this claim. (App. 48; Gray's Answer to First Amended Petition). Plaintiff pled three counts in her First Amended Petition: Count I – Sexual Harassment in violation of Iowa Code section 216.6 against Defendant Slagle; Count II –

Hostile Work Environment in violation of Iowa Code section 216.6 against Defendant City; and Count III – Retaliation against City, Gray, and McHale. (App. 15; First Amended Petition).

On September 30, 2022, Defendant Gray filed a Motion for Summary Judgment ("Gray's MSJ Motion") asserting that Rheeder's claim against Gray must be dismissed as the undisputed facts demonstrate Gray lacked the ability to effectuate adverse employment action, that Rheeder could not rely on constructive discharge as form of retaliation by Gray, and that Rheeder's lack of an adverse employment action by Gray was fatal to the claim against her. (App. 69; Gray's MSJ Motion).

On January 20, 2023 ("the January Ruling"), the District Court granted summary judgment and dismissed Rheeder's allegations of constructive discharge and denied Gray's MSJ Motion in all other respects. (App. 691; January Ruling). Specifically, the District Court ruled Gray was capable of effectuating adverse, retaliatory actions against Rheeder because Gray had the physical ability to place her hands on Rheeder's shoulders and the physical ability to talk to Rheeder. (App. 691; January Ruling). Not only did the District Court find that Gray could be liable as an individual employee for Retaliation under the ICRA, but the District Court *sua sponte* determined Rheeder also asserted a Retaliatory Hostile Work Environment claim against

Gray—a claim without any elements or guidance under Iowa law. (App. 691; January Ruling).

On February 6, 2023, Gray Moved to Enlarge or Reconsider the January Ruling pursuant to Rule 1.904(2) ("Gray's 1.904 Motion") requesting the District Court enlarge and/or reconsider: (1) whether Plaintiff's Petition and the current stage of litigation gave Gray fair notice of a retaliatory hostile work environment claim against her; (2) whether the District Court's application of the D.C. Circuit's *Menoken v. Dhillon* test was appropriate when: (a) the *Menoken* test is not adopted by Iowa Courts and (b) a hostile work environment was not pled against Gray; and (3) whether *Rumsey's* test for individual liability under the ICRA impacted *Haskenhoff's* discussion regarding adverse employment action. (App. 768; Gray's 1.904 Motion).

On April 3, 2023 ("the April Ruling"), the District Court denied all Defendants' 1.904 Motions, including Defendant Gray's. (App. 827; April Ruling). In denying the Defendants' 1.904 Motions, the Court addressed Defendants' argument that only a discrete retaliation claim was pled and granted leave for Rheeder to amend her Petition to allow cumulative-based retaliation to be pled against Gray, McHale, and the City; acknowledged that Iowa law does not provide guidance on the elements of such a claim; that there is a circuit split on these elements at the federal level; and denied Gray's

argument that *Rumsey* governed liability for a non-employer defendant. (App. 827; April Ruling).

On April 13, 2023, Rheeder filed her second amended petition to include a claim for retaliatory hostile work against Defendants City, Gray, and McHale. (App. 1023; Second Amended Petition). Defendant Gray moved to dismiss urging the affirmative defense that the now-added alternative Count III was not preserved before the Iowa Civil Rights Commission ("ICRC") and was, therefore, barred and the same prejudice arguments raised in the prior Motion to Reconsider. (Gray's Answer to Second Amended Petition, Dkt. #0236). The District Court denied the motion to dismiss on May 9, 2023 stating the reasoning for the denial was found in the prior orders.

On April 12, 2023, Defendant Gray timely applied for Interlocutory Appeal. (App. 841; Application for Interlocutory Appeal sans exhibits). On April 13 and April 14, 2023, the City and Slagle timely applied for Interlocutory Appeal. On April 6, 2023, Defendant Gray filed a Motion to Stay Proceedings. (App. 926; Slagle's Motion for Stay and Gray's Joinder). Although on September 1, 2023, an Order was entered denying the Defendants' applications for interlocutory review and motions for stay, upon motion for reconsideration filed September 8, 2023, a panel of Justices

granted Defendants' Applications for Interlocutory Appeal and Motion for Stay on September 28, 2023. (App. 1033; Sept. 28, 2023, Order).

STATEMENT OF THE FACTS

The City employed Rheeder as a part-time custodian at the Marion Police Department ("MPD") at all relevant times and until her resignation in August 2019. (App. 40, 44; City/McHale Answer to Amended Petition, p. 2 at ¶ 4, p. 6 at ¶ 29; App. 49, Gray Answer to Amended Petition, p. 2 at ¶ 4). At all relevant times, the City employed McHale as the Police Chief, Slagle as a Deputy Chief of Police, and Gray as administrative manager for the Marion Police Department. (City/McHale Answer to Second Amended Petition at ¶¶ 6-8, Dkt. #0240). None of these individuals are still employed at the City.

Gray was a tenured, non-sworn civilian employee at the City for approximately 23 years. (App. 691; January Ruling, p. 1). For approximately two years Gray directly supervised Mike Kula ("Kula") in her role as Administrative Manager. (App. 691; January Ruling, p. 1). Rheeder eventually applied at the City and Gray, Kula, and Doug Slagle ("Slagle") participated in Rheeder's interview and agreed that Rheeder was the best candidate for the position. (App. 692; January Ruling, p. 2). Through Gray's role, Gray approved and denied Rheeder's time off requests. (App. 716; January Ruling, p. 26). However, Gray did not have the ability to terminate Rheeder's

employment, change her rate or pay, or otherwise change the benefits offered to Rheeder. (App. 691; January Ruling, p. 1; App. 716, January Ruling, p. 26). Even if Gray wanted to change the terms and conditions of Rheeder's employment, she lacked the authority to do so. (App. 691; January Ruling, p. 1; App. 716, January Ruling, p. 26).

Unbeknownst to Gray, Rheeder engaged in text messages and interactions with Defendant Slagle. (App. 692-693; January Ruling, pp. 2-3). In January 2019, Rheeder made an internal complaint about then-Deputy Chief Slagle. (City/McHale Answer to Second Amended Petition, p. 3 at ¶ 18, Dkt. #0240). Chief McHale promptly investigated the complaint, did not substantiate it as harassment, but issued directives related to the complaint. City/McHale Answer to Second Amended Petition, p. 4 at ¶¶ 19 and 21, Dkt. #0240). Gray did not participate in the January 2019 investigation regarding Rheeder and Slagle. (App. 716; January Ruling, p. 26). Consequently, Gray did not participate in any decision making or drafting of the January 22, 2019, training memos regarding Rheeder and Slagle other than possibly physically filing them in a filing cabinet. (App. 716; January Ruling, p. 26).

On January 23, 2019, Gray and Rheeder interacted. (App. 701; January Ruling, p. 11). The version accepted as true for summary judgment is that Gray approached Rheeder, placed her hands on Rheeder's shoulders and told

Rheeder that she should have come to her [Gray] about Slagle, that McHale was upset Gray did not handle this issue, that Gray had warned Rheeder about working around mostly men and their proclivities, that the "attention must have been nice", that Rheeder was "to never speak about this again" and to notify Gray of any future complaints. (App. 701; January Ruling, p. 11). This is the interaction that Rheeder describes as an "assault." (App. 715; January Ruling, p. 25).

The next day, January 24, 2019, the facts accepted as true for summary judgment are that Gray entered McHale's office where Rheeder was working and stood in the doorway, thus blocking it. (App. 701; January Ruling, p. 11). Gray asked Rheeder who Rheeder told about the Slagle complaint. (App. 701; January Ruling, p. 11). Rheeder identified three employees with whom she had spoken to about Slagle. (App. 701-702; January Ruling, pp. 11-12). Rheeder said Gray "threatened" her by stating Gray would "come after" and "get" anyone who spoke of the complaint about Slagle. (App. 702; January Ruling, p. 12). Gray further is alleged to have said that "nothing happened" because there was no physical activity and to "never speak about this anymore" and that Rheeder "should never have spoken to anyone in the first place." (App. 702; January Ruling, p. 12).

It is undisputed that the three employees identified by Rheeder as knowing about the Slagle complaint were not met with retaliation by Gray (or anyone). (App. 702; January Ruling, p. 12). One employee, Kula, alleges Gray told him he would be fired if he talked about the report. (App. 702; January Ruling, p. 12). Gray does not have hiring or firing authority. (App. 716; January Ruling, p. 26). Kula was not fired by Rheeder or anyone. (App. 702; January Ruling, p. 12).

Months passed from January to April 2019 when another City employee (the Marion Fire Chief) heard rumors about Slagle/Rheeder prompting her to report to City Manager Lon Pluckhahn ("Pluckhahn") and Assistant City Manager Amanda Kaufman ("Kaufman"). (App. 702; January Ruling, p. 12). Pluckhahn and Kaufman conferred with Human Resources employee Jen Ketelsen ("Ketelsen"). (App. 702; January Ruling, p. 12). Ketelsen reviewed the MPD's internal investigation and hired an outside investigator. (App. 702; January Ruling, p. 12). On April 24, 2019, the investigator concluded her report concerning Slagle. (App. 703; January Ruling, p. 13). At that time, the investigator found Gray had retaliated against Rheeder on January 23rd and 24th and for telling Kula he could be fired. (App. 704; January Ruling, p. 14).

Rheeder returned to work on May 6, 2019, after being granted leave during the investigation. (App. 705; January Ruling, p. 15). Slagle had since resigned. (App. 705; January Ruling, p. 15). Rheeder's focus seemingly transferred to Gray. On May 9, 2019, Rheeder was called to a meeting with McHale and Gray that was audio-recorded. (App. 705; January Ruling, p. 15). Rheeder expressed concerns about working with Gray. (App. 705; January Ruling, p. 15). McHale promptly stated Rheeder did not have to work with Gray any longer. (App. 705; January Ruling, p. 15). Gray apologized for any misunderstanding of their prior interactions. (App. 705; January Ruling, p. 15).

The following week, on May 13, 2019, Rheeder verbally complained about Gray to Ketelsen and supplemented this verbal complaint on May 20th with a written complaint stating the May 9th meeting made Rheeder feel sick. (App. 705; January Ruling, p. 15). Rheeder further believed sometime after May 9, 2019, Rheeder was vacuuming, and Gray walked directly towards her in a manner designed to intimidate her and Rheeder speculates that, had she not stepped aside, Gray would have walked into her. (App. 705; January Ruling, p. 15). This interaction was recorded on the MPD's security cameras and is in the record confirming the date was May 13, 2019. (App. 705; January Ruling, p. 15).

Rheeder was granted additional paid administrative leave from May 20 through May 22. (App. 705; January Ruling, p. 15). Gray was placed on seven days of paid administrative leave pending an investigation. (App. 705; January Ruling, p. 15). The complaint about Gray, the May 9th meeting and the walking near her while vacuuming, were investigated and deemed unfounded. (App. 705; January Ruling, p. 15). Rheeder was told not to have one-on-one interactions with Gray. (App. 706; January Ruling, p. 16). Rheeder was also offered a transfer within the City, away from MPD. (App. 706; January Ruling, p. 16).

On June 18, 2019, Rheeder filed charges with the ICRC. (App. 706; January Ruling, p. 16). Rheeder remained on unpaid leave until she resigned through her attorney on August 21, 2019. (App. 706; January Ruling, p. 16).

ARGUMENT

I. With *Rumsey's* requirement that a non-employer 'person' sued under the Iowa Civil Rights Act has the ability to effectuate adverse employment action, when is a non-employer person liable for non-employment-based retaliation?

A. Issue Preserved for Appellate Review

Defendant Gray raised and preserved individual liability through her September 30, 2022 Motion for Summary Judgment. (Gray's MSJ Brief pp. 8-10, Dkt. #0169). The issue was then decided in the District Court's January Ruling. (App. 715-717; January Ruling, pp. 25-27). Based on the District

Court's January Ruling, Defendant Gray then raised the issue of whether *Rumsey* and its progeny impacted *Haskenhoff* via Gray's 1.904(2) motion. *See* Gray's 1.904 Motion, p. 6-8. This issue was decided in the District Court's April Ruling. (App. 834-836; April Ruling, pp. 8-10).

B. Standard of Review

Summary judgment and construction of statutes like the Iowa Civil Rights Act at Iowa Code Chapter 216, et seq., are reviewed for correction of errors at law. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012); *Iowa Individual Health Ben. Reins. Ass'n v. State U. of Iowa*, 876 N.W.2d 800, 804 (Iowa 2016). "Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McQuistion v. City of Clinton*, 872 N.W.2d 817, 822 (Iowa 2015).

C. Argument: Perceived Tension based on the holdings in *Haskenhoff* and *Godfrey* with the holdings in *Rumsey* and *Vroegh*

There is an open question under Iowa law regarding liability where an individual purportedly engages in non-employment retaliation under the Iowa Civil Rights Act ("ICRA"). Based on the District Court's Rulings, Gray seeks to harmonize the holdings in *Haskenhoff* and *Godfrey* which state adverse action can be non-employment-related with *Rumsey* and *Vroegh* wherein the

second step of the test for non-employer liability examines the non-employer-defendant's "ability to effectuate" the harm within the context of employment. *Haskenhoff v. Homeland Energy Soluts., LLC*, 897 N.W.2d 553, 588 (Iowa 2017); *Godfrey v. State*, 962 N.W.2d 84, 109 (Iowa 2021); *Rumsey v. Woodgrain Millwork, Inc.*, 962 N.W.2d 9, 35 (Iowa 2021) ("[I]t is the individual's ability to effectuate the adverse employment action at issue that can subject them to personal liability."); *Vroegh v. Iowa Dept. of Corr.*, 972 N.W.2d 686, 706-707 (Iowa 2022) (holding the state of Iowa's insurer, Wellmark, was "not within the sphere of liability as a matter of law" because Wellmark's role with the employer was "insufficient to control or effectuate the [adverse action].").

Retaliation claims under the ICRA section 216.11(2) are analyzed as discrete incidents to determine if the challenged action is "adverse action." *Godfrey*, 962 N.W.2d at 110. Adverse actions can include non-employment-related conduct when it is material and produces an actual injury or harm to the plaintiff. *Id.* The same week *Godfrey* reiterated these standards, the Iowa Supreme Court decided *Rumsey v. Woodgrain Millwork* aimed at defining a non-employer's liability under the ICRA. 962 N.W.2d at 34. Non-employer liability for civil rights violations is not found in federal law. *See Rumsey*, 962 N.W.2d at 34 ("use of the words 'person' and 'employer' [in the ICRA] . . .

indicated the general assembly intended [ICRA] liability to extend further than Title VII, which had no comparable provision.").

Rumsey delineated the test for non-employer liability under the ICRA for discrimination or retaliation claims. *Id.* To be liable as a non-employer, the non-employer must have "personal involvement and the ability to bring about" the action. *Id.* at 36. Thus, liability is limited to those who have the "ability to effectuate the adverse employment action." *Id.* at 35. Non-employers involved in a mere advisory role in a decision-making process cannot be held liable for an employer's decisions. *See id.* at 35–36; *see also Vroegh*, 972 N.W.2d at 706-707.

In *Rumsey*, there is a thoughtful analysis of the non-employer's role in the employment organization at issue. The Court rejected the notion that the inquiry is superficial and focuses only on titles or generalized authority. *Rumsey*, 962 N.W.2d at 36. But, the Court did not open the door to "indirect" impacts as the District Court ruled here. Instead, in step two of the *Rumsey* framework, the Court held liability requires authority and control that exceeds mere advice or simply being in the circle of individuals involved. *Id.* (citing *Nelson v. Wittern Grp., Inc.*, 140 F.Supp.2d 1001, 1010-11 (S.D. Iowa 2001)) (holding a general counsel who was present at a termination meeting did not control the company's decisions; counsel was a mere advisor); *Sahai v.*

Davies, 557 N.W.2d 898, 900 (Iowa 1997) (holding a physician who recommended against the hiring of a person may have caused the employer to not hire, but the advisory role was insufficient as a matter of law)).

Similarly, in *Vroegh*, the non-employer defendant was the employer's insurer who was allegedly the "driving force" behind the discriminatory conduct. *Vroegh*, 972 N.W.2d at 706. The Court affirmed summary judgment in favor of the non-employer defendant stating, "[n]ot every 'person' with a connection to an employment decision bears legal liability for a discriminatory action." *Id.* at 707. The Supreme Court focused on whether the insurer "was in a position to 'control' or 'effectuate'" the challenged action. *Id.* Finding insufficient record evidence of control, the Court held the insurer was "not within the sphere of liability as a matter of law." *Id.*

However, when a non-employer is sued for non-employment-related retaliation, there is tension between step two of the *Rumsey* framework (which requires employment action and authority) and the *Burlington Northern* (or *Godfrey*) standard for retaliation claims that retaliation includes non-employment related actions which "dissuade a reasonable person from making or supporting an allegation of discrimination or harassment." *Godfrey*, 962 N.W.2d at 109-110 (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006)). This tension is highlighted by these facts where the

District Court found Gray was "capable of effectuating adverse, retaliatory actions indirectly related to [Plaintiff's] employment . . . [and] exercised this ability . . . by physically placing her hands on [Plaintiff], telling [Plaintiff] she should not have complained, telling [Plaintiff] to never talk about her complaint…again. . . .". (App. 716; January Ruling, p. 26). In other words, because Gray is alleged to have physically moved her hands and to have literally spoken to Plaintiff that means Gray had the ability to effectuate the harm. (App. 716; January Ruling, p. 26). Essentially, the District Court's Summary Judgment Ruling and its literal application of the phrase "ability to effectuate" removes the requirement that one be able to effectuate the adverse action in terms of corporate authority.

The January Ruling, then reiterated in the April Ruling, found Gray's emphasis on her undisputed "inability to effectuate adverse action directly related to [Plaintiff's] employment is misguided." (App. 716; January Ruling, p. 26). The District Court instead asked whether "the alleged acts would 'dissuade a reasonable person from making or supporting an allegation of discrimination or harassment.'" (App. 716; January Ruling, p. 26 (citing *Godfrey*, 96 N.W.2d at 110 (quoting *Haskenhoff*, 897 N.W.2d at 588-89))). The April Ruling went further and determined that the Iowa Supreme Court "simply revised the definition of the second element" for retaliation claims

because the "term 'adverse employment action' has different meanings depending on the context." (App. 834; April Ruling, p. 8).

The issue of this "context" discussed by the District Court demonstrates the conflict as to Defendant Gray's individual liability under *Rumsey*. While appreciating that individual liability under *Rumsey* is such that Gray must have the "ability to effectuate the adverse employment action at issue", the April Ruling again highlighted that in the context of Rheeder's Retaliation claim, Gray "was able to effectuate some action causing a material injury or harm" by speaking to her and/or merely being near Rheeder on the four separate occasions alleged. Under this reading, the *Rumsey* two-step framework collapses into one question when the allegations are physically touching or speaking. Obviously, someone is "personally involved" when it is their hands or mouth that took the action or statement at issue. Gray was "personally involved" and thus the second step is superfluous and without meaning.

It does not appear to Gray that it was the intention of *Rumsey* or the Court's subsequent decision in *Vroegh* to find a submissible case for non-employer liability due to actions indirectly related to a Plaintiff's employment when an accused has no authority. Here, the record shows non-employer

defendant Gray had no ability to effectuate employment decisions against Plaintiff. (App. 716; January Ruling, p. 26).

Accordingly, Gray, a non-employer defendant, who fails the *Rumsey* two-step framework, should be dismissed on summary judgment as the plaintiff's only allegations include non-employment-related actions. Gray thus asks that this Court dismiss her and clarify that a defendant is not liable under section 216.11(2) of the ICRA for non-employment related adverse action so as to harmonize *Rumsey* with *Godfrey*.

II. Is it prejudicial to add a cumulative retaliatory claim, i.e., a "retaliatory hostile work environment claim" when it was not presented to the Iowa Civil Rights Commission, and given leave to amend after the close of pleadings, discovery, and summary judgment?

A. Issue Preserved for Appellate Review

Defendant Gray preserved this issue for Appellate review via her 1.904 Motion addressing the District Court's January Ruling where the Court first decided the claim could be read into the Plaintiff's First Amended Petition. (App. 716-17, January Ruling, pp. 26-27; App. 769-770, Gray's 1.904 Motion, pp. 2-3). This issue was then confirmed by the District Court in its April Ruling. (App. 835-836; April Ruling, pp. 9-10.

B. Standard of Review

A district court's grant to assert new claims is reviewed for a clear abuse of discretion. *Davis v. Ottumwa*, 438 N.W.2d 10, 14 (Iowa 1989).

C. Argument

The District Court's April Ruling added Retaliatory Hostile Work Environment against Gray. Adding this new, undefined claim is an abuse of discretion. Since she was sued in 2019, Gray's defense is that the alleged adverse action attributed to her is insufficient, as a matter of law, as a discrete action retaliation claim. *See Godfrey*, 962 N.W.2d at 109 (holding adverse actions must be material and produce an actual injury or harm, and not be merely disagreeable to another). The District Court's decision to read a claim of Retaliatory Hostile Work Environment into Rheeder's First Amended Petition, and then subsequently permit Rheeder to add the claim in a Second Amended Petition, deprived Gray of the ability to argue that the theory of hostile work environment retaliation was not raised at the ICRA and thus was not properly before the District Court.

Further, Rheeder's ability to plead an alternative theory of liability (retaliatory hostile work environment) on what was the eve of trial denied Gray the ability to conduct discovery and file summary judgment on such a claim. *Peterson v. Bottomley*, 582 N.W.2d 187, 188–89 (Iowa 1998) ("[W]e

believe the [Defendants] were prejudiced by not having been put on notice that a statutory violation was being asserted.")); *Glenn v. Carlstrom*, 556 N.W.2d 800, 804 (Iowa 1996) ("A motion to amend pleadings should not be granted in close proximity to trial if it will substantially alter the issues."). While the trial was continued for unrelated reasons, this does not change the positioning of this case. Discovery is closed. It is palpable prejudice to defend a newly inserted claim without the benefit of discovery or the option to move for summary judgment, or even Defendants' ability to know the claims against them, consider them, and evaluate them meaningfully. Defendant Gray had and will have no opportunity to conduct discovery or file summary judgment on this new claim.

This inability to move for judgment is inconsistent with the Supreme Court's holding in *Feeback v. Swift Pork Company* wherein the Supreme Court emphasized that summary judgment is a critical and important part of litigation. 988 N.W.2d 340, 348 (Iowa 2023). It is incumbent on the plaintiff to come forward with admissible evidence demonstrating a trial is necessary and summary judgment is the check in the process that weeds out paper cases and defenses. *Id.* (quoting *Slaughter v. DMU*, 925 N.W.2d 793, 808 (Iowa 2019)); *see also Scott v. City of Sioux City, Iowa*, 68 F. Supp. 3d 1022, 1037 (N.D. Iowa 2014) (ruling a plaintiff did not plead retaliatory hostile work

environment in their petition and refusing to add claims after the close of the pleadings, discovery, and summary judgment). As Gray noted in her 1.904 Motion, Rheeder is the master of her own pleadings and Rheeder chose to file a hostile work environment claim in Count II that did not include Gray. (First Amended Petition at 8-9, Dkt #0028). Gray is only a defendant in Count III and it was styled as a discrete retaliation claim. (First Amended Petition at 8-9, Dkt #0028). Gray is also unable to argue that this separate cause of action was not preserved at the agency level which is necessary in order to file claims under the ICRA because the way by which the claim was added is through the Court's order.

Therefore, the District Court's January and April Rulings allowing a new, undefined claim of Retaliatory Hostile Work Environment to be added by Rheeder is a clear abuse of discretion.

III. If a retaliatory hostile work environment claim is in this case, what are the elements under the Iowa Civil Rights Act?

A. Issue Preserved for Appellate Review

Defendant Gray preserved this issue in her 1.904 Motion and this issue was decided by the District Court in its April Ruling. (App. 771-773, Gray's 1.904 Motion, pp. 4-6; App. 830-832; April Ruling, pp. 4-6).

B. Standard of Review

A district court's ruling on a motion for summary judgment is reviewed for correction of errors of law. *Pitts*, 818 N.W.2d at 96. "Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McQuistion*, 872 N.W.2d at 822. Construction of statutes like the Iowa Civil Rights Act at Iowa Code Chapter 216, et seq., are reviewed for correction of errors at law. *Iowa Individual Health Benefit Reins. Ass'n*, 876 N.W.2d at 804.

C. Argument

If Plaintiff is allowed to add a claim for Retaliatory Hostile Work Environment at this juncture of the case to rescue her retaliation claim, then Gray and the other defendants in Count III have no direction as to the elements for trial.

Defendant Gray does not dispute that there is support that a Retaliatory Hostile Work Environment could exist under Iowa law. In *Godfrey*, the Court acknowledged this cause of action stating plaintiff could plead a "special type of retaliation claim based on a hostile work environment" wherein a "series of individual acts that may not be actionable on their own [] become actionable due to their cumulative effect." *Godfrey*, 962 N.W.2d at 110

(quoting *Menoken v. Dhillon*, 975 F.3d 1, 5-6 (D.C. Cir. 2020) (construing Title VII)).

However, the Court did not define the standard for this cause of action under Iowa law and did not articulate any impact or consideration given for individual liability. *See id.* The *Godfrey* court cited to *Menoken v. Dhillon* from the D.C. Circuit which states that the cumulated actions must be "adequately linked" to form a coherent hostile work environment claim and be so severe and pervasive to alter the conditions of employment to create an abusive environment. *Id.* To decide if the actions were linked, the court examines the actions to see if they are the same type of actions, frequency of their occurrence, and if they were done by the same or different managers. *Id.* The severity and pervasiveness is governed by the familiar factors of frequency of conduct, severity, physically threatening or humility, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work. *Menoken*, 975 F.3d at 5-6.

While the District Court's January Ruling adopted the test for Retaliatory Hostile Work Environment under *Menoken*, the April Ruling upon further consideration, found it "unclear" and stated that "Iowa has yet to establish the applicable test." (*Compare* App. 713-714, January Ruling, pp. 23–24 *with* App. 836, April Ruling, p. 10). It is unclear because the federal

courts construing Title VII have divergent standards, unable to harmonize the heightened standards associated with a hostile work environment claim (born from the anti-discrimination provisions of the statute) and the lower standard associated with the anti-retaliation statute. *See Tonkyro v. Sec'y, Dep't of Veterans Aff.*, 995 F.3d 828, 835 (11th Cir. 2021); *Wyatt v. Nissan N. Am., Inc*., 999 F.3d 400, 426 (6th Cir. 2021); s*ee also Flanagan v. Off. of Chief Judge of Cir. Ct. of Cook County*, 893 F.3d 372, 375 (7th Cir. 2018); *Noviello v. City of Boston*, 398 F.3d 76, 92 (1st Cir. 2005).

Even further, the federal circuit split fails to account for Iowa law and the ability to bring suit against non-employers. The Eighth Circuit Court has made plain that the continuing violation doctrine does not apply to cases involving discrete discriminatory acts such as retaliation, as opposed to hostile work environment claims. *See Godfrey*, 962 N.W.2d at 110 (citing *Liles v. C.S. McCrossan, Inc.*, 851 F.3d 810, 820–21 (8th Cir. 2017)). Similar to Iowa courts, the Eighth Circuit describes hostile work environment claims as based on the cumulative effect of individual acts, which is a separate and distinct claim from retaliation where each alleged incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable allegedly unlawful employment action. *See id.* (citing *Liles*, 851 F.3d at 820–21).

Accordingly, if the Court adopts this theory of law and allows it to proceed in this case despite the prejudice, then Gray's case demonstrates the critical need to require the alleged actions to be sufficiently linked and cause a material adversity that objectively would dissuade a worker from making or supporting a charge. The allegations against Gray are trivial, low level and caused no material adversity to Plaintiff.

IV. Whether it is a submissible case for retaliation against a non-employer when the record shows a handful of subjectively unpleasant interactions and no change in Plaintiff's terms, conditions, and privileges of employment?

A. Issue Preserved for Appellate Review

Defendant Gray preserved this issue for appeal in her September 30, 2022, Brief in Support of Summary Judgment, (MSJ Brief, Dkt. #0169) as well as Gray's Reply Brief on November 14, 2022 (Gray's Reply Brief for MSJ Dkt. #0187). The issue was then decided in the District Court's January Ruling. (App. 716-717, January Ruling, pp. 26-27).

B. Standard of Review

This Court reviews a summary judgment ruling to determine if the law was correctly applied. *Zimmer v. Vander Waal*, 780 N.W.2d 730, 732-33 (Iowa 2010). Here, the law applied was Iowa case law construing the ICRA and thus the review is for correction of errors at law. *Id.*

C. Argument

Lastly, Gray seeks a ruling that Rheeder's case is not a submissible case under the ICRA—confirming that Rheeder's paper case amounts to the Court's sitting as "super-personnel department" applying a general civility code. *Feeback*, 988 N.W.2d at 350. Here, the factual allegations against Gray (accepted as true for summary judgment) amount to immaterial and trivial interactions between City personnel and functionally turns this Court into a super-personnel department arbitering a disagreement between two former co-workers. There is no record evidence to support adverse action—no change to material terms, conditions, or privileges of employment. *See Godfrey*, 962 N.W.2d at 109. Plaintiff's claims for constructive discharge were dismissed as a matter of law.

Assuming Gray remains in this case, even though she fails the *Rumsey* two-step framework, there are only two instances that the District Court found actionable on their own: the January 23rd and January 24th actions. Thus, the only adverse action here are the two alleged encounters in January 23 and January 24, 2019. Specifically:

- That on January 23, 2019, Gray placed her hands on Plaintiff's shoulders and told Plaintiff that Plaintiff should not have complained, not to talk about the complaint again, and to come to Gray with her future complaints. Plaintiff did continue to assert complaints beyond this point.

- And, then on January 24, 2019, Gray blocked an office doorway such that Plaintiff felt she could not leave without answering Gray's pending question of which employees knew about the complaint, and that Gray threatened to "come after" other employees with whom Plaintiff discussed her complaint (that did not involve Gray) and, that there is no record evidence that Gray "c[a]me after" any of these employees.

(App. 716–17, January Ruling, pp. 26–27; App. 775–776, Gray's 1.904 Motion, pp. 8–9). Neither of these actions constitute adverse action.

"To avoid the triviality pitfall, the retaliation must produce some 'injury or harm.'" *AuBuchon v. Geithner*, 743 F.3d 638, 644 (8th Cir. 2014) (quoting *Littleton v. Pilot Travel Ctrs., LLC*, 568 F.3d 641, 644 (8th Cir. 2009)); *Godfrey*, 962 N.W.2d at 109–110 ("the adverse action must produce an actual 'injury or harm' to the plaintiff") (citation omitted). "And the actual injury or harm must be sufficiently severe such that it would 'dissuade a reasonable person from making or supporting an allegation of discrimination or harassment.'" *Godfrey*, 962 N.W.2d at 110 (quoting *Haskenhoff*, 897 N.W.2d at 588–89); *see also AuBuchon*, 743 F.3d at 642 (To establish an action is materially adverse, a plaintiff is required to "show that a reasonable employee would have found the challenged action materially adverse, which…means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.") (citations omitted).

Here, Plaintiff alleges she was subjectively intimidated, but she continued to lodge her concerns. These allegations of interactions on January 23 and January 24 fall short, as a matter of law. Even accepting Plaintiff's rhetoric concerning an "assault" on January 23, Iowa courts do not and have not ever held that mere physical touch is tantamount to retaliation. *See Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 678–79 (Iowa 2014) (reversing and remanding summary judgment by holding that a punch to the chest coupled with the employee's resulting death may constitute adverse employment action for a retaliation claim as the death "result[ed] in termination of his employment."); *Colbert v. State, Dept. of Human Servs.-Bureau of Refugee Servs*, 859 N.W.2d 672 (Table), 2014 WL 5861777, *6 (Iowa Ct. App. Nov. 13, 2014) (holding that plaintiff could not demonstrate how an arm grab affected "the terms, conditions, or privileges of [her] employment").

Additionally, the complaint that on January 24 Gray blocked a doorway and demanded to know the names of who knew so she could "get them" strains support in the record. Regardless, for the same reason that a physical touch and conversation about her complaint is not retaliation, discussion of who knew about the complaint is also not actionable retaliation. *See id.*; *Haberer v. Woodbury Cnty.*, 560 N.W.2d 571, 576 (Iowa 1997) ("An employee may

not be unreasonably sensitive to his or her working environment." (citations omitted)). Assuming Gray's actions are aggregated for retaliatory hostile work environment, the result is the same. The allegations are low-level, trivial, and caused no material adversity to Plaintiff.

The fact that non-tangible, or non-employment-related adverse action may generate a claim does not mean that it is "adverse merely because the employee does not like it or disagrees with it." *Godfrey*, 962 N.W.2d at 110 (citing *Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n*, 672 N.W.2d 733, 742 (Iowa 2003)). Materiality is what separates significant from trivial harms. *Haskenhoff*, 897 N.W.2d at 588 (quoting *Burlington N.*, 548 U.S. at 68). Civil Rights laws are not a general civility code, courts are not super-personnel departments, and "an employee's decision to report discriminatory behavior cannot immunize the employee from those petty slights or minor annoyances that often take place at work." *Id.*

Accordingly, there is not a submissible claim under the ICRA against Gray and judgment should be entered in favor of Gray, dismissing her from this case.

CONCLUSION

For all the reasons stated above and set forth, the District Court abused its discretion and did not appropriately apply the available Iowa law in its

January and April Rulings. Accordingly, the District Court's January and April Rulings should be reversed.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellant Shellene Gray respectfully requests that this matter be heard orally upon submission of this case.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,140 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 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 Times New Roman, size 14.

Dated: January 30, 2024

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 30, 2024, I filed this Final Brief with the Clerk of the Supreme Court using the Iowa Electronic Document Management System ("EDMS"), on January 30, 2024.

I further certify that on January 30, 2024, a copy of the attached Final Brief was served using the EDMS system, upon the following persons:

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