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 RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS' DECISION DATED JULY 24, 2024

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This Court Should Reject Corteva's Request for Further Review Because There Is No Conflict with Precedent as Corteva Claims

Plaintiff Jeff McClure worked as a production technician for Corteva Agriscience, a company once known as Pioneer Hi-Bred, for more than 39 years before being terminated on July 10, 2020, at the age of 58. McClure was terminated after a forklift driven by a temporary worker collided with his forklift. Using Corteva's own evidence, the temporary worker was driving twice as fast as McClure just prior to the collision. McClure's termination, which occurred at both the request and approval of plant manager Dehrkoop, and in consultation with Corteva's human resources, marked the culmination of a series of efforts by relatively new Corteva management (individuals in their 30s who were hired and promoted in approximately 2017) to undermine the ability of older, disabled workers to continue to work for Corteva.

One of the biggest sticking points for Corteva management was disability-related restrictions, like those held by McClure, and especially restrictions that affected which shifts an employee could be placed on or affected times that the employee could report to work. McClure suffered one heart attack in early February, 2014 and another in April, 2019, both during the time he was still working for Corteva. After his first heart attack in 2014, and until new management came on board, Corteva followed

McClure's doctor's restriction to work day shifts without any question. New management, including new plant manager Dehrkoop, however, attempted to put McClure back on night shift work in the fall of 2017. Then began a lasting battle over McClure's requested accommodation to work the day shift. McClure ultimately was required to provide four doctor's notes before Corteva finally admitted that he did in fact need the accommodation he had already held for three years. But management also began issuing unjustified discipline to McClure—writing him up, for example, for taking photos with his cell phone within the plant even though the assistant plant manager had instructed him to take the photos with his phone.

Management also, behind the scenes in emails between Dehrkoop and human resources employees, continued, after his second heart attack, to question and scrutinize McClure's entitlement to his night shift restriction. Unlike isolated write ups that McClure had received during the course of his multi-decade career, like the September, 1993 write up over the accidental discharge of a firearm McClure brought to work after he and other workers had been shot at the night before, which was resolved between McClure and the prior plant manager long before Dehrkoop became plant manager (in fact Dehrkoop would have been 10-years-old when the matter was resolved), the new write ups were baseless attempts to discriminate against McClure.

McClure complained, in a lengthy written complaint, to corporate Corteva human resources after the first of these writeups which, not coincidentally, occurred within weeks after he re-requested his day shift accommodation in the fall of 2017. However, Corteva human resources concluded its new management deserved only a wrist slap, but was not discriminating, and thereafter the write ups continued.

In addition, new forklift sensors were installed at the Hedrick plant in approximately September, 2019. Far from achieving any safety goals for which they may have been designed, the sensors were erratic and unreliable and instead of recording impacts to the forklift, often recorded impacts when no impacts actually occurred—for example recording impacts when the forklift drove over cracks in the concrete floors or when a clipboard was dropped on the sensor, and yet not recording actual impacts or recording false speeds. The sensors did provide Corteva with the perfect ruse, however, the perfect pretext, to claim then, and claim now, that McClure was a problem employee—as they argue here—with "more than thirty separate safety violations"—Corteva relies heavily on aggregating the unreliable impacts recorded by these sensors. Yet Corteva could not explain to the Court of Appeals how there was not at least a genuine issue of material fact when Corteva's own employees, including an experienced

forklift driver and long-term employee who was involved in Corteva's own expert testing of the forklift sensors, described, through sworn testimony, specific aspects of the unreliability of the sensors.

Further, McClure offered evidence that Corteva management knew the sensors were unreliable and had received many employee complaints about them by the time it both disciplined and fired McClure. In fact, the sensors were so unreliable that Dehrkoop went to great lengths to manipulate Corteva's expert tests in advance of the trial originally scheduled in this case. Similarly, plant management, including safety supervisor Josey Hubanks, knew well of issues with the plant's loading docks, including issues that ultimately precipitated a final written warning McClure received in the Spring of 2020, after he self-reported a broken lock dock that lead to him being temporarily trapped in the back of a semi-trailer. In other words, fact issues fully surrounded any alleged "honest belief" held by Corteva's management. This is not a case of second-guessing business decisions as Corteva claims—instead what is second-guessed is the credibility of each of Corteva's management witnesses.

Moreover, McClure offered testimony of similarly situated employees who held the same position he did, production technicians, and who worked under the same managers, during the same or similar time periods, and who

suffered very similar instances of unjustified discipline or problems having management recognize and adhere to their disability accommodations. McClure obtained testimony helpful to his case from these employees even though Corteva insisted that its lawyers represent most of them individually despite what appeared to be glaring conflicts of interest. While this made for awkward depositions in Sigourney, to the witnesses' credit, they told the truth. One such employee was Mike Ellis, who at the time of his deposition, was days away from turning 63-years old and was still employed by Corteva, and who testified:

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

Although during McClure's suit, which has now been pending since August, 2021, some noticeable changes have occurred at Corteva—Dehrkoop was quietly "promoted" from his position as plant manager to an office position where he no longer supervises plant employees, and disabled employee McKenna Graves appeared to be able to return to work after her maternity leave, McClure still awaits a jury trial on his claims. The Appellate Court did not retain all of McClure's claims, dismissing his claims of harassment and retaliation, but it held that genuine issues of material fact

existed as to his claims of age discrimination and disability discrimination. The most relevant portion of the opinion is copied below because it addressed many of the arguments that Corteva repeats in its request for further review and because it contains the one paragraph on "honest belief" from the Court of Appeals opinion that has been mischaracterized by Corteva as something it is not. There is no misunderstanding of the "honest belief" analysis set forth in *Feeback*. Instead, there is just a fact dispute over Corteva's witnesses' overall lack of honesty. This section of the Court of Appeals opinion also concisely sets forth relevant and accurate analysis of McClure's remaining claims:

> Finding McClure proved or at least generated a fact question on his prima facie cases of age and disability discrimination, and because step two is undisputed, we move to step three. McClure must "demonstrate the employer's proffered reason [was] pretextual or, while true, was not the only reason for his [discharge] and that his age [or disability] was another motivating factor." *Feeback*, 988 N.W.2d at 348. At oral argument, McClure clarified that he was pursuing both a pretext theory and a motivating-factor theory. And Corteva agreed both theories were at play. Despite the avenue taken (pretext, motivating factor, or both), the bottom-line question under the *Feeback* framework is the same: whether there is a genuine issue of material fact that the employee's protected characteristic played a part in the adverse employment action. *See DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009) (noting a motivating factor is one that "played a part" in the adverse employment action); *Boge v. Deere & Co.*, No. 22-CV-2074-CJW- KEM, 2024 WL 690234, at *17 (N.D. Iowa Feb. 20, 2024) (examining *Feeback*'s modified test).

Discrimination claims that advance to step three of the *Feeback* framework are tough to square with summary judgment because the focus is on discerning discriminatory animus from the evidence. *See Hoefer v. Wis. Educ. Ass'n Ins. Tr.*, 470 N.W.2d 336, 338 (Iowa 1991) (en banc) (noting civil claims dealing with motive and intent "are generally poor candidates for summary judgment because of the[ir] subjective nature"). The often-elusive nature of this animus means employees usually piece together circumstantial evidence to create a "mosaic of intentional discrimination" at this stage. *Banks v. Gen. Motors, LLC*, 81 F.4th 242, 259 (2d Cir. 2023) (citation omitted). Still, employees "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5). In reviewing the evidence put forward by McClure, we analyze his age and disability claims largely in tandem.

McClure offered a variety of evidence to prove that his age, disability, or both played a part in Corteva's decision to fire him. He first points to the declarations and depositions of former and current Corteva employees who claim to have also experienced age or disability discrimination at the hands of supervisors using allegedly similar unwarranted discipline, documentation, and scrutiny. McClure then directs us to the two younger, nondisabled employees who were part of the 2020 docking incident and forklift collision and notes they were not fired. Finally, McClure highlights remarks by Dehrkoop and others over the years questioning his restrictions and disability.

The district court did not have the benefit of the *Feeback* framework when ruling on whether this evidence was sufficient to survive summary judgment. Instead, the court analyzed whether McClure's age (but not his disability) played a part in his 2020 discharge under McClure's prima facie case. In doing so, the court ruled that McClure's age was not a motivating factor because it found the depositions, declarations, and letters from current and former Corteva employees were "not the sort of competent evidence to defeat a motion for summary judgment." The court further found the younger Corteva employees involved in both of McClure's 2020 incidents were "poor examples" because they had different disciplinary histories from McClure

and the temporary employee was "only under [Corteva]'s control in a limited capacity." We disagree.

First, the discriminatory experiences of other employees can help determine an employer's animus depending on "how closely related the evidence is to the [employee]'s circumstances and theory of the case" among other factors. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008). Here, McClure provided evidence showing Dehrkoop and other supervisors scrutinized the accommodations of other disabled employees in similar or identical ways, including through requests to resubmit their paperwork, challenging doctor's notes, and verbally doubting the impact their disabilities had on their punctuality and attendance. *See Valdez v. W. Des Moines Cmty. Schs.*, 992 N.W.2d 613, 640 (Iowa 2023) (noting the relevance of analogous evidence, even though its admission at trial is subject to the court's discretion). Similarly, McClure put forward evidence that multiple former and current employees around his age experienced comparable allegedly unwarranted written warnings and monitoring by management based on minor safety violations or unreliable forklift sensor data. *See id*. In sum, we find the evidence of Corteva's "discriminatory atmosphere" competent to survive summary judgment. *See Hamer v. Iowa C.R. Comm'n*, 472 N.W.2d 259, 262–63 (Iowa 1991) (discussing prior-acts evidence in a similar context); *Cap. One Bank (USA), N.A. v. Taylor*, No. 13-2043, 2015 WL 7567398, at *6 (Iowa Ct. App. Nov. 25, 2015) (finding an affidavit competent—though not the strongest—evidence).

Second, while we employ a "rigorous" test to determine whether two employees are so similarly situated that the disparate treatment they faced is a useful comparison, we do not require doppelgängers. *Feeback*, 988 N.W.2d at 350. McClure must show that "he 'was treated differently than other employees whose violations were of comparable seriousness.'" *Id.* (emphasis and citation omitted). And he put forward evidence on this question, pointing to the two younger, nondisabled employees who were doing the same job as him and committed some of the same infractions but were not disciplined or fired. While one of those employees was a temporary worker, a

Corteva supervisor acknowledged the company could have disciplined or functionally discharged the employee and did not do so. Despite these younger employees committing some of the same violations as McClure, Corteva contends they are not useful comparators because of McClure's disciplinary history. But this argument takes a wrong turn; the extent and accuracy of McClure's safety record and discipline is itself a factual dispute here, which we are not empowered to resolve at summary judgment. *See George v. Leavitt*, 407 F.3d 405, 415 (D.C. Cir. 2005) (finding employees similarly situated for summary judgment despite plaintiff's contested workplace violations). Thus, we find the disciplinary history between McClure and the two younger, nondisabled employees was not so disparate as to bar them as useful comparators. *See Wyngarden*, 2014 WL 4230192, at *9–10; *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012) ("So long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied." (citation omitted)).

Third, independent of the comparator evidence, McClure also put forward evidence of management's repeated inquiry into his shift restriction and doctor's notes. *See Palmer Coll. of Chiropractic v. Davenport C.R. Comm'n*, 850 N.W.2d326, 333 (Iowa 2014) (noting the prohibition on disability discrimination includes "discrimination based on thoughtlessness, apathy, or stereotype"). Much of this scrutiny came from Dehrkoop who, over the years, repeatedly questioned and commented on the perceived veracity of McClure's shift restriction, complained about how long McClure took off after his second heart attack, and sought opportunities to end his accommodation. *See Leonard v. Twin Towers*, 6 F. App'x 223, 230 (6th Cir. 2001) ("[W]e must carefully examine the nature of the inquiries and the context in which that inquiry was made."); *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 132–33 (3d Cir. 1997) (acknowledging comments by an executive can be circumstantial evidence of discrimination). McClure's evidence at this stage tended to corroborate that Dehrkoop targeted McClure's accommodation, with emails documenting questions about McClure's continuing restrictions, commenting on his outside

activities while on short-term disability, and discussing shift accommodations more generally. *Cf. Abrams v. Dep't of Pub. Safety*, 764 F.3d 244, 254 (2d Cir. 2014) (finding vague comments on whether candidate "fit in" could create an inference of discrimination depending on the circumstances). While these remarks and inquiries may not be "sufficient on their own," *Hedlund*, 930 N.W.2d at 721, they provide circumstantial evidence that points toward intentional discrimination when combined with other evidence. *See Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998) (concluding "remarks can no longer be deemed 'stray'" when "other indicia of discrimination are properly presented").

Corteva last points to Iowa's recently adopted "honest belief rule." Under this rule, McClure must provide evidence that Corteva did not in good faith reasonably believe McClure's continued employment was a safety risk. *See Feeback*, 988 N.W.2d at 349–50. Naturally, the fact that an employer's belief is objectively false or unreasonable can provide evidence of its dishonesty depending on the circumstances. *DeJesus v. WP Co. LLC*, 841 F.3d 527, 534 (D.C. Cir. 2016) (observing that "honesty and reasonableness are linked"). But Corteva could still prevail, despite the factual disputes swirling around McClure's safety history, if it could demonstrate the absence of a similar dispute on whether management honestly and reasonably believed McClure was a safety risk. *See George*, 407 F.3d at 415. We conclude on this record Corteva cannot show the question is undisputed. Along with contesting his safety history, McClure provided evidence that could lead a rational jury to conclude Dehrkoop acknowledged McClure's improvement on certain performance issues right before firing him, Dehrkoop and other supervisors knew about the malfunctioning docks and unreliable forklift sensors, and this same forklift sensor data depicted McClure's forklift as going slower than the younger and nondisabled employee's at the time of collision—corroborating McClure's version of events. Given this evidence, we find fact questions on Corteva's professed honest belief that McClure was a safety risk are appropriately left for a jury rather than summary judgment.

(Appellate Decision, at pp. 15-21).

Thus, and as seen from this passage, and contrary to Corteva's arguments, the Court of Appeals diligently followed the analysis of *Feeback v. Swift Pork Company*, 988 N.W.2d 340 (Iowa 2023) and the modified *McDonnell Douglas* test that case announced. It also properly analyzed evidence McClure had offered from other employees. However, and apparently to Corteva's chagrin, the relevant facts of this case cannot be discussed without substantial dispute, and under any version of them, they are very different from the unique set of facts set forth in *Feeback*. In that case, an employee had, prior to being terminated, texted "FUCK You!" to his manager. *Feeback*, 988 N.W.2d at 343. Here, McClure was terminated by Corteva after 39 years of employment because of a forklift collision that Corteva's own data shows was caused by a younger, non-disabled temporary employee—an employee who remained employed, unlike McClure. McClure and other employees also suffered years of discriminatory behavior and unjustified write ups and disability-related scrutiny, which is well-documented in specific, sworn testimony of employees Corteva insisted its own lawyers sponsor.

Finally, Corteva also argues that the Court of Appeals decision conflicts with this Court's 1988 decision in *Probasco v. Iowa Civil Rights*

Commission to the extent that the Court held McClure had generated a fact issue as to whether he was disabled as a result of his two heart attacks and related restriction from working the night shift. This argument is odd considering that Corteva failed to cite *Probasco* before the Court of Appeals. In any event, and even if Corteva had decided to bring that case to the Court of Appeal's attention prior to arguing that that Court overlooked it, it has no bearing on this matter. *Probasco* involved a case in which this Court held an employee was not "substantially limited" in her ability to perform administrative/clerical work as a result of her alleged disability—chronic susceptibility to bronchitis. *Probasco v. Iowa Civil Rights Commission*, 420 N.W.2d 432, 434 (Iowa 1988). There, and after review of pre-ADAAA federal cases and pre-ADAAA federal regulations, the Court adopted a strict construction of "substantially limited." To the extent *Probasco*, which relied on outdated federal case law and regulations to narrowly construe the meaning of "substantially limited," narrowly construed what it means to be disabled under the ICRA, it is no longer good law under either federal or state law. *See Goodpaster v. Schwans Home Serv., Inc.*, 849 N.W.2d 1, 7-14 (Iowa 2014). In addition, McClure also argued that he was discriminated against on the basis of a perceived disability due to Corteva's intense scrutiny and different treatment of employees with any shift/work time

restrictions. As to both real and perceived disability, the Court of Appeals again got it right:

> It's undisputed that McClure had two heart attacks over the course of his employment with Corteva. And McClure presented multiple doctor's notes showing how his first heart attack affected his health and required a permanently consistent "sleep cycle" to avoid further adverse health impacts. *See Katz v. City Metal Co.*, 87 F.3d 26, 31 (1st Cir. 1996) (concluding a heart attack could be a physical impairment). His second heart attack reinforced the ongoing nature of his impairment and meaningfully limited his ability to work swing shifts like other product technicians: he could not consistently work two of Corteva's three potential eight-hour shifts or the twelve-hour night shift. *Cf. Gile v. United Airlines, Inc.*, 213 F.3d 365, 373 (7th Cir. 2000) (discussing shift accommodation for employee with anxiety and insomnia). Nor could McClure have his schedule changed like others because of his accommodation—a fact which mattered to management. *See Vetter*, 2017 WL 2181191, at *4–6 (discussing the permanency and duration of the employee's impairment and that it limited his ability to work as compared to others in "manner and duration").
>
> Corteva invites us to weigh evidence and question the credibility of McClure's restriction based on his EMT work and fire chief duties along with his volunteer work at the speedway. But determining credibility and weighing evidence is for juries, not judges deciding motions for summary judgment. *See Carr*, 546 N.W.2d at 905. In line with the ICRA's broad construction, we find McClure generated a disputed issue of material fact as to whether he was disabled sufficient to defeat summary judgment on the first element of his prima facie case. *See* Iowa Code § 216.18(1); *see also Smidt v. Porter*, 695 N.W.2d 9, 14–15 (Iowa 2005) (detailing how the prima facie case "is a minimal requirement" (citation omitted)).

(Appellate Decision, at 14-15). In light of the above analysis and authorities, and *Goodpaster* and progeny, *Probasco* does not provide a basis to undermine the Court of Appeals' decision in this case.

In conclusion, Corteva has not met the standard for seeking further review, there is no conflict between the Court of Appeals opinion and either opinions of this Court or the Court of Appeals on an important matter. Instead, this case involves many genuine issues of material fact as to McClure's remaining claims of age and disability discrimination, facts which must be decided by a jury. McClure should proceed to trial on his remaining claims and Corteva's request for further review should be denied.

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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. 6.1103(4)(a) because it contains 4,398 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.1103(4)(a).

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 Appellant's Resistance to Request for Further Review with the Clerk of the Supreme Court, Appellate Court's Building, 1111 E. Court Street, Des Moines, Iowa, on September 3, 2024.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify, that on the 3rd day of September, 2024, I caused to be served by electronic filing Appellant's Final Brief and Request for Oral Argument pursuant to Iowa Rule 16.1201 et. seq. which service included the following attorneys of record for Defendant Corteva:

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