IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1600
DELAWARE COUNTY NO. LACV008271

DEBORAH FERGUSON,
Plaintiff-Appellee

vs.

EXIDE TECHNOLOGIES, INC. and FRED GILBERT,
Defendants-Appellants

Appeal from the Iowa District Court for Delaware County
The Honorable Michael J. Shubatt

PLAINTIFF-APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The Supreme Court should retain this appeal because it presents a substantial issue of first impression. *See* IOWA R. APP. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Defendants fired Plaintiff Deborah Ferguson (Deb") for refusing to submit to an illegal drug and alcohol test. This decision violated the public policy of the State of Iowa. The district court found as a matter of law that Deb was terminated in violation of public policy. Defendants appeal, claiming Iowa Code section 730.5 preempts a common law claim for wrongful discharge in violation of public policy. They ask the Court to overturn thirty years of precedent which has found statutes to be reliable indicators of Iowa's public policies.

Defendants also claim the district court's award of attorney fees and expenses was excessive. However, Defendants fail to identify the time entries and expenses they find unreasonable. Defendants' argument also ignores the fact that Plaintiff already reduced her attorney fees and expenses by more than half before she submitted them to the Court.

STATEMENT OF FACTS

In October 2012, Deb began working for Defendant Exide Technologies, Inc. ("Exide") as a full-time Wet Formation Operator. (Tr. Day 2, 11:14-15) (App. 365). Deb's job duties included unloading charged car and tractor batteries and loading them onto pallets for transport. (Tr. Day 2, 11:21-12:24) (App. 365-66). During a

typical shift, Deb lifted almost 2,500 batteries, each weighing up to 160 pounds. (Ferguson Dep. 22:22-23:9) (App. 349-50); (11.1.16 Letter from Saunders to Fields) (App. 80); (10.17.16 Injury Report) (App. 84-85).

In 2013, Deb started noticing pain in her elbows. (Ferguson Dep. 26) (App. 350). Because the pain came and went, Deb did not initially report it to anyone at work. (Ferguson Dep. 26:5-8) (App. 350). However, by September 2016, her arm soreness had become progressively worse. (Ferguson Dep. 26:23-27:11) (App. 350-51). Deb's soreness was not the result of a specific injury or accident. (Amended Answer ¶¶ 10-11) (App. 41).

On October 17, 2016, Deb's pain became unbearable. (Tr. Day 2, 18:3-9) (App. 367); (Ferguson Dep. 33:23-34:4) (App. 352). She told Supervisor Greg Hawker that her arms felt like they would fall off and a shooting pain was in each elbow. *Id.* Hawker completed a report of injury and instructed Deb to see Plant Nurse Brenda Saunders. (10.17.16 Injury Report) (App. 84-85); (Tr. Day 2, 18:13-16) (App. 367). Deb met with Nurse Saunders throughout the next few weeks and received massage therapy on her arms. (Tr. Day 2, 18:17-20:5) (App. 367-69). Despite that treatment, Deb's soreness remained. (Ferguson Dep. 28:22-23) (App. 351).

On November 1, Nurse Saunders scheduled an appointment for Deb with Dr. Jonathan Fields, Exide's workers' compensation doctor. (11.1.16 Letter from Saunders to Fields) (App. 80). In Nurse Saunders' introductory letter to Dr. Fields,

she admitted Deb had not had any "specific injury," but that her arm pain was likely caused by her repetitive lifting of thousands of heavy batteries on each shift. *Id.*

Deb had her first appointment with Dr. Fields on November 2. (Tr. Day 2, 20:6-11) (App. 369). Dr. Fields diagnosed Deb with tendonitis in both elbows. (Fields Medical Records) (App. 397). He prescribed Deb medication and gave her a release to return to work on light duty. *Id.* Deb's restrictions included a 20-pound lifting restriction and no gripping or squeezing with either of her hands. (Ex. G) (App. 394-401).

Stacy Pillak was a nurse at Dr. Fields' office. (Amended Answer ¶ 18) (App. 41). At the close of Deb's appointment, Nurse Pillak told Deb that Exide would not allow her to leave Dr. Fields' office until she took a drug and breathalyzer test. *Id.* Deb questioned this demand and explained that she had not been involved in any accident. (Amended Answer ¶ 19) (App. 41). Nurse Pillak called Nurse Saunders, who confirmed that Defendants were requiring Deb to submit to the drug and alcohol test. (Amended Answer ¶ 20) (App. 41). Nurse Saunders indicated that if Deb refused to take the test, it would be equivalent to Deb testing positive for drugs under Exide's drug and alcohol policy. (Amended Answer ¶ 21) (App. 41).

Exide's drug and alcohol testing policy listed four situations in which employees could be tested: (1) when an employee received a conditional job offer as part of a pre-employment screening; (2) after an employee was involved in an on-the-job accident resulting in an injury or damage to property in excess of $1,000; (3) when

there was a reasonable suspicion based on the employee's appearance, conduct, or behavior that indicated the employee was impaired by drugs or alcohol; and (4) when an employee submits to follow-up testing after having tested positive for drugs or alcohol and undergoing rehabilitation to keep his or her job. (Drug/Alcohol Policy) (App. 75-79).

In requiring Deb to undergo a drug and breathalyzer test before leaving Dr. Fields' office, Defendants violated their policy and Iowa's Drug Testing statute. (Amended Answer ¶ 1) (App. 40). None of the situations outlined in Exide's drug and alcohol testing policy or in section 730.5(8) applied. (Amended Answer ¶¶ 1, 36-37) (App. 40, 42); (Ferguson Affidavit ¶¶ 1-7) (App. 81); (Fields Medical Records) (App. 397). Deb was not a prospective employee. (Ferguson Affidavit ¶ 5) (App. 81). She was not involved in an on-the-job-accident resulting in an injury or damage to Exide property. (Amended Answer ¶ 37) (App. 42). Defendants had no basis to believe Deb was impaired by drugs or alcohol. (Ferguson Affidavit ¶¶ 1, 2, 6, 7) (App. 81). Defendants admit that the sole reason Nurse Saunders demanded Deb submit to the drug test was because she complained of work-related arm pain and asked to see a doctor. (Amended Answer ¶ 43) (App. 42).

Because Deb believed that the test was illegal and violated her rights, she refused to submit to it. (Tr. Day 2, 20:24-21:3) (App. 369-70). That evening, Human Resources Manager Fred Gilbert called Deb and instructed her not to come in for work that night. (Tr. Day 2, 21:8-19) (App. 370). The next day, November 3, 2016,

Defendants fired Deb for refusing to submit to the drug and alcohol test. (Tr. Day 2, 21:20-22:6) (App. 370-71).

ARGUMENT

I. THE COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Standard of Review: Plaintiff agrees the standard of review is correction of errors of law. *See* Def. Brief, 7; *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 637 (Iowa 2006).

Preservation of Error: Defendants preserved error only to the question of whether Iowa's Drug Testing Statute preempts a wrongful discharge in violation of public policy claim. (MSJ Ruling at 2-4) (App. 87-89).

On January 17, 2018, Judge George L. Stigler granted Plaintiff's motion for summary judgment in its entirety, finding as a matter of law that Iowa Code section 730.5 does not preempt a wrongful discharge in violation of public policy claim. (MSJ Ruling 2-4) (App. 87-89). Defendants' appeal asserts that Plaintiff's public policy claim is preempted by Iowa's drug testing statute, which is the source of the public policy for her claim. Defendants' argument ignores over 30 years of precedent recognizing statutes as a proper source of public policy for wrongful discharge claims. Like Iowa's Wage Payment Collection Law—a statutory source of public policy already recognized by this Court as an appropriate basis for a wrongful discharge

claim--Iowa's Drug Testing statute does not include a standalone, private cause of action for retaliation. Recognition of such a cause of action is necessary to fully effectuate the statute.

In addition, Defendants' arguments are based on a fundamental misunderstanding about when preemption applies to claims related to the Iowa Civil Rights Act. There is no rule that says common law claims must be "separate and distinct" from statutory claims or that a person might not sometimes have two or more legal claims for the same wrongful conduct. Rather, the reason the ICRA preempts other claims based on the same conduct is because the statute itself indicates its remedies are exclusive. *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 197 (Iowa 1985). In contrast, the drug testing statute contains no such preemption language.

A. THE IOWA SUPREME COURT HAS CONSISTENTLY LOOKED TO STATUTES AS SOURCES OF PUBLIC POLICY

"Retaliatory discharge claims . . . enforce 'the communal conscience and common sense of our state in matters of public health, safety, morals, and general welfare.'" *Ackerman v. State*, 913 N.W.2d 610, 617 (Iowa 2018) (quoting *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761 (Iowa 2009)). Merely because a statute includes a private cause of action does not mean it preempts a wrongful discharge in violation of public policy claim. This would fly in the face of purpose of the tort—to protect societal interests, not solely personal interests. *See id.*; *see also Keveney v. Missouri Mil.*

Acad., 304 S.W.3d 98, 102 (Mo. 2010) (recognizing that wrongful discharge is illegal "because it is based on the employer's attempt to condition employment on the violation of public policy expressed in applicable constitutional, statutory or regulatory provisions"); *Retherford v. AT & T Commun. of Mt. States, Inc.*, 844 P.2d 949, 960 (Utah 1992) (recognizing "[a] primary purpose behind giving employees a right to sue for discharges in violation of public policy is to protect the vital state interests embodied in such policies"). The issue is not whether a statutory remedy exists for a person to enforce their personal rights; rather, the ultimate purpose of the tort is to protect the public policy interest served by the statute itself. *See Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 288 (Iowa 2000*)*

The Supreme Court has recognized three situations in which a public policy discharge case arises. These include:

(1) protecting a worker's refusal to participate in illegal activity;

(2) ***enforcing a worker's statutory right***; and

(3) protecting a worker's right to engage in whistleblowing.

Dorshkind v. Oak Park Place of Dubuque II, L.L.C., 835 N.W.2d 293, 300–01 (Iowa 2013).

This case involves enforcing a worker's statutory rights under Iowa's drug testing statute. Iowa courts have recognized that statutory rights are real only if they can be enforced. Thus, courts have found public policy discharge claims necessary to enforce workers' rights to:

- file a worker's compensation claim - *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988);

- refuse to take an illegal polygraph test - *Wilcox v. Hy-Vee Food Stores, Inc.*, 458 N.W.2d 870, 872 (Iowa Ct. App. 1990);

- apply for partial unemployment benefits - *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994);

- demand wages - *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998);

- vote, serve on a jury, engage in union activity, and perform national guard duty - *See Fitzgerald*, 613 N.W.2d at 283 n.3.

The Iowa Supreme Court has "consistently held that an employee cannot be discharged in retaliation for enforcing a statutory right." *Dorshkind*, 835 N.W.2d at 300. In *Dorshkind*, the Court noted that it looks primarily to statutes when determining whether "an implied or express public policy exists." *Id.* at 303; *see also Jasper*, 764 N.W.2d at 762 (citing *Springer*, 429 N.W.2d at 561 (Because "[t]he legislature is the branch of government responsible for advancing public policy," the "courts can be assured that the tort is advancing 'a legislatively declared goal' when public policy is derived from a statute.")); *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 685 (Iowa 2001). Thus, a wrongful discharge in violation of public policy claim may arise from the same set of facts giving rise to a statutory claim. *Fitzgerald.*, 613 N.W.2d at 283 ("In determining whether a clear, well-recognized public policy exists for purposes of a cause of action, we have primarily looked to our statutes"). Yet, Defendants are claiming that if a statutory remedy exists, a wrongful discharge in

violation of public policy claim is preempted. Defendants' argument ignores 30 years of precedent to the contrary. *See Springer*, 429 N.W.2d at 560.

B. THE EXISTENCE OF A STATUTORY REMEDY DOES NOT DOOM A CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

The Iowa Supreme Court has recognized public policy discharge claims when a statute lacks specific language allowing for a cause of action as well as when a statute *does* contain such language. The availability of a private remedy has not stopped Iowa appellate courts from allowing a wrongful discharge in violation of public policy claim to proceed. *See Tullis*, 584 N.W.2d at 238 (wrongful discharge for demanding wages); *George v. D.W. Zinser Co.*, 762 N.W.2d 865, 871 (Iowa 2009) (wrongful discharge for reporting workplace safety violations). As a matter of fact, in *Fitzgerald*, the Supreme Court made clear it did not "**limit** the public policy exception to specific statutes which mandate protection for employees." *Fitzgerald*, 613 N.W.2d at 283 (emphasis added). There would be no need for such a disclaimer if the existence of statutory protection for employees ruled out the possibility that a public policy discharge claim might be based on the statute.

For instance, the IOSHA statute includes an administrative procedure whereby an employee who is fired for complaining about unsafe working conditions can file an agency complaint and obtain relief. *See* IOWA CODE § 88.9(3); *George*, 762 N.W.2d at 872. Nevertheless, in *George v. D.W. Zinser Co.*, the court held the plaintiff could proceed with his public policy claim in court. *Id.* It relied on the fact that the statute

contained no language to indicate the administrative remedy was meant to be exclusive. *Id.*

> We hold that the remedy set forth in Iowa Code section 88.9(3) does not preclude an employee from bringing a common law action for wrongful discharge. The policy of encouraging employees to improve workplace safety and the fact that the statute contains permissive and not mandatory language point in favor of allowing a common law action.

Id.

The same is true with respect to Iowa's Wage Payment Collection Law, which expressly forbids the discharge or retaliation of a worker who files a complaint about wages. IOWA CODE § 91A.10(5). The WPCL also provides for an administrative agency process by which aggrieved employees can seek relief. *Id.* Yet in *Tullis*, 584 N.W.2d at 240, the court upheld a jury verdict against the employer for wrongful discharge in violation of public policy after the employee was fired for making a complaint related to unpaid wages.[1] It noted that "'by sanctioning wrongful discharge actions for contravention of a public policy which has been articulated in a statutory scheme, we are acting to advance a legislatively declared goal.'" *Id.* (quoting *Springer*, 429 N.W.2d at 561). Thus, even if a statute contains a mechanism for relief, that will

[1] Although the court refused to address a defense argument that Chapter 91A did not provide for a private cause of action for retaliation, it seems clear from the rest of the opinion that such an argument would have been soundly rejected. *See Tullis*, 584 N.W.2d at 239 n.3.

not affect the availability of a public policy discharge claim, unless the statute itself indicates that its own mechanism is exclusive.[2]

Defendants claim *Tullis* and *George* are distinguishable because "Iowa Code section 730.5(15) does not prescribe an administrative remedy; rather, it provides a private right of action to an aggrieved employee in district court and sets forth the specific judicial remedy." Def. Br. 16.

But the same is true of the WPCL. Employees can, *and often do*, bring private causes of action directly to court for violations of Chapter 91A. *See* IOWA CODE §§ 91A.8, 91A.10(3). For example, an employee who has not been paid overtime, may file a lawsuit against her employer—circumventing the administrative remedies provided by the Iowa Department of Labor. Similarly, employees and prospective employees may bring a private cause of action for drug and alcohol testing violations under Iowa Code section 730.5(15).

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[2] The only statutes the Supreme Court has indicated fall into that category is the Iowa Civil Rights Act and Iowa Code 70A.28. *See Hamilton v. First Baptist Elderly Housing Found.*, 436 N.W.2d 336, 341-42 (Iowa 1989); *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 197 (Iowa 1985); *Walsh v. Wahlert*, 913 N.W.2d 517, 526 (Iowa 2018). The ICRA contains a complex remedial plan and says a person claiming a violation "*must*" go through the administrative agency process before seeking relief in court. *Northrup*, at 196; IOWA CODE § 216.16(1). Likewise, Iowa Code 70A.28 is a civil service statute that provides a comprehensive framework for the resolution of whistleblower retaliation claims. *See Walsh*, 913 N.W.2d at 526; *see also Van Baale v. City of Des Moines*, 550 N.W.2d 153, 155 (Iowa 1996).

The Iowa Supreme Court has never indicated that the absence of a private cause of action was relevant as to its recognition of a wrongful discharge claim. *See Tullis*, 584 N.W.2d at 239; *George*, 762 N.W.2d at 872. Rather, the focus has consistently been on whether the presence of administrative remedies indicate an intent by the legislature to preempt a common law cause of action. In both *Tullis* and *George*, the Iowa Supreme Court found the administrative remedies in Iowa Code sections 91A.10(5) and 88.9(3) did not preclude a public policy claim because they were permissive, in that a plaintiff "may" file administrative complaints. *See Tullis*, 584 N.W.2d at 239; *George*, 762 N.W.2d at 872; *cf.* Iowa Code § 216.16(1) ("A person claiming to be aggrieved by an unfair or discriminatory practice *must* initially seek an administrative relief by filing a complaint with the commission") (emphasis added). The Court found that if the legislature "had intended section 88.9(3) to be the exclusive remedy and preclude a private cause of action, it could have done so expressly." *George*, 762 N.W.2d at 872.; *see also Ferrell v. IBP, Inc.*, 1999 WL 33656878, at *11 (N.D. Iowa Aug. 24, 1999) (finding if the legislature had wanted to foreclose a common law cause of action for violations of section 88.9(3), it could have done so expressly). Thus, the absence of an administrative remedy in section 730.5 further supports that the statutory scheme is permissive, not preemptive.

Chapters 91A and 88 are different from the drug testing statute in that Iowa Code sections 91A.10(5) and 88.9(3) include specific retaliation provisions; Iowa Code section 730.5 does not. There is nothing in Iowa Code section 730.5 that says it is

illegal for an employer to fire an employee who refuses to submit to an illegal drug test. Defendants demanded that Deb submit to a post-accident test when there was no accident. This violated section 730.5 and is why the test was illegal. Firing Deb for refusing to submit to the illegal test was an act separate from the initial statutory violation and an act not prohibited by any specific provision found in Iowa Code section 730.5. The lack of a retaliation remedy makes a wrongful discharge in violation of public policy claim even more essential. Otherwise, there would be no deterrent for employers who disregard the statute's requirements and the public policy would be undermined. Such a situation was contemplated in *Borschel v. City of Perry*, 512 N.W.2d 565, 568 (Iowa 1994), where the court noted that some workers' rights statutes do not contain any express prohibition on retaliation against workers who exercise those rights. In those instances, a prohibition against retaliation will be implied by the courts. *Id.*

This was the case in *Wilcox v. Hy-Vee Food Stores, Inc.* There, the Iowa Court of Appeals recognized that Iowa's Polygraph Testing Statute could serve as a public policy basis for a wrongful discharge claim and held the defendant violated public policy when it fired the plaintiff for refusing to take a polygraph test that violated Iowa Code section 730.4. *Wilcox*, 458 N.W.2d at 872. Like the drug testing statute, the polygraph testing statute did not include a specific anti-retaliation provision. Moreover, the nature of refusing an illegal polygraph test has much in common with the right to refuse to take an illegal drug test which is at issue in the case at bar. The

polygraph statute and the drug testing statute both protect employee privacy concerns from overreaching employers.

Notably, in between the *Wilcox* plaintiff's termination and the *Wilcox* Court of Appeals' holding, the legislature amended section 730.4 to specifically set forth a private right of action—using almost identical language to that in Iowa's Drug Testing Statute. *Id.*; *cf.* IOWA CODE §§ 730.4(5)(a)(1) *and* 730.5(15)(a)(1).[3] In its opinion, the Court of Appeals did not indicate that this addition would have changed the case's result. Even more telling is that the Iowa Supreme Court and Iowa Court of Appeals have repeatedly cited *Wilcox* with approval even after section 730.4 was amended to set forth a private right of action. *Borschel v. City of Perry*, 512 N.W.2d 565, 568 (Iowa 1994); *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994); *Butts v. Univ. of Osteopathic Med. & Health Scis.*, 561 N.W.2d 838, 841-42 (Iowa Ct. App. 1997), *overruled on other grounds by Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296 (Iowa 1998); *Hahn v. Stock*, 1996 WL 870828, at *2 (Iowa Ct. App. Dec. 20, 1996); *Smuck v. Nat'l Mgt. Corp.*, 540 N.W.2d 669, 672 (Iowa Ct. App. 1995). Iowa appellate courts' analysis of *Wilcox* and Iowa Code section 730.4 is consistent with the conclusion that Iowa Code 730.5 serves as a source of public policy for a wrongful discharge claim.

[3] For example, both statutes place the burden of proof on the employer to establish the requirements for testing have been met. IOWA CODE §§ 730.4(2)(b); 730.5(15)(b).

Defendants also claim that because ERISA and the FMLA preempt wrongful discharge in violation of public policy claims, Iowa's drug testing statute must also preempt a wrongful discharge claim. Def. Br. 13-14.[4] Defendants' argument ignores the fact that no Iowa appellate court has held that ERISA or the FMLA preempts a wrongful discharge claim. *See Hasenwinkel v. Mosaic*, 809 F.3d 427, 435 (8th Cir. 2015) ("The Iowa Supreme Court has not decided whether a federal statute, as opposed to Iowa law, can supply a public policy to support the tort of wrongful discharge."). Contrary to Defendants' assertions, courts have repeatedly allowed an ERISA and wrongful discharge claim to coexist when the employee's termination was motivated by whistleblowing. *See, e.g. Campbell v. Aerospace Corp.*, 123 F.3d 1308, 1313 (9th Cir. 1997) (allowing wrongful discharge claim to proceed because defendant was motivated to retaliate because of the plaintiff's whistleblowing, not from a motive to deprive benefits); *Ethridge v. Harbor House Rest.,* 861 F.2d 1389, 1405 (9th Cir. 1988) (no preemption when loss of benefits is not "a motivating factor" behind termination). Likewise, the Eighth Circuit recognized over 24 years ago that an employee could bring a wrongful discharge claim under Missouri's common law when his employer fired him in retaliation for exercising his rights under the FLSA. *Saffels v. Rice*, 40 F.3d 1546, 1550 (8th Cir. 1994). While both ERISA and the FLSA provide

[4] Defendants' argument relies solely on federal district court cases, not Iowa or federal appellate law.

private causes of action, courts have allowed wrongful discharge claims to proceed based on the public policy interest expressed in these statutes.

The takeaway from these cases is that the presence of a *permissive* administrative remedy or a private cause of action does not affect a plaintiff's ability to bring a public policy claim. *Id.*

C. THE ICRA IS PREEMPTIVE BECAUSE THE ADMINISTRATIVE PROCESS IS THE EXCLUSIVE MEANS OF OBTAINING RELIEF

The Iowa Civil Rights Act ("ICRA") is the only Iowa statute Defendants have cited where the Iowa Supreme Court held that the statutory source for a public policy was the exclusive remedy for a violation and preempted a wrongful discharge in violation of public policy claim. Defendants' reliance upon the ICRA misses the mark in two major respects: (1) the language in the ICRA mandates compliance with strict jurisdictional requirements; and (2) the language of the ICRA makes administrative exhaustion mandatory.

1. The ICRA mandates strict compliance with jurisdictional requirements

The ICRA states that a person claiming a violation "*must*" go through the complex administrative agency process before seeking relief in court. IOWA CODE § 216.16(1); *Northrup*, 372 N.W.2d at 196. As a prerequisite to filing a civil rights lawsuit, "[a] person claiming to be aggrieved by an unfair or discriminatory practice

must initially seek an administrative relief by filing a complaint with the commission in accordance with section 216.15." IOWA CODE § 216.16(1) (emphasis added).

The ICRA goes on to state: "An action authorized under this section is **barred** unless commenced within ninety days after issuance by the commission of a release under subsection 2 of this section or within one year after the filing of the complaint, whichever occurs first." IOWA CODE § 216.16(4) (emphasis added).

In *Northrup v. Farmland Industries, Inc.*, the plaintiff argued he could bring a common law claim for wrongful discharge based on his alcoholism. *Northrup*, 372 N.W.2d at 195. However, the only source for a public policy protecting alcoholism as a protected class was the ICRA and its disability discrimination provisions. *Id.* at 196. The problem was that the remedial scheme set forth in the ICRA is mandatory: either you follow it, or you cannot recover. *Id.* at 196-97; IOWA CODE §§ 216.16(1), (4). "It is clear from a reading of section [216.16(1)] that the procedure under the civil rights act is exclusive, and a claimant asserting a discriminatory practice must pursue the remedy provided by the act." *Id.* at 197. Therefore, the court held "that any remedies to which Northrup may be entitled would lie solely under chapter [216] and his independent common-law action [could not] be recognized." *Id.*

Of course, even if the ICRA's remedial process was mandatory for claims based on the ICRA, that could not preempt other causes of action that are based on independent legal principles. For instance, a termination might be illegal based on age discrimination and also because it breached a written contract. In such a case, the

breach of contract claim can be pursued along with or in lieu of the age discrimination claim. *See Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, Inc.*, 473 N.W.2d 31, 34 (Iowa 1991). On the other hand, a claim for breach of the implied covenant of good faith and fair dealing would be preempted, as long as age discrimination is the only act of bad faith alleged. *Id.*

Another set of examples regarding the scope of the ICRA's preemption can be found in *Greenland v. Fairtron Corp.*, 500 N.W.2d 36 (Iowa 1993). There, the plaintiff's claim for intentional infliction of emotional distress was preempted because sexual harassment (in violation of the ICRA) was the outrageous conduct alleged. *Id.* at 38. Nevertheless, assault and battery were legal claims that existed even if the ICRA did not exist; therefore, they were not preempted. *Id.* at 38-39.

The lesson to be learned from these cases is this: because its remedial scheme is mandatory rather than permissive, the ICRA preempts any claim that relies on the standards set by the ICRA in order to prove an element of that claim. In other words, the ICRA is the exclusive remedy for claims based, in whole or in part, on the ICRA.

Preemption occurs because of the mandatory nature of the ICRA's remedial process. The scope of the preemption is limited to claims that are not completely separate and independent from the ICRA. *Greenland*, 500 N.W.2d at 38.

2. Conduct may be illegal on multiple bases

As noted above, Defendants argue that there is some rule that says conduct cannot violate both a statute and the common law. But there is no such rule. The

same conduct can constitute two different common law torts. It can be the basis for a common law cause of action at the same time it violates a statute. The same conduct can even violate two different statutes—or a statute and a constitutional provision. The only circumstance in which that cannot happen is when a statute demonstrates a clear legislative intent that its remedies are exclusive. *See Lodge v. Drake*, 51 N.W.2d 418, 419–20 (Iowa 1952) ("When a statute gives a new and affirmative remedy, but does not negative, expressly or impliedly, any existing remedies, the new remedy is to be considered merely cumulative.").

Defendants rely almost solely on ICRA cases to support their argument that conduct cannot violate both a statute and the common law. *See Borschel*, 512 N.W.2d at 567–68 (noting that the ICRA "preempts an employee's claim that the discharge was in violation of public policy"); *Greenland*, 500 N.W.2d at 38 (holding the ICRA preempted an intentional infliction of emotional distress claim but not assault and battery claims); *Channing v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 858 (Iowa 2001) (finding the ICRA preempts an intentional infliction of emotional distress claim). However, this argument ignores the fact that Iowa appellate courts have repeatedly allowed for statutory claims to coexist peacefully alongside claims for wrongful discharge in violation of public policy. *See* Section I(A).

3. Unlike the ICRA, the drug testing statute does not say its remedies are exclusive

Iowa Code section 730.5(15) sets forth the statutory remedies available in Iowa's drug testing statute. The statute contains no language to indicate that its remedies are exclusive. In fact, there is every opposite indication.

The statute says violations "**may** be enforced through a civil action." IOWA CODE § 730.5(15) (emphasis added). There is no express, or even implied, language indicating that the remedies set forth are exclusive or that the Iowa Legislature sought to abrogate or supersede common law remedies.

Because the remedies in section 730.5(15) are not exclusive, it does not make a whit of difference whether a common law public policy discharge claim is based in whole or in part on the Drug Testing statute.

The Court should find that section 730.5 is not the exclusive remedy for drug testing violations and may constitute a public policy basis for a wrongful discharge claim.

D. IOWA'S DRUG TESTING STATUTE REFLECTS A CLEARLY DEFINED AND WELL-RECOGNIZED PUBLIC POLICY

Iowa Code section 730.5 involves precisely the type of clearly defined public policy that the common law cause of action was created to protect. In drafting Iowa Code section 730.5, the Iowa Legislature focused "on the protection of employees who are required to submit to drug testing." *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009). The legislature outlined not only the specific procedures employers must follow when requiring employees to submit to testing, but also the

rights of employees regarding drug and alcohol testing by an employer. "The manifest purpose of section 730.5 is to regulate drug testing initiated by employers for the purpose of influencing employment decisions." *Tow v. Truck Country of Iowa, Inc.*, 695 N.W.2d 36, 39 (Iowa 2005).

While no case exactly like this one has so far reached Iowa's appellate courts, the Iowa Supreme Court has already held that the drug testing statute reflects an important public policy of the State of Iowa. *McVey v. National Org. Serv., Inc.*, 719 N.W.2d 801, 803 n.1 (Iowa 2006). In *McVey*, the plaintiff brought her claim solely under the statutory remedy set forth in Iowa Code section 730.5(15). *Id.* at 802. The defendant argued that the court should not recognize a public policy discharge claim based on the Drug Testing statute. *Id.* at 803. That argument was not reached because the plaintiff had not brought a public policy claim. *Id.* In its decision, however, the Court noted that it "must apply that ***public policy*** **that the legislature has set forth in section 730.5**." *Id.* at 803 n.1 (emphasis added).

In *Harrison v. Employment Appeal Board*, 659 N.W.2d 581, 588 (Iowa 2003), the court refused to disqualify a worker for unemployment benefits even though he had tested positive for marijuana because the employer had not followed all the requirements of the Drug Testing statute. "[I]t would be contrary to the spirit of Iowa's drug testing law if we were to allow employers to ignore the protections afforded by this statute, yet gain the advantage of using a test that did not comport with the law to support a denial of unemployment compensation." *Id.* While the

court did not use the term "public policy," the basis for its decision was clearly the Legislature's policy decision that a drug test that violates the protections of section 730.5 was not entitled to any affect.

Iowa Code section 730.5(8) lists the limited situations in which an employer may require an employee to submit to drug or alcohol testing. This is how the statute provides Iowa workers with protection from employers infringing on their privacy interests. The Legislature also added a method of recourse for employees who have been subjected to illegal tests. Iowa Code section 730.5(15)(a) outlines a statutory cause of action for employees who have been exploited by employers who demand testing contrary to the prerequisites for selection listed in section 730.5(8). Importantly, however, there is nothing to indicate the Legislature intended that remedy to be exclusive.

The district court correctly held that Iowa Code section 730.5 reflects a clearly defined public policy that protects employees' refusal to submit to an illegal drug or alcohol test.

E. THE PUBLIC POLICY BEHIND THE DRUG TESTING STATUTE WOULD BE JEOPARDIZED IF THE COURT WERE TO FIND PLAINTIFF'S WRONGFUL DISCHARGE CLAIM WAS PREEMPTED

Importantly, recognition of a claim for retaliation in violation of public policy is necessary in order to ensure the public policies the drug testing statute is designed to protect are not undermined. As noted above, the statute lacks a specific provision

outlawing retaliation for refusing to take an illegal drug test. But the protections in the drug testing statute would be meaningless if employers could get away with firing workers who refused to submit to illegal testing. If the Court were to find the drug testing statute preempts a claim for wrongful discharge in violation of public policy, employers would be free to fire workers for engaging in activity that is necessary to fulfill the statutory mandate.

Common law wrongful discharge claims are necessary when the particular policy would be undermined if employers were free to discharge employees for exercising rights pursuant to the policy. *Fitzgerald*, 613 N.W.2d at 284, 288. A plaintiff is required to show that the conduct in which she engaged furthered the public policy, and that allowing employers to fire employees for engaging in the activity would discourage the activity.

The Court is required to consider not only the impact of the discharge on the dismissed employee, but on his coworkers as well. *Id.* at 288. "If the dismissal of one employee for engaging in public policy conduct will discourage other employees from engaging in the public policy conduct, public policy is undermined." *Id.*

This "jeopardy" prong is directly implicated by Defendants' actions in the instant case. The public policy of protecting workers' privacy would be undermined if employers could fire employees for refusing to submit to drug or alcohol testing under conditions which are forbidden by the statute. *See Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894 (8th Cir. 2004) ("If employers were permitted to discharge

employees for such conduct, then employees would be hesitant to articulate safety concerns because to do so would potentially put their jobs at risk.").

> Some statutes articulate public policy by specifically prohibiting employers from discharging employees for engaging in certain conduct or other circumstances. Yet we do not limit the public policy exception to specific statutes which mandate protection for employees. Instead, we look to other statutes which not only define clear public policy but imply a prohibition against termination from employment to avoid undermining that policy.

Fitzgerald, 613 N.W.2d at 283. The drug testing law is exactly that type of statute. Although it does not prohibit retaliation against an employee who refuses to succumb to corporate demands to take an illegal drug test, the public policies recognized by the Legislature would be jeopardized if such retaliation were permitted. This is exactly what would happen if the Court were to hold that a public policy wrongful discharge claim was preempted.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AWARDING PLAINTIFF ATTORNEY FEES AND EXPENSES

Standard of Review: Plaintiff agrees the standard of review is abuse of discretion. *Lee v. State*, 874 N.W.2d 631, 648 (Iowa 2016); *Hensely v. Eckerhart*, 461 U.S. 424, 436-37 (1983).

Preservation of Error: Plaintiff agrees that Defendants preserved error on their argument that her attorney fees and expenses should be reduced. However, Defendants did not identify the specific time entries and expense they contend should

be reduced. For example, Defendant broadly reference trial preparation time entries and trial time entries without identifying any specific problematic entries.

Iowa Code section 730.5(15)(a) states: "A person who violates this section or who aids in the violation of this section, is liable to an aggrieved employee or prospective employee for affirmative relief . . . including attorney fees and court costs." "Absent special circumstances, a prevailing party should be awarded . . . fees *as a matter of course*." *Hatfield v. Hayes*, 877 F.2d 717, 719 (8th Cir. 1989) (emphasis in original). There is no question Defendants violated Iowa Code section 730.5. Defendants admitted their violation in their Amended Answer, and the Court confirmed Defendants violated Iowa's Drug Testing statute when it granted Plaintiff's motion for summary judgment. Amended Answer ¶ 1 (App. 40); MSJ Ruling 1-2 (App. 86-87). Yet, prior to trial, Defendants refused to take responsibility for their actions, pay Plaintiff's lost wages, or reinstate her to her former position. Instead, Defendants chose to take their chances at trial and argue that Plaintiff would not have been able to perform her former position at Exide.

As a result, Plaintiff had to vigorously try this case and prove her damages, overcoming Defendants' causation arguments, and establish that Plaintiff would have been able to continue working at Exide with or without reasonable accommodation. Though liability for the section 730.5 claim had been established, Defendants' decision forced Plaintiff to prove that their violation, and not Plaintiff's physical health, caused her damages. This took significant preparation, including but not

limited to conversations with Plaintiff's treating physician, reviewing and printing medical records, and investigating Defendants' ability to accommodate Plaintiff by interviewing her former coworkers. Defendants made a strategic decision to litigate this case. They should not be able to shirk their duty to pay Plaintiff's attorney fees and costs associated with her section 730.5 claim.

Plaintiff recognized in her Motion for Attorney Fees and Costs that Defendants were not responsible for the attorney fees and expenses expended solely on her public policy claim, reducing her time entries by almost 90 hours and cutting over one thousand dollars in expenses. *See* Exhibit 1A Fees Report (App. 287-304); Exhibit 2A Expenses Report (App. 305-7). After making these significant voluntary reductions, Plaintiff asked the district court to award her $70,343.95 in fees and $5,648.04 in litigation expenses. Amended Mot. for Fees. ¶ 8 (App. 283-86). The district court awarded $35,000 in fees and $4,500 in expenses. After the district court's drastic reduction, there was no question that the feed and expense award solely encompassed time and costs expended on Plaintiff's section 730.5 claim.

A. DEFENDANTS FAILED TO IDENTIFY WITH SPECIFICITY THE TIME ENTRIES AND EXPENSES THEY WANT REDUCED

The party challenging an attorney fees award has the burden to make specific objections that are sufficiently precise to give fee applicants notice of any deficiencies. *See I.W. v. School Dist. of Philadelphia*, 2016 WL 147148, at *3 (E.D. Pa. Jan. 13, 2016); *Herrin v. Lamachys Village at Indigo Lakes, Inc.*, 2011 WL 7333928, at *5 (M.D. Fla. Dec.

8, 2011); *Beltran Rosas v. County of San Bernardino*, 260 F. Supp. 2d 990, 996 n.4 (C.D. Cal. 2003); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1313, 1320 (M.D. Fla. 2001); *Jackson v. Philadelphia Housing Auth.*, 858 F. Supp. 464, 469 (E.D. Pa. 1994); *Mitchell v. Secretary of Commerce*, 1992 WL 10509, at *3 (D.C.D.C. Jan. 10, 1992). A court should not simply exclude time entries *sua sponte*. *Barnes*, 168 F.3d at 428; *I.W.*, 2016 WL 147148, at *3; *Beltran Rosas*, 260 F. Supp. 2d at 996 n.4; *Wales*, 192 F. Supp. 2d at 1320. Judges are not required to "sift through countless time entries in an effort to fractionally decrease an award of attorney fees that otherwise seems fair and reasonable." *Community of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's Church*, 2010 WL 1254581, at *3 (W.D. Mo. March 24, 2010). Courts should not "become green-eyeshade accountants"—the goal "is to do rough justice, not to achieve auditing perfection. *Fox*, 563 U.S. at 838.

Contrary to these authorities, Defendants failed to identify the time entries and expenses they contend should not be reimbursed. Instead, they broadly refer to two categories of time they claim should be excluded: (1) "All time relating to the summary judgment motions and hearing"; and (2) "Trial preparation and trial." Def. Br. 21. Defendants fail to identify *any* time entries by date or description. Similarly, Defendants' only reference to the specific expenses it believed should be excluded were in a footnote, not indicating whether the list was exhaustive. Def. Br. 23 n.8. To the extent Defendants fail to identify time and expenses they contend should not be reimbursed, their protests can be summarily dismissed. *See ACLU v. Barnes*, 168

F.3d 423, 428 (11th Cir. 1999) ("Those opposing fee applications have obligations, too. In order for courts to carry out their duties in this area, 'objections and proof from fee opponents' concerning hours that should be excluded must be specific and 'reasonably precise.'"): *United States v. Eleven Vehicles*, 200 F.3d 203, 211-12 (3d Cir. 2000) (court may not award less fees than requested unless the opposing party makes specific objections); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 674 F.2d 1319, 1337-38 (D.C. Cir. 1982) (once applicant presents adequate factual proffer, challenging party must submit facts and detailed affidavits to demonstrate inappropriateness of the fee request).

B. THE DISTRICT COURT PROPERLY GRANTED PLAINTIFF ATTORNEY FEES FOR WORK ON HER IOWA CODE SECTION 730.5 CLAIM

Defendants rely on *Smith v. Iowa State University of Science and Technology*, 885 N.W.2d 620 (Iowa 2016), for the proposition that a worker is not entitled to recovery of attorney fees necessary to prove a separate claim for which fees are not recoverable. Plaintiff agrees. That is why she did not ask the district court to order Defendants to pay fees that relate solely to her public policy claim.

Plaintiff's Amended Motion for Attorney Fees and Expenses requested $70,343.95 in attorney fees. Plaintiff provided the district court with detailed billing statements, showing that she reduced her time billed by 89.1 hours, representing the time expended solely on Plaintiff's public policy claim. *See* Exhibit 1A Fees Report (App. 287-304). The district court awarded plaintiff approximately half of that

reduced amount, cutting another $35,000 in attorney fees. July 20, 2018 Ruling, p. 3-4 (App. 308-13). When the district court cut over half of Plaintiff's requested fees, it eliminated ***any*** doubt that Plaintiff was receiving fees solely for time expended on her Iowa Code section 730.5 claim.

1. Plaintiff's summary judgment motion was appropriate

Plaintiff properly moved for summary judgment on her Iowa Code section 730.5 drug testing claim. The purpose of summary judgment is to avoid the expense of litigation where no factual issues exist. *Drainage Ditch No. 119 v. Incorporated City of Spencer*, 268 N.W.2d 493, 499 (Iowa 1978); *Davis v. Traveler's Ins. Co.*, 196 N.W.2d 526, 529 (Iowa 1972). It is a useful tool to "narrow the issues raised under a 'notice' pleading." *Lamantia v. Sojka*, 298 N.W.2d 245, 248 (Iowa 1980); *see also Kester v. Bruns*, 326 N.W.2d 279, 284 (Iowa 1982).

On August 18, 2017, Defendants amended their Answer to admit they violated Iowa Code section 730.5. Amended Answer ¶ 1 (App. 40). On November 10, 2017, Plaintiff filed her motion for summary judgment on her section 730.5 claim to alert the Court about the narrowness of the expected trial and avoid additional time and expense litigating liability on a claim with no material factual disputes. Summary judgment is a proper tool for obtaining judgment as a matter of law in such a situation. *See* IOWA R. CIV. P. 1.981(3); *Luana Sav. Bank v. Pro-Build Holdings, Inc.*, 856 N.W.2d 892, 895 (Iowa 2014).

Defendants' Amended Answer also left some doubt as to whether they planned to contest any liability related issues at trial. For example, Defendants denied that Plaintiff questioned their demand that she take a drug test and that Plaintiff explained that she had not been in an accident. Amended Answer ¶ 19 (App. 41). Likewise, Defendants denied that their drug testing policies and procedures violated Iowa Code 730.5. Amended Answer ¶ 35 (App. 42). These denials also led Plaintiff to file for summary judgment to remove any question as to Defendants' liability on her drug testing claim.

Defendants now claim that it was unnecessary for Plaintiff to file for summary judgment because it "admitted" the drug testing violation. But an admission in an Answer does not itself create a judgment. It is only a summary judgment motion or a trial that creates a judgment.

Defendants' argument ignores the fact that summary judgment is properly granted only under this very circumstance—when there are no genuine disputes of material fact. IOWA R. CIV. P. 1.981(3); *see also Liska v. First Nat'l Bank of Sioux City*, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981); *James v. Swiss Valley Ag Serv.*, 449 N.W.2d 886, 888 (Iowa Ct. App. 1989). The drafters of the summary judgment rule, provided that "[t]he sole function of this rule is to expedite litigation by enabling a party with a just cause of action to recover judgment promptly and without the delay and expense of a trial, where there is in fact no issue of fact to try." IOWA R. CIV. P. 1.981, Official

Cmt. Because Defendants' Amended Answer eliminated material factual disputes, this was *exactly* the kind of case where summary judgment was appropriate.

As noted above, Defendants' appeal does not identify any specific time entries related to the motions for summary judgment that it believes were excessive or unreasonable. Rather, Defendants cast a wide net, encompassing all of Plaintiff's time relating to the summary judgment motions and hearing. Defendants also ignore the fact that Plaintiff reduced her fee application by 86.7 hours for time spent on the summary judgment motions. Plaintiff only asked the district court to award her fees on 57.24 hours for time spent on the drug testing portion of her summary judgment motion and the summary judgment hearing—less than half of the total time expended on the summary judgment motions. It was reasonable of the district court to award Plaintiff fees on this time.

2. Plaintiff should be awarded fees for trial preparation and trial work related to her Iowa Code section 730.5 claim

Defendants again broadly assert that Plaintiff's trial preparation and trial time should be reduced without identifying the time entries they claim were unreasonable. Plaintiff requested $44,335.50 in fees for trial preparation and trial. *See* Exhibit 1A Fees Report (App. 287-304). As evidenced by the district court's $35,000 total fee award, this amount was drastically reduced. July 20, 2018 Ruling, p. 3-4 (App. 308-13). It is abundantly clear that Plaintiff's fees for trial preparation and trial were

reduced by the district court to represent the time that would have been expended on a bench trial solely for her section 730.5 claim.

Regardless of whether the case was tried to a jury or the bench, Defendants still made it necessary for Plaintiff to prepare for trial and go to trial to establish her lost wages damages. And this was not as straight forward as it might first appear. Defendants denied their actions were the proximate cause of plaintiff's damages, claiming that her arm injuries rendered her physically unable to work. *See* Tr. Day 2, 69:6-70:24 (App. 382-83). As result, the trial morphed into a pseudo disability trial, focused on whether plaintiff was qualified to work with or without reasonable accommodations. Much of Plaintiff's trial preparation time was spent focused on the accommodation process and preparing evidence and argument to refute Defendants' claims that Deb was too disabled to work. Plaintiff testified extensively about her work search and her lost wages. Tr. Day 2, 32:20-36:1 (App. 372-76), 43:25-47:22 (App. 377-81). Many of the trial witnesses testified about Plaintiff's physical abilities and/or Defendants' ability to accommodate her. *See* Tr. Day 1, 52:14-55:17 (App. 359-62); Tr. Day 2, 35:18-36:13 (App. 375-76), 162:18-163:22 (App. 384-85); Tr. Day 3, 40:9-43:1 (App. 390-93).

C. THE DISTRICT COURT PROPERLY ORDERED DEFENDANTS TO PAY PLAINTIFF'S LITIGATION EXPENSES

The district court cut Plaintiff's requested expenses by over $1,000.00. Defendants now suggest that this Court further reduce the district court's expense

award by an additional $2,641.07. Def. Br. 23 n.8. However, Defendants only specifically identify $1,599.35 worth of expenses it claims should be reduced and provide little to no explanation as to why the expenses were not related to Plaintiff's drug testing claim.

Recoverable expenses include items as scanning, photocopying, printing, computerized legal research, long-distance calls, mileage, postage, meals, parking, travel, and other litigation expenses not recoverable as part of "costs." *Vetter v. State*, 2017 WL 2181191, at *15 (Iowa Ct. App. May 17, 2017); *Hernandez v. Bridgestone Am. Tire Ops., L.L.C.*, 831 F.3d 940, 950 (8th Cir. 2016); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1036 (8th Cir. 2008). All the expenses identified by Defendants are recoverable.

Westlaw Expenses. Plaintiff incurred $3,092.00 in Westlaw expenses, but only asked for $1,764.30 to be reimbursed. *See* Exhibit 2A Expense Report (App. 305-7). Defendants claim the expense award should be reduced by an additional $930.00 in Westlaw charges. Again, Defendants do not identify which specific Westlaw charges it believes were unnecessary or unrelated to Plaintiff's claims. Plaintiff's expense report outlined the issues being researched in detail, and there is no excuse why Defendants could not explain why it believed the charges were unreasonable or inappropriate.

To recover expenses related to computerized legal research, a party must "present sufficient information to the court to permit the court to determine the basis

for the charge and its relation to the issue or issues in the case." *Lee v. State*, 906 N.W.2d 186, 195 (Iowa 2018). A party need not "'record in great detail how each minute of his time was expended,'" but must "identify the general subject matter of his time expenditures.'" *Id.* at 196 (quoting *Hensley*, 461 U.S. at 437, n.12). Plaintiff's counsel provided more than enough information for the district court to determine both the basis for the charge and its relation to the issues in this case. *See* Exhibit 2A Expense Report (App. 305-7). Further, Defendants had an opportunity at the district court stage to specifically identify any charges they deemed unreasonable, yet they chose not to do so.

A party must also show that charges for legal research are "costs normally billed to a paying client in the relevant market." *Id.* at 196. Plaintiff's counsel's clients are responsible for the expenses and costs of their case—including the costs of electronic legal research. *See* Beck Affidavit ¶ 34 (App. 218). Accordingly, the district court properly awarded Westlaw charged in its expense award.

Photocopies. Plaintiff's counsel charges $0.15 per page for photocopies (which includes printing) and totals the photocopy bill on the last day of every month. Without any argument or reasoning, Defendants claim that none of the photocopy charges for the month of March should be included in the expense award.[5] Plaintiff

[5] Defendants did not preserve error because they failed to specifically object to these charges when resisting Plaintiff's motion for attorney fees and expenses in the district court.

requested $109.05 for the cost of 727 copies. Exhibit 2A Expense Report (App. 305-7). This case was tried in March. It can be expected that March was also the month that the most printing and photocopying would take place.

A key issue in this case was whether Plaintiff would have been physically able to continue working at Exide. As a result, Plaintiff needed to have rebuttal exhibits available to counter any of Defendants' arguments that she was too disabled to work. This meant that Plaintiff needed to print numerous pages of medical records, so she could be prepared to introduce the documents at trial. Preparation of these documents would have been necessary irrespective of whether the case was tried to a jury or the bench.

Medical Records. For clarification, the March 1, 2018 expense for "Medical Records from St. Luke's" was not solely for medical records. *See* Exhibit 2A Expense Report (App. 305-7). Rather, the $350.30 charge included Dr. Mathew Stanley's time for a conference call with Plaintiff's counsel. Exhibit 2 Expense Report with Receipts p. 71 (App. 189). Dr. Stanley was Plaintiff's treating physician and had knowledge about her physical capabilities and restrictions.

On February 28, 2018, Defendants filed their witness and exhibit lists. Defendants' witness list included Dr. Jonathan Fields, their workers' compensation doctor, and its exhibit list included multiple pages of medical records related to Plaintiff's ability to work at Exide. As a result, Plaintiff's counsel reached out to Dr. Stanley to discuss his medical records and discuss issues he may be asked to testify

about at trial. Ultimately, Plaintiff's counsel determined that it would not be necessary (or cost effective) to call Dr. Stanley to testify at trial as a rebuttal witness.

This expense related directly to Plaintiff's drug testing claim, because Dr. Stanley's records and knowledge related to Plaintiff's ability to continue working at Exide and thus her entitlement to lost wages. Accordingly, the district court properly included this charge in its expense award.

Investigator Services. Defendants claim that the district court erred in including $210.00 in investigator expenses in its award. The investigator expenses included witness interviews of Deb's former coworkers Kenny Higgins and Bob McMahon. Exhibit 2A Expense Report (App. 305-7). Again, the interviews with Kenny Higgins and Bob McMahon related solely to Plaintiff's lost wages damages and Defendants' ability to accommodate her potential restrictions. This issue directly relates to Plaintiff's drug testing claim. As with Dr. Stanley, Mr. Higgins and Mr. McMahon were not called as rebuttal witnesses at trial, because Defendants' witnesses admitted on the stand that they would have been able to accommodate Plaintiff's restrictions. *See* Tr. Day 1, 52:14-55:17 (App. 359-62); Tr. Day 3, 40:9-43:1 (App. 390-93). The district court correctly included the investigator expenses in its award.

CONCLUSION

Plaintiff respectfully requests that the Court affirm the trial court's decisions and remand the case solely for consideration of the attorney fees and costs incurred since the last order.

REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiff-Appellee request to be heard in oral argument.

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I, Robin Daisy-Jahn, certify that there was no cost to reproduce copies of the preceding Plaintiff-Appellee's Final Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: */s/ Robin Daisy-Jahn*

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I, Robin Daisy-Jahn, hereby certify that on the 25th day of January, 2019, I electronically filed the foregoing Final Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

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