IN THE SUPREME COURT OF IOWA

Supreme Court No. 23-0628

DARRELL JEFFREY MCCLURE,

Appellant/Plaintiff,

vs.

CORTEVA AGRISCIENCE LLC,

Appellee/Defendant.

APPEAL FROM THE KEOKUK COUNTY DISTRICT COURT
District Court Judge Crystal S. Cronk

APPELLANT'S FINAL REPLY BRIEF

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I. Introduction

Writing of the death of civil jury trials discussed within Professor Suja A. Thomas's book *The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries*, Judge Mark Bennett writes:

> Her discussion of the overuse of both motions to dismiss and summary judgment by judges leading to far fewer jury trials is consistent with both her beliefs and mine expressed in our prior scholarly articles. Professor Thomas writes: **'[I]t is clear that courts use summary judgment to dismiss many cases, including factually intensive cases, like employment discrimination cases, reducing the number of cases decided by juries.' This is one result of the transformation of real trial judges to managerial judges**."

Mark W. Bennett, *Going, Going, Gone: The Missing American Jury*, 69 ALA. L. REV. 247, 258 (2017) (emphasis added). "In part, the Declaration of Independence was adopted by the colonists 'because the King repeatedly had deprived them of trial by jury.' Even before the Constitutional convention, all the states with written constitutions provided some right to jury trials." *Id.* at 256. The question for trial lawyers and judges witnessing the death of the American jury trial then becomes, well, how exactly did we get here?

II. Corteva Asked the District Court to Ignore Plaintiff's Evidence and It Did

One way to get a court to throw out a case is to ask the court to ignore evidence. This is exactly what Corteva did. The applicable standard demands that the district court, on summary judgment, review the evidence in the light most favorable to the non-moving party. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692-93 (Iowa 2009). "The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record." *Hedlund v. State*, 930 N.W.2d 707, 715 (Iowa 2019).

One way that attorneys attempt to circumvent this standard is by arguing that various of the non-moving party's evidence should not be considered at all for some reason or another, usually alleging a contrived infirmity, including wholesale relevance objections, which though unlikely to prevail in motions in *limine* before an experienced trial judge, offer an argument that has surface-level-appeal. The most glaring instance of Corteva's use of this tactic is its arguments made to ignore similar evidence of discrimination and harassment of employees other than McClure.

A. Evidence of Discrimination of Other Employees Should Have Been Considered

Corteva argues: "Finally, Appellant cobbles together a collection of random, unsupported complaints by other employees and argues that because Corteva discriminated against them, it necessarily discriminated against him." (Appellee Br., at 42). Corteva fails to describe how these accounts of other workers are "random" or "unsupported." Instead, the accounts bear striking similarity to McClure's own complaints in all of the legally important respects: timing, job titles of the witnesses, supervisors, similarity of subject matter, similar accounts of unjustified discipline, and similar scrutiny of work restrictions. (Appellant Br., 19-38). *Salami v. Von Maur, Inc.*, No. 12-0639, 2013 WL 3864537, at *8 (Iowa Ct. App. Jul. 24, 2013) ("As the Supreme Court has explained, such testimony is neither per se admissible nor per se inadmissible; the question whether such testimony is relevant and sufficiently more probative than unfairly prejudicial in a particular case is 'fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.'") (quoting *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008)).

Further, instead of attempting to use evidence of discrimination or harassment of other employees as impermissible character evidence, as

Corteva posits, McClure instead offers evidence of discrimination to others as evidence of a discriminatory atmosphere, as evidence of notice that was provided to Corteva of harassment and discrimination, as evidence of Corteva's lack of response to the notice, and as evidence of the discriminatory animus of the managers issuing McClure discipline, including plant manager Dan Dehrkoop, and managers Steven Brooks, Jake Mittag, Will Ritter, Josey Hubanks, and Chad Langstraat. *See* Iowa R. of Evid. 5.404(b)(2).

Nor does Corteva explain how the accounts of Mike Ellis, Ron Witt, McKenna Graves, Jeff Winn and Bob Swearingen are "unsupported" when to the contrary each was specific and factual and in the form of deposition testimony or affidavit. Yet the district court agreed with this argument, holding: "Testimony from individuals that they felt discriminated against without supporting evidence is not the sort of competent evidence to defeat a motion for summary judgment." (APP. v. I p.255, Ruling, at 14). This ruling, with no citation or explanation, ignores the detailed testimony of each of these witnesses. The testimony of Mike Ellis, Ron Witt, and McKenna Graves was all the more interesting and persuasive because the same lawyers who represented Corteva throughout this case represented these individuals during their depositions, despite what appeared to be a glaring conflict of

interest which McClure's counsel brought to their attention.[1] (*See, e.g.*, APP. v. III p.247, Witt Dep. 30:11-32:21).

While this was part of Corteva's counsel's global effort to shield these witnesses from direct communication (outside of depositions) with McClure's counsel, to the witnesses' credit, each offered testimony that was directly adverse to Corteva's interests. *Id.* The fact that Corteva now attempts to disavow as irrelevant, "random" and "unsupported" evidence the detailed and honest testimony of its own employees obtained through its own attorneys' representation is no surprise—McClure's complaints while employed with Corteva fell on similarly deaf ears.

By way of example only, employee Mike Ellis, who, at the time of his November 1, 2022 deposition was days away from turning 63-years old, and who had worked for Corteva as a production technician, the same position as Jeff McClure, for almost 32 years (APP. v. IIII p.133; Ellis Dep. 3:10-4:15), and who was also represented by Corteva counsel during his deposition, testified in relevant part as follows:

> Q: Have you experienced any unfair treatment during your time working for Corteva?

[1] For example, how could Corteva's lawyers give truly impartial advice to these witnesses as to potential claims or suits against Corteva that these witnesses possessed without adversely impacting at least one of its joint clients?

A: Yes.

Q: What do you consider unfair treatment that you've experienced?

A: A little harassing and age discriminating.

Q: Describe how that's happened.

A: At the time my supervisor was Chad Langstraat.

Q: What did he do?

A: I had to put product in Warehouse 4, and by – my team lead told me to. I come back to work two days later and asked me why I did it four or five times while I was trying to run production.

And I explained to him that my team lead told me to do it. And he just kept coming at me and told me there would be repercussions for it.

Q: Who is the team lead who told you to do it?

A: Kyle Ward.

Q: Was—go ahead.

A: When I was wrote up—he apologized later, said there was nothing he could do about it.

Q: So Mr. Langstraat apologized to you?

A: Kyle Ward did.

Q: And about how long after you put the product where Kyle told you to were you written up?

A: Chad—it was during the COVID era. Chad wasn't there, but he had Will Ritter and Josey Hubanks give me the paperwork.

Q: So they are the ones that delivered the write-up?

A: Yes. Along with Josey Hubanks' write-up.

Q: There was another write-up?

A: Yeah.

Q: And that was from—

A: By Josey Hubanks. Said I disrespected an ASI employee, which was wrong.

Q: Tell me first what he said you did.

A: Of which one?

Q: The ASI employee. I'm sorry.

A: We was to have a lockout/tagout training at the time. It was night shift. Come into the lounge for it, and there was not supposed to be any ASI employees in there for the training. And I was acting as a team lead at the time, because we didn't have one. Since I was an older person, I knew all the situations of how to run soybeans. And so I asked Aaron Weston, who's the ASI employee, if he was going to get up from his seat.

And at the time Josey had his back turned against me, and he supposedly heard what I had said to the ASI employee. He thought I said to get up out of the seat, and I did not tell him to get that. I asked him if he was going to get up.

Q: And it sounds like you asked him because he wasn't supposed to be there for that –

A: Yes.

Q: --particular training.

A: And Josey says, "well, he's going to be here. So you go find another seat."

I said, "That's okay. I already had planned on finding another seat."

Q: So for you it wasn't about the chair; you were just trying to follow protocol?

A: Yes.

Q: Did you –

A: My son was sitting to the next table over, and when I got wrote up, I explained to my son what happened. He said, "Dad you never did tell him to get up out of his seat."

Q: Were you ever allowed to explain your side of the story at the time that you were written up?

A: Yes. I explained everything to Josey and Will Ritter when they handed me the paper.

Q: And what happened?

A: They just told me to sign the paper. And I told them I would not sign the paper, because it was wrong. It was all lies.

Q: Were you ever forced to sign the paper?

A: They kept asking me to sign it.

Q: Did you ever sign it?

A: No, I didn't.

Q: How many times do you think they asked you to sign it?

A: Three. They said, "Well, we'll just put it in your file as—put it in your file as you refused to sign it."

(APP. v. III p.135-136; Ellis Dep. 12:1-15:13). Ellis continued to describe, in detail, additional unjustified discipline he received under the same managers that disciplined McClure, including plant manager Dehrkoop. (APP. v. III p.136-139; Ellis Dep. 15:14-28:15). Ellis also

described that manager Chad Langstraat was "constantly watching him" especially when he went to speak to team leads. (APP. v. III pp.137-138; Ellis 21:19-22:6).

Similarly, former Corteva production technician Jeff Winn, who was 64 at the time he constructively discharged, and who was disabled and requested a day-shift accommodation due to his diabetes, also testified to unjustified discipline he received preceding his constructive discharge. Winn testified in part:

> Older employees were not being treated well and were treated worse than younger employees at the plant. We were being targeted with things like the lengthy review of an accommodations request I experienced and with unfair discipline.
>
> I experienced unjustified discipline where I was disciplined for things I did not do.
>
> Dan Dehrkoop approached me on two separate occasions about not stopping at stop signs while driving the forklift. On both occasions I had come to a full stop. Also on both occasions, I was aware of where Dehrkoop was while I was driving, and on both occasions he was not in a location where he could even see whether or not my forklift came to a stop at the intersection.
>
> In the first situation, I came to an intersection where I could see clearly in all directions and I stopped. At the time, Dehrkoop was not in my line of sight and was not able to see me because there was product stacked in between us. As I drove through the intersection he came into view. He stopped me after I went through the intersection and told me I did not stop because he did not hear me sound my horn. I was not supposed to sound my horn because the view was unobstructed and no other trucks were

> in the area. I told Dehrkoop I had stopped. This incident was later included in a write up that I received.
>
> On the second occasion, Dehrkoop was in a separate warehouse from me and there was a wall in between us when I stopped at the intersection. Nevertheless, he approached me when I drove into the other warehouse and told me he did not 'hear me stop.' I again told him I did stop but this incident was later included in a write up that I received.
>
> ***
>
> Another time Hubanks came to talk to me about something I did not do was when a labeler, a machine that adds labels to pallets of seed, got broken. At the time the machine got broken, I was over 100 feet away from it walking near some pallets with another Corteva employee. Hubanks asked me 'what did you do to it?' meaning the labeler. I told him I did nothing and I was 100 feet away when I heard a big crash. Even though I gave Hubanks the name of the employee who had been with me, and that employee told me that he told Hubanks the truth—that I was nowhere near the labeler when it broke—Hubanks told me 'I don't believe you.'

(APP. v. III pp.19-21; Winn Dec. ¶¶ 9-13, 16).

Again, Corteva has failed to point out how testimony such as the testimony excerpted above would be inadmissible at trial or is "unsupported" and has also failed to rebut this testimony in any respect.

Moreover, when arguing that evidence of discrimination to others is irrelevant, Corteva fails to discuss or distinguish the many authorities cited by Plaintiff other than to argue that most were not decided on summary judgment, and, without any further specificity, the bare conclusion that: "But not one of these cases Appellant cites is on point." (Appellee Br., at 42). Of

course, McClure disagrees. *Salami*, 2013 WL 3864537 at *8 ("As the Supreme Court has explained, such testimony is neither per se admissible nor per se inadmissible; the question whether such testimony is relevant and sufficiently more probative than unfairly prejudicial in a particular case is 'fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.'") (quoting *Sprint/United Mgmt. Co.*, 552 U.S. at 388); *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262-63 (Iowa 1991) ("Evidence of a discriminatory atmosphere is relevant in considering a discrimination claim, and it 'is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment.'"); *Sandoval v. Am. Build. Maint. Indus., Inc.*, 578 F.3d 787, 802-803 (8th Cir. 2009) ("When judging the severity and pervasiveness of workplace sexual harassment, this court has long held harassment directed towards other female employees is relevant and must be considered."); *White v. Honeywell, Inc.*, 141 F.3d 127 (8th Cir. 1998) ("We have long held that '[e]vidence of prior acts of discrimination is relevant to an employer's motive . . ., even where this evidence is not extensive enough to establish discriminatory animus by itself"); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988) (same).

More recently, in *Valdez v. West Des Moines Community School District*, the Iowa Supreme Court discussed the standard for admission of evidence of discrimination or harassment to others as follows:

> As a general matter, "[e]vidence of a discriminatory atmosphere is relevant in considering a discrimination claim, and it 'is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment.'" *Hamer*, 472 N.W.2d at 262 (quoting *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987)); *see also Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. 379, 387-88, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008) (disavowing per se rule of exclusion for similar acts evidence in age discrimination case that would require such evidence to involve the same supervisor).

Valdez v. West Des Moines Cmt. Schs, 992 N.W.2d 613, 640 (Iowa 2023). *Valdez* also held the relevancy of such evidence can be affected by many factors including:

> 'whether such past discriminatory behavior by the employer is close in time to the events at issue in the case, whether the same decisionmakers were involved, whether the witness and the plaintiff were treated in a similar manner, and whether the witness and the plaintiff were otherwise similarly situated.'

Id. (quoting *Elion v. Jackson*, 544 F. Supp.2d 1, 8 (D.D.C. 2008). Corteva's one cited case on point, *Garang v. Smithfield Farmland Corp.*, is both factually and legally distinguishable as the court in that case applied a more restrictive test than is set forth in *Valdez* and *Salami* and also held that the evidence of discrimination to others in that case lacked the factual similarity

that is present here—timing, supervisors, job positions, etc. *Garang v. Smithfield Farmland Corp.*, 439 F. Supp.3d 1073, 1095 (N.D. Iowa 2020).

Finally, the testimony of other employees that Corteva avoids and the district court ignored does not relate solely to their own claims or circumstances and instead also relates directly to McClure's claims. For example, witness Ellis testified, among other things, that at least one of the impacts recorded against McClure happened when another employee was driving McClure's forklift. (APP. v. III pp.142-143; Ellis Dep. 41:16-43:1). In addition, the testimony of Corteva employee Bob Swearingen, which described the ways in which Dehrkoop manipulated the expert testing of the Hyster tracker forklifts, is directly relevant to undermine the veracity and reliability of any of the information obtained from the Hyster Trackers which Corteva attempts to rely upon at trial and also to undermine Dehrkoop's credibility as to his reliance upon Hyster tracker data. (APP. v. III pp.12-15; Swearingen Dec. ¶¶ 4-24). While McClure is not arguing that this testimony is dispositive, he is arguing that it creates a record replete with genuine issues of material fact, and also with credibility determinations, which much be resolved by a jury.

B. Classic Jury Trial Issues Are Sidestepped—Was the Light Red or Green? Did the Dock Lights Work? What Was the Applicable Policy? Who Was at Fault for the Accident? Were Older and Younger Employees Involved Treated the Same or Differently? *What Did Corteva Management Know About All of the Above When Discipline Was Issued*? *Were Management's Motivations Legitimate, and Non-Discriminatory, or Did Age or Disability Play a Part*?

Perhaps the biggest red flag that this district court opinion, if affirmed, is another notch in the belt of those ushering in the death of the American jury trial is the existence of classic jury questions which have been sidestepped by the district court in order to grant summary judgment. Questions as basic and as synonymous with jury trial practice as "Was the light red or green?" "What was the applicable policy?" "Who was at fault for the accident?" "Were older and younger employees involved treated the same or differently?" "What did Corteva management know about all of the above when discipline was issued?" and then the ultimate question, which is of course answered based on all of the answers to questions that preceded it (not in an evidentiary vacuum as Corteva suggests when it argues that this evidence is somehow irrelevant): "Were management's motivations legitimate, and non-discriminatory, or did age or disability play a part?"

Some of these questions and resulting dispute regarding what the evidence showed appeared within the parties' responses to facts. By way of

example only, the parties do not agree regarding the circumstances that resulted in McClure being temporarily trapped in the back of a truck, (Resp. to Addt'l Facts #17), nor what plant management knew about the incident and the faulty equipment, (*id.* #18-19); (*see also* APP. v. III p.252; Witt Dep. 50:4-52:4) (management knew of faulty dock equipment), nor the facts surrounding the forklift accident (who hit whom and how fast each was going—indeed Corteva's witnesses disagree with one another about speed), (*id.* #21), nor the reliability of the Hyster tracker data (*id*. #24); nor what management knew regarding the lack of reliability of the Hyster data (APP. v. I pp.123-128; Pl. Resp. to Def.Facts #32), nor the disparate treatment of older versus younger employees (APP. v. I pp.118-119; Resp. to Addt'l Facts #20-22); (*see also* (APP. v. III p.82, 4.6.20 Hubanks/Brooks/Boone emails); (APP. v. II p.268, McClure Dep. 227:2-227:9); (APP. v. II p.66, McClure Dep. 220:2-8)) (no discipline to younger employee involved in truck incident), and most especially, the parties disagree as to the motivations or intent behind the disciplinary measures McClure received after his complaint to human resources. (*See, e.g.*, APP. v. I p.122, 129-130, 138-139; *id.* ## 28, 36, and 63). And with regard the keys being given to the driver for the incident in which McClure ended up in the back of a truck, Witt testified that after this incident involving McClure, Corteva changed the

applicable policy. (APP. v. III p.254; Witt Dep. 60:10-61:7). This is additional evidence that management was looking for any reason it could to discipline McClure when he self-reported this "near miss" incident—dedicated to foisting all responsibility on his shoulders while simultaneously changing its own policies to avoid a near miss in the future.

Corteva's efforts to discount McClure's evidence are contrary to Iowa law. The district court's ruling granting summary judgment should be reversed.

III. Even if the Prima Facie Case Continues to Be Misconstrued—Evidence of Illegal Motivations Prevails Whether at the Prima Facie Stage or Final Stage of the *McDonnell Douglas* Analysis

McClure again returns to the death knell to jury trial sounded by the district court ruling in this case and here addresses more nuanced issues—i.e. correct application of the *McDonnell Douglas* test and in particular the second element of the prima facie case. The district court in this case got stuck at that step of the test, and based on the case law, which is conflicting, it was not alone in doing so. While the evidence of unjustified discipline and illegal motivations discussed within Section II above should have prevailed whether at the prima facie stage or the final stage of the *McDonnell Douglas* test to at least raise genuine issues of material fact as to

age and disability discrimination, confusion in the courts abounds as to how to apply the "qualified" element of the prima facie case.

A. The Second Element of the Prima Facie Case Continues to Be Misconstrued

The second element of the prima facie case of age or disability discrimination, whether the employee was "qualified to perform [his or her] position" or whether the employee was "performing satisfactorily" is, as McClure emphasized in his opening brief, often misunderstood or misapplied. By referencing the different language used for this prima facie test, McClure is not raising a new argument, as Corteva posits, but is raising the issue of the varying language used to show how summary judgment was improperly achieved through a substantive misunderstanding of the case law—no matter the incantation of the test used. For example, McClure argued, before the district court, that this element: "does not require proof that Plaintiff was meeting Defendant's performance expectations." (McClure SJ Res. Br., at 29). Further, as McClure argued in his opening appellate brief: "McClure offers this analysis regarding the second step of the prima facie case not because it is dispositive, but because the applicable standards are easily convoluted and confused, or purposefully conflated, with significant negative effects. Swapping "qualified" for "performing satisfactorily," *without thoroughly understanding the case law*, for example,

can have a significant impact." (Appellant Br., at 45) (emphasis added). [2] Further, substantial confusion exists in the courts about this element of the test. *Garang*, 439 F. Supp.3d at 1085.

McClure suggested that one way to avoid confusion would be to incorporate Judge Strand's efforts in *Garang* to wade through the cognitive dissonance:

> an analysis of whether a plaintiff has established the second element must be guided by the fact that the plaintiff does not have to disprove the defendant's proffered legitimate reasons for an adverse employment action during the prima facie stage of the *McDonnell Douglas* analysis. That must be reserved for step three of the *McDonnell Douglas* test. To do otherwise would collapse the *McDonnell Douglas* burden-shifting analysis 'into the second element of the prima facie case' and create too onerous a burden for plaintiffs at the prima facie stage.

Id. at 1086.

To prove the second element a "'plaintiff must show only that he possesses the basic skills necessary for the performance of the job,' not that he was doing it satisfactorily." *Cox v. Infomax Office Systems, Inc.,* No. 4:07-

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[2] Regardless of whether *Feeback* is considered retroactive, McClure advocates for interpretation of the second element of the prima facie case which requires that the plaintiff show he can perform the "basic skills" necessary for the performance of the job regardless of the language used for this element. *Feeback v. Swift Pork Co.*, 988 N.W.2d 340 (2023). The facts of *Feeback* in which an employee texted his plant manager "FUCK You!" and "Believe who and what you want" are distinguishable and thus, beyond its use of "qualified" for the second element of the prima facie case, *Feeback* has little interpretive value. *Id.* at 343.

cv-0457-JAJ, 2009 WL 124700, at *4 (S.D. Iowa Jan. 16, 2009), citing *McGinnis v. Union Pac. R.R.,* 496 F.3d 868, 874 n. 2 (8th Cir. 2007) (quoting *Slattery v. Swiss Reinsurance Am. Corp.,* 248 F.3d 87, 92 (2d Cir. 2001), *cert denied,* 534 U.S. 951, 122 S.Ct. 348, 151 L.Ed.2d 263 (2001)).

Given the length of McClure's tenure, and his track record of overall positive performance reviews, even during the time period during which Corteva contends McClure was incurring dispositive safety violations, proof of the second element of the prima facie test should be inferred. *Riley v. Lance*, 518 F.3d 996, 1000 (8th Cir. 2008) (holding it was error for the district court to require the plaintiff to show that he was "performing his job at the level that met the employer's legitimate expectations" and instead held that, at the prima facie stage, the plaintiff needed only to show that he was "otherwise qualified" for the position he held, which in that case was shown because he had been performing the job successfully for years); *see also Peterson v. Martin Marietta Materials, Inc.*, 2016 U.S. Dist. LEXIS 64469, (N.D. Iowa May 17, 2016) (Strand, J.) (analyzing summary judgment claims under the ADA and ICRA and holding as to the "qualified" element that "I am unable to find as a matter of law that Peterson was not qualified to perform this essential duty. The fact that Peterson was involved in two property damage accidents does not conclusively demonstrate that Peterson

was unqualified to follow safety practices. While defendants argue that Peterson was not meeting his employer's legitimate expectations, the Eighth Circuit has rejected that standard") (citing *Riley*, 518 F.3d at 1000); *Roberts v. USCC Payroll Corp.*, 635 F. Supp.2d 948, 964 (N.D. Iowa 2009) (Bennett, J.) (citing *McGinnis,* 496 F.3d at 874 n.2 and holding "Applying the *Riley-McGinnis* criterion in this case, plaintiffs easily meet their burden of establishing this stage of the prima facie case based on their multi-year work history at USCC").

Corteva fails to rebut that McClure possessed overall successful performance reviews even during the latter part of his more than 39-year tenure when it apparently became so concerned with his job performance. (APP. v. III p.190, McClure Dep. 42:14-42:16) (length of service to Pioneer/Corteva); (APP. v. III pp.31-40; McClure 2017 Performance Evaluation Form) (giving scores of all "on track"); (APP. v. III pp.41-42; McClure 2018 Annual Performance Review) (giving overall rating of "Successful Performance"); (APP. v. III pp.43-46; McClure 2019 Annual Performance Review) (giving overall rating of "Successful Performance").

Further, during his deposition, Witt described McClure as a good forklift driver who had not required any correction from Witt's perspective. (APP. v. III p.254; Witt Dep. 38:21-39:10).

Summary judgment was improperly granted against McClure on this basis and should be reversed.

B. Fact Issues Exist in this Case at Any Stage of the *McDonnell Douglas* Test

Whether the evidence of discrimination to McClure and others is considered at the prima facie stage or at the final stage of the *McDonnell Douglas* test, especially when the evidence must be viewed in the light most favorable to McClure, it is apparent that genuine issues of material fact exist. From review of the disputed facts cited in Section II, *supra*, summary judgment should not have been granted in on either McClure's claim for age discrimination or his claim for disability discrimination. McClure provides additional analysis of the disability claim in the next section.

IV. Corteva Offers a Federal, Pre-ADAAA Restrictive View of What Constitutes a Disability While Also Arguing for An Unduly Restrictive Interpretation of the Perceived Disability Doctrine

Corteva relies primarily upon one federal district court case from the Eastern District of Michigan to argue that his inability to work the night shift should not be considered a disability for the purpose of the Iowa Civil Rights Act. (Appellee Br., at 33) (citing *Runkle v. Potter*, 271 F. Supp.2d 951 (E.D. Mich. 2003)). The problem with this argument is that *Runkle* was decided

prior to the amendments to the Americans with Disabilities Act, which occurred in 2008. As described in *Goodpaster*:

> The Amendments Act states that its purpose is 'to reinstate a broad scope of protection' by expanding the definition of the term 'disability.' Congress found that persons with many types of impairments—including epilepsy, diabetes, HIV infection, cancer, multiple sclerosis, intellectual disabilities (formerly called mental retardation), major depression, and bipolar disorder—had been unable to bring ADA claims because they were found not to meet the ADA's definition of 'disability.' Yet, Congress through that individuals with these and other impairments should be covered and revised the ADA accordingly. Congress explicitly rejected certain Supreme Court interpretations of the term 'disability' and a portion of the EECO regulations that it found had inappropriately narrowed the definition of disability.

Goodpaster, 849 N.W.2d at 9.

While the *Goodpaster* Court was careful to acknowledge that "[f]ederal law does not necessarily control our interpretation of a state statute," and "an amendment to a federal statute does not simultaneously and automatically amend a parallel or even identical Iowa statute," *id.*, the Court recognized that the restrictive readings of the meaning of the term disability offered by the U.S. Supreme Court prior to the ADA amendments in 2008 "are inapposite to any discussion of the meaning of the ICRA." *Id.* at 10. In part, the Court based its ruling, which recognized a broader interpretation of the meaning of "disability," on the ICRA's proscription that "*it shall be broadly construed to effectuate its purposes*." *Id.* (quoting Iowa Code §

216.18(1)) (emphasis in the original). Naming specifically two U.S. Supreme Court cases that had restricted the meaning of "disability," *Goodpaster* held:

> Of course, *Toyota* and *Sutton* did not construe the terms of the federal statute broadly. *See Toyota*, 534 U.S. at 196-98, 122 S.Ct. at 691, 151 L.Ed.2d at 630-31; *Sutton*, 527 U.S. at 488, 119 S.Ct. at 2149, 144 L.Ed.2d at 466; *see also* Alex B. Long, "*If the Train Should Jump the Track . ..*" : *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 Ga. L. Rev. 469, 495 (2006) ("The Supreme Court's restrictive reading of the ADA's terms has provoked a large outcry from academics and the original sponsors of the measure in Congress.") . . .

Goodpaster, 849 N.W.2d at 9-10**.**

And yet, while *Goodpaster* denounced as in conflict with the Iowa Civil Rights Act the holdings of cases like *Toyota* and *Sutton*, *see Goodpaster*, 849 N.W.2d at 10, those are the very authorities relied upon in the one pre-ADAAA federal case cited by Corteva. In *Runkle*, a United States Postal Service employee who had epilepsy but had not suffered any grand mal seizures close in time to his request for accommodation, the district court relied upon both *Sutton* and *Toyota* when determining he was not disabled, under the more restrictive approach to defining a disability that was the impetus for the 2008 amendments to the ADA. *See Runkle*, 271 F.Supp.2d at 961-62. Thus, *Runkle* is not even good law within the federal courts, presently, given the 2008 amendments to the ADA, and, according to

Goodpaster, it is has never been good law in Iowa. Corteva made no attempt to point any of this out to the Court below—that it was reviewing bad, pre-ADAAA authority—or for that matter, to this Court.

Corteva further argues that Plaintiff cannot show he is disabled because he is not substantially limited in his major life activities as a result of his (now three) heart attacks nor his migraines existing at the time he was employed. Corteva focuses on deposition testimony wherein plaintiff was asked if he is limited in any of his daily activities. However, both the questioning during the deposition and Corteva's brief purposefully sidestep the obvious truth—Corteva does not dispute that McClure's physician (in four separate doctor's notes) prohibited McClure from working a prolonged or continuous night shift. It is this heart attack/cardiovascular disability for which McClure requested accommodation both in 2014 and in 2017 when new management sought to change McClure back to night shift. Corteva concedes that working is a major life activity, (Appellee Br. at 31), and it has also been consistent in its efforts to reiterate, throughout the litigation, that Corteva was good enough to accommodate McClure's disabilities—as a defense to any failure to accommodate claim and to rebut harassment allegations concerning the requirement of four separate doctor's notes. (*See,*

e.g., APP. v. III pp.180-181; Appellee Br., at 48) ("and requested an accommodation that was, at all times, granted").

Furthermore, it is apparent from the record that Dehrkoop had a problem with McClure and others who had disabilities and similar night shift restrictions—which includes his insistence upon four separate doctor's notes to substantiate an accommodation that McClure had been provided for years, similar requests to Jeff Winn, his constant questioning of whether McClure should in fact be entitled to the accommodation, and, when all else failed, his write ups for attendance issues, which Dehrkoop meted out to both McClure and to Graves after each requested accommodations for their respective disabilities. (APP. v. III p.90; 4.30.20 Dehrkoop email); (APP. v. III p.155; Graves Dep. 40:9-41:14). Thus, whether the heart attacks and resulting cardiovascular conditions/migraines constitute a disability under Iowa law, including *Goodpaster*, should be decided by a jury.

Finally, and although the facts viewed in the light most favorable to McClure indicate that Dehrkoop had a problem with McClure, Jeff Winn, and McKenna Graves because of their disabilities and disability-related restrictions, Corteva attempts to parse the meaning of "perceived disability" in a pedantic fashion, adding extra elements to that term that are not found in

the case law. (Appellee Br., at 34-35). Summary judgment was improperly granted on McClure's claims of disability discrimination.

V. Genuine Issues of Material Fact Exist as to Whether the Harassment at the Hedrick Plant of Older, Disabled Workers Created a Hostile Work Environment

Corteva accuses McClure of not having "engaged with the case law," regarding his harassment claim. Setting aside direct trial experience of the undersigned trying harassment cases to juries, Mclure also finds this ironic, given that he has had to explain how Corteva cited bad, pre-ADAAA case law without identifying it as such. In any event, whether a workplace is "permeated with discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions" of McClure's employment, the standard quoted by Corteva from *Haskenhoff,* is a highly fact-dependent inquiry which no string of cases can definitively answer. It is dependent upon the individual facts of the particular case. The Eighth Circuit Court of Appeals has described the fact-intensive nature of this inquiry as follows:

> Whether an environment is hostile or abusive cannot be determined by a "mathematically precise test"; it entails consideration of the entire record and all the circumstances. *Id.* There is no particular factor that must be present, but conduct that is merely offensive is insufficient to implicate Title VII. Id. at 370. Relevant considerations include:

> The frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.
>
> *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996).

Plaintiff argues he was subjected to a hostile work environment through unjustified discipline and Dehrkoop's questioning of his doctor's notes and also by working in an environment where employees were regularly being mistreated. McClure's 2017 complaint to Corteva human resources identified the harassment to others that he was witnessing. (APP. v. III pp.54-64, McClure Complaint).

Witness Ron Witt, again, represented by Corteva's lawyers for his deposition in this case, also made a complaint to human resources at about the same time McClure did based on witnessing harassment of others. (APP. v. III p.242; Witt Dep. 7:11-8:3). Witness Jeff Winn described an experience similar to McClure's with respect to both unjustified discipline and unjustified scrutiny and delay in granting his request for accommodation due to his diabetes. (APP. v. III pp.18-23; Winn Dec.). Witness McKenna Graves testified regarding the unfair discipline she received and also that her complaints to human resources were falling on deaf ears. (APP. v. III pp.151-152; Graves Dep. 25:3-27:12). Witness Mike Ellis described that if human resources had ever returned his call regarding his complaints he

would have told them that "I come to work every day not knowing when my last day's going to be there." (APP. v. III p.140; Ellis Dep. 30:18-19). In addition, McClure described the harassment he was experiencing directly to Corteva human resources in his October 30, 2017 update to his complaint as follows:

> I am physically, mentally, and emotionally drained by this mess. It is taking a toll on my family, and work life. I physically get ill when I have to be around Dan and his supervisor's, because I never know what they are going to pull next. I suffer from involuntary muscle tremors and I generally have them under control by medicine, the increased stress load from this increased my tremors to the point my medicine is hardly keeping [it] in check.

(APP. v. III pp.63-64, McClure Complaint Update; APP. v. III p.257 McClure Dec. ¶ 3).

Genuine issues of material fact preclude summary judgment as to McClure's harassment claim and the district court's ruling on this basis should also be reversed.

VI. Dehrkoop's Retaliatory Vendetta Against McClure and His Protected Activity, Culminating in Termination, Creates Fact Issues as To Causation that Should Be Decided by a Jury

In order to recover for retaliatory discharge, the plaintiff must prove: (1) he was engaged in statutorily protected activity; (2) the employer took adverse employment action against him; and (3) there was a causal connection between his participation in the protected activity and the

adverse employment action taken. *Haskenhoff*, 897 N.W.2d 553, 582, at *43 (Waterman, J.). The causation standard applicable to ICRA retaliation claims is the "motivating factor" standard. *Id.* at 602 (Cady, C.J.); *see also id.* at 637 (Appel, J.).

Corteva argues it is entitled to dispositive relief on McClure's retaliation claim because too much time elapsed in between the time that McClure complained to Corteva human resources in October, 2017 and the time he was fired in July, 2020. This argument, however, is based on a faulty reading of both the facts and the law. In addition, McClure pleaded that protected activity included not only his complaint to human resources but also his newly needed request for accommodation to work the day shift. (APP. v. I p.55, McClure Am.Pet. ¶ 109). This fact is important because Dehrkoop showed hostility to workers, including McClure, who had restrictions from working the night shift.

While Dehrkoop and the managers working under him laid fairly low with respect to McClure throughout the time that Corteva investigated McClure's internal complaint, by 2019, and after McClure's second heart attack, Dehrkoop questioned McClure's accommodations, accusing McClure of working in other outside jobs while on leave, and, in the words of the

district court, "ramped up" the discipline of McClure, all of which McClure contends was unjustified discipline, culminating in McClure's termination.

While Corteva focuses on an asserted lack of temporal proximity between the protected activity and adverse action,"'the mere passage of time is not legally conclusive proof against retaliation.'" *Branch v. Temple Univ.*, 554 F. Supp.3d 642, 655 (E.D.Pa. 2021) (quoting *Robinson v. SEPTA*, 982 F.2d 892, 894, (3d Cir. 1993)). "In *Robinson*, during the two years that passed between the employee's complaint of racial discrimination and the employee's discharge, the defendants subjected plaintiff to a 'constant barrage of written and verbal warnings . . ., inaccurate point totalings, and disciplinary action.'" *Id.* "The Third Circuit concluded this pattern of antagonism in the intervening pattern sufficed to establish a causal link between the plaintiff's protected conduct and subsequent discharge." *Id.*; *see also Malin v. Hospira, Inc.*, 762 F.3d 552, 559 (7th Cir. 2014) ("The district court held that three years was simply too long an interval to support an inference that retaliation had occurred. Hospira goes further, arguing in this appeal that the three-year time interval is a 'fatal time gap' that forecloses any inference of retaliation. We disagree."); *Tekippe v. State,* No. 10-0464, 2011 Iowa App. LEXIS 214 (Iowa Ct. App. 2011) (gap in timing not dispositive as to causation with respect to whistleblower retaliation

claims). Summary judgment should not have been granted as to McClure's retaliation claim.

VII. Conclusion

Genuine issues of material fact preclude summary judgment as to each of McClure's claims. The case should be reversed and remanded for a jury trial on all claims.

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COST CERTIFICATE

I hereby certify that the costs of printing this brief were $0.00 because it was filed electronically.

/s/ Megan Flynn

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements of Iowa R. App. P. 6.903(1)(g) because it contains 6,999 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the typestyle requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14 type.

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CERTIFICATE OF FILING

I, the undersigned attorney, hereby certify that I have cause to be filed electronically pursuant to Iowa Rule 16.1201 et. seq. this Finaly Reply Brief with the Clerk of the Supreme Court, Appellate Court's Building, 1111 E. Court Street, Des Moines, Iowa, on December 1, 2023.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify, that on December 1, 2023, I caused to be served by electronic filing Appellant's Final Reply Brief pursuant to Iowa Rule 16.1201 et. seq. which service included the following attorneys of record for Defendant Corteva:

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