IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0135

POLK COUNTY CASE NO. LACL138889

RONALD RUMSEY
Plaintiff-Appellee/Cross-Appellant

vs.

WOODGRAIN MILLWORK, INC., d/b/a WINDSOR WINDOWS AND DOORS, LIZ MALLANEY, and CLAY COPPOCK

Defendants-Appellants/Cross-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE COLEMAN MCALLISTER

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

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V. DID THE DISTRICT COURT ERR IN EXCLUDING EVIDENCE OF PRIOR ACTS OF DISCRIMINATION AGAINST PLAINTIFF?

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ROUTING STATEMENT

This case applies existing legal principles, so the case may be transferred to the Court of Appeals. *See* IOWA R. APP. P. 6.1101(3)(a).

INTRODUCTION

Defendants told the jury "you're going to have to weigh the credibility because there were three people there in the room at HR offices that day: Mr. Rumsey, Mr. Coppock, and Ms. Mallaney." (T-Day 1, 222:20-23) (App. 144). Defendants made this case about credibility and they lost. Defendants oversold the evidence and were caught lying. The jury decided the credibility question by answering "Yes" to all three of Ron's claims. In this appeal, Defendants defiantly repeat their mistakes.

Iowa Rule of Appellate Procedure 6.903(f) requires factual statements "be supported by appropriate references to the record." Yet, Defendants repeatedly make citation-free assertions directly refuted by the record. Many claims contradict *their own evidence*. For example, Defendants' primary argument is "there is nothing in the record that shows [Mallaney or Coppock] had the authority to terminate

Rumsey." (Def. Brief 34). Compare that assertion with the testimony of HR Director, Liz Mallaney:

> MALLANEY: . . . So at that time Mr. Coppock and I both came to the conclusion that we didn't feel that we could have Mr. Rumsey back into our workplace.
> ARMENTROUT: So did you decide to terminate him at that point?
> MALLANEY: We did.

(T-Day 2, 184:22-185:6) (App. 329-30). That Coppock and Mallaney had the authority to fire Ron did not come from tricky cross examination. It happened on direct. This is not a one off; Defendants repeatedly engage in legerdemain to convince this Court to ignore the evidence.

STATEMENT OF THE CASE

A Polk County jury unanimously found that Defendants discriminated against Plaintiff Ron Rumsey, failed to accommodate his disabilities, and retaliated against him for making accommodation requests.

The district court properly denied Defendants' post-trial motions but erroneously excluded evidence of prior discrimination and erred in refusing to award front pay.

STATEMENT OF FACTS

Ron Rumsey has been deaf since birth. (T-Day 3, 131:12-22) (App. 475). He cannot hear anything without his hearing aid. With his hearing aid, Ron can hear very loud noises, but cannot distinguish sounds. *Id.* Ron learned to read lips and

can converse one-on-one but struggles when multiple people are talking. (T-Day 3, 133:7-18) (App. 477).

When Ron was about four, his mother gave him up as a ward of the state. (T-Day 3, 134:6-20) (App. 478). In junior high, Ron's peers bullied him.[1] (T-Day 3, 136:14-138:4) (App. 480-82). Ron's classmates mocked Ron's sign language and threw things at him in class. *Id.* As Ron got older, he attended the Iowa School for the Deaf. (T-Day 3, 138:17-140:6) (App. 482-84). While there, Ron observed teachers abusing some students. *Id.* Ron organized a protest, resulting in Ron getting kicked out of school. *Id.* Ron's background impacts how he interacts with and is affected by others.

WOODGRAIN IGNORES RON'S ACCOMMODATION REQUESTS

In 2007, Ron started working for Woodgrain through a temp agency. Soon after, Woodgrain hired Ron fulltime, noting he "excelled in any task he performs. He hits his efficiencies daily and helps others reach theirs." (T-Day 2, 24:3-25:14) (App. 159-60); Exhibit 1 (App. 764). Over the years, Ron worked in numerous departments. *Id.*; (T-Day 3, 141:12-143:6) (App. 485-87). In 2010 and 2012, Ron was employee of the month. (T-Day 2, 119:9-21) (App. 254); Exhibits 4, 5 (App.

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[1] Defendants' objection to this testimony was overruled because, prior to Ron's testimony, Defendants questioned Mallaney and Coppock at length about their personal histories and family members with disabilities. (T-Day 3, 137:4-15) (App. 481).

765-66). Ron was so proud he hung the posters in his house. (T-Day 3, 159:18-161:11) (App. 503-05).

Still, there were issues. Defendants had Ron watch training videos featuring an unseen narrator, making it nearly impossible for Ron to understand. (T-Day 3, 145:19-147:4) (App. 489-91). Ron asked Mallaney for closed captioning. *Id.* She promised to investigate, but Woodgrain never provided it. *Id.* Ron also asked Defendants to install lights on the fire and tornado alarms because he could not hear them. (T-Day 3, 148:7-151:3) (App. 492-95). Instead, Defendants told Ron they would send someone to get him in an emergency. *Id.* When Woodgrain ran an emergency drill, however, Ron looked up from his workstation and found himself completely alone. *Id.* Ron did not know whether it was a fire or tornado drill, so he guessed. *Id.* He ran outside, but again found himself alone. *Id.* It was a tornado drill. *Id.* Had it been real, Ron could have been killed.

Woodgrain held plantwide meetings where a speaker gave updates on the company, discussed defects the plant needed to address, and fielded questions from employees. (T-Day 3, 143:7-145:18) (App. 487-89). Ron could not follow along. *Id.* He asked for an interpreter, but Woodgrain never provided one. *Id.*

RON GETS INJURED AND CHANGES JOBS

On January 21, 2015, Ron suffered a serious workplace injury to his back, shoulder, and wrist. (T-Day 3, 161:12-162:17) (App. 505-06). He was working as a

Material Handler II doing a job called IG Wrap[2], involving lifting and wrapping heavy panes of glass for transport. *Id.* Ron filed a claim for workers' compensation benefits with Defendants' carrier, Gallagher-Bassett, and the claim was assigned to adjuster Cathy Sams. (T-Day 3, 163:3-6) (App. 507); (T-Day 2, 152:14-153:2) (App. 287-88). Ron saw many doctors over the following months, and he used interpreters for all his appointments. (T-Day 2, 43:10-44:5) (App. 178-79). It was quickly apparent Ron would never completely heal, and as early as March 29, Ron told Mallaney he could not return to IG Wrap. (T-Day 4, 61:9-62:4) (App. 596).; Exhibit G. (App. 727-28).

Shortly after Ron's injury, Defendants reassigned him to jobs that accommodated his restrictions. On July 29, Dr. Daniel Miller determined Ron's back was at maximum medical improvement (MMI) and issued a permanent 10-pound lifting restriction. (T-Day 2, 49:7-50:2) (App. 184-85); Exhibit 8 (App. 767-76). Mallaney understood Ron's back was not going to get any better. (T-Day 2, 163:19-164:15) (App. 288-89). Mallaney testified that Ron's restriction was not a problem. (T-Day 2, 125:3-126:2) (App. 260-61). Defendants moved Ron to a job called "beader," a specific job under the category of "Fabricator." Ron put thin strips of foam, called bead, on all windows and doors that went through the plant.

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[2] Defendants call this position "Material Handler II," but that was just the general category of jobs. IG Wrap was Ron's specific job title.

(T-Day 2, 51:16-52:7) (App. 186-87). This was fulltime work and could be performed standing or sitting. *Id.*; (T-Day 3, 181:5-16) (App. 525).

Despite Dr. Miller's MMI pronouncement, Ron still had back pain. He asked for a temporary sit-down accommodation. (T-Day 3, 169:1-170:7) (App. 513-14). Mallaney refused to grant any accommodations without a restriction from a company doctor; but when Ron asked her to set up an appointment, Mallaney failed to do so. *Id.* On April 3, Mallaney received email notification that Ron had left early due to extreme back pain. (T-Day 2, 45:10-46:16) (App. 180-81); Exhibit 25 (App. 791). Mallaney forwarded the email with a single, sarcastic word: "Dying." *Id.*

In September, Ron had shoulder surgery, returning with a temporary sit-down restriction that Defendants had no problem accommodating. (T-Day 2, 55:1-12) (App. 190). Once Ron's shoulder healed sufficiently, he returned to doing bead work, but he lost his sit-down restriction. *Id.* Ron again asked Mallaney for a sit-down accommodation, which she refused to provide without a company doctor's note. (T-Day 2, 56:6-57:14) (App. 191-92).

DEFENDANTS CONVINCE RON'S DOCTOR TO ALTER RON'S RESTRICTIONS

On Friday, December 11, Ron visited Dr. Todd Harbach, who had also treated Ron's back and was then treating his shoulder. (T-Day 2, 59:7-60:14) (App. 194-95); (T-Day 3, 175:8-176:2) (App. 519-20). After hearing about Ron's ongoing back pain, Dr. Harbach issued a sit-down restriction. *Id.* Ron gave the restriction

to Mallaney, who sent Ron home. (T-Day 2, 67:1-14) (App. 202); Exhibit U (App. 735). Mallaney then fired off an email to Sams and HR Director Pete Crivaro, demanding: "Action MUST be taken on Ron Rumsey" and his restriction. *Id.*; Exhibit 16 (App. 784-85)., p. 2. Crivaro asked about contacting Ron's physician, but Sams beat him to it. *Id.* Less than an hour and a half after Mallaney's email, Sams reported that she contacted Dr. Harbach's nurse and "Brandi will get Dr. Harbach to make an addendum" removing the restriction. *Id.* Dr. Harbach issued a release directly to Defendants, scrubbing all references to Ron's back and removing the restriction. Exhibits U, X (App. 735, 741).

Defendants never asked Ron's permission to contact his physician, nor did anyone tell Ron that they had gotten Dr. Harbach to remove the restriction. (T-Day 2, 69:20-70:16) (App. 204-5); (T-Day 3, 177:7-22) (App. 521). On Monday December 14, Mallaney told Ron to return to work on Tuesday. Mallaney told management Ron was returning and that "The back is not in the equation." Exhibit 20 (App. 790).

DEFENDANTS FIRE A CONFUSED RON

Ron believed he had a sit-down accommodation when he came to work on December 15. (T-Day 3, 178:10-16) (App. 522). Despite knowing Ron would question the elimination of his restriction, Defendants took no action to explain what they had done, such as scheduling an interpreter. (T-Day 2, 104:9-105:11) (App. 239-40). Floor Manager Jay Lauridsen asked Ron to sign an internal work

release. Ron objected because his sit-down accommodation was missing. (T-Day 3, 182:3-185:14) (App. 526-29); Exhibit Z (App. 743). Lauridsen had no idea what Ron was talking about. *Id.* Lauridsen brought in Plant Manager Clay Coppock, who had been coordinating Ron's accommodations with Mallaney. *Id.* Coppock did not appear to know what Mallaney had done either. *Id.* Ron and Coppock walked toward Mallaney's office, while Coppock badgered Ron to sign the paper, saying Ron could not return to work unless he did. *Id.*

When Ron and Coppock arrived in HR, Coppock and Mallaney talked alone in her office, moving to the side so Ron could not see or read their lips. (T-Day 3, 188:10-25) (App. 532). No sign language interpreter was present. (T-Day 3, 187:6-9) (App. 531). After about 10 minutes, Mallaney asked Ron, "What's the problem?" (T-Day 3, 189:5-190:10) (App. 533-34). Ron insisted he had a sit-down restriction. *Id.* Mallaney said she "had it removed," but provided no other explanation. (T-Day 3, 191:12-192:10) (App. 535-36). Ron felt betrayed and confused; he had no idea how Mallaney had the authority to go behind his back and eliminate his restriction. *Id.*; (T-Day 4, 30:1-11) (App. 565). He took out his cell phone to text his workers' compensation attorney about the release. (T-Day 3, 187:10-188:3) (App. 531-32). Coppock ordered Ron to put his phone away, and when Ron explained he was trying to text his attorney, Coppock repeated the order. *Id.*

Mallaney and Coppock asked if Ron would like to wait and meet with Crivaro. (T-Day 2, 108:6-19) (App. 243); (T-Day 3, 190:24-191) (App. 534-35). Ron

requested an interpreter so he could understand what was happening. (T-Day 3, 190:24-191) (App. 534-35). Mallaney and Coppock said Crivaro would not arrive for around 1.5 hours. *Id.* Ron's back hurt, and he knew the interpreter company was not yet open, so he said he was going to leave. (T-Day 4, 83:9-84:17) (App. 618). No one stopped him, said he was in trouble, or told him not to leave. (T-Day 4, 83:9-84:17) (App. 618). Mallaney and Coppock agreed that the meeting with Crivaro was not disciplinary in nature. (T-Day 3, 51:4-8) (App. 442); (T-Day 2, 108:20-109:4; 248:7-9) (App. 243-44; 383). After Ron clocked out, he texted Mallaney, requesting 30 minutes' notice once they scheduled an interpreter so he could return for the meeting. (T-Day 3, 193:6-195:5) (App. 537-39). Ron went home and waited, but when his phone vibrated, it was his workers' compensation attorney telling Ron that Defendants fired him. *Id.*

DEFENDANTS' STORY

Defendants told Sams they fired Ron for fighting on company property. (T-Day 3, 126:21-127:1). Eventually, Defendants claimed that on December 15, Ron became enraged about the sit-down restriction, swearing at Mallaney and Coppock. During voir dire and opening argument, defense counsel went further, comparing Ron to then-recent workplace shooting massacres in El Paso, Texas and Dayton, Ohio. (T-Day 1, 140:16-141:7, 216:13-23) (App. 141-43). However, Defendants themselves admitted they did not think Ron was going to shoot someone. They

acknowledged Ron never engaged in violence, fought anyone, or threatened to fight anyone. (T-Day 2, 121:11-122:6; 239:7-12) (App. 256-57; 374).

RON'S UNRELATED WORKERS' COMPENSATION SETTLEMENT

In February 2017, Ron and Gallagher-Bassett entered a "compromise settlement" under Iowa Code section 85.35(3), resolving Ron's workers' compensation claim.

ARGUMENT

I. DEFENDANTS COPPOCK AND MALLANEY ARE INDIVIDUALLY LIABLE

Plaintiff agrees Defendants preserved error.

A. Individuals Are Liable For Violating the ICRA When They Violate the ICRA

Defendants wrongly imply that in *Vivian v. Madison*, this Court held only "supervisors" could be individually liable under the ICRA. (Def. Brief 32). Defendants even presuppose the universe of potential individual defendants is smaller than "supervisors." *Id.* *Vivian* admittedly contains some quotes which—taken out of context—seem to indicate that only "supervisors" are personally liable. Those who misuse such quotes for their own purposes ignore that the dispute came to the Court on a certified question asking "Is a *supervisory* employee subject to individual liability for unfair employment practices under Iowa Code section 216.6(1) of the Iowa Civil Rights Act." *Vivian v. Madison*, 601 N.W.2d 872, 872 (Iowa 1999) (emphasis added). The *Vivian* Court had neither the duty nor authority

to decide the outer parameters of individual liability. *See Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997) (refusing to provide advisory opinion in response to certified question). "Nothing in *Vivian* or the ICRA" "limits individual liability to supervisors." *Paskert v. Kemna-ASA Auto Plaza, Inc.*, 2018 WL 5839092, *6 (N.D. Iowa Nov. 7, 2018). *Vivian* provides the floor of individual liability—not the ceiling.

Defendants fret that there is no clear standard for when an individual is liable for his personal violations of the ICRA. (Def. Brief 32). On the contrary, the clear standard was established by the Legislature and is exactly same as the one that applies to corporate employers. "Persons" are liable when they in any way "discriminate in employment." IOWA CODE § 216.6(1).

Defendants incorrectly proclaim a federal court consensus that "an individual must possess decision-making authority over the employment action" before liability can attach. (Def. Brief 32). They overlooked decisions in *Paskert*, 2018 WL 5839092, *10 ("Not all acts of discrimination listed in the ICRA require action of a supervisor"); *Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003, 1023 (N.D. Iowa 2011) (coworkers who contribute to pervasive sexual harassment personally violate ICRA); *Johnson v. BE&K Const., LLC*, 593 F. Supp. 2d 1044, 1050 (S.D. Iowa 2009) (rejecting employer's argument that personal liability is limited to employers and supervisors); *Stricker v. Cessford Const. Co.*, 179 F. Supp. 2d 987, 1015-16 (N.D. Iowa 2001) (individual may be liable for failing to take action to end sexual harassment).

As a factual matter, non-supervisors will rarely *be* in a position to violate the ICRA. Individuals without any decision-making authority will be in a position to violate the ICRA even less frequently. *But the contours of liability must follow the facts* rather than being arbitrarily imposed. The polestar of the Court's analysis must always be the legislative directive that the ICRA be "interpreted broadly to effectuate its purpose." IOWA CODE § 216.18(1). An individual may personally violate the ICRA by:

- Sexually harassing a coworker;[3]
- Failing to provide reasonable accommodations;
- Initiating, approving, or otherwise participating in a discriminatory adverse action.[4]

There are undoubtedly other ways, limited only by the imagination and the language of the law.

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[3] "Pervasive sexual harassment creating a hostile work environment need not be committed by a supervisor to be actionable." *Paskert*, 2018 WL 5839092, *10.

[4] Employers are liable for making discriminatory employment decisions even when the actual decisionmaker is blameless, so long as the decision is influenced by someone who takes the worker's protected status or conduct into account. *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (recognizing "cat's paw" liability). The person whose discriminatory motive led to the employer's liability should be personally responsible for her own violations.

In this case, the court correctly instructed the jury that Mallaney and Coppock were liable if they fired Ron because of his disability, failed to accommodate his disability, and/or retaliated against him because he engaged in protected activity. (Inst. 17, 19, 21).

The court also correctly declined to give separate instructions for each Defendant because the evidence was undisputed that corporate liability was based on the conduct of Mallaney and Coppock. (T-Day 2, 184:22-185:6) (App. 319-20).

B. Defendants' Proposed Instruction 23 Incorrectly Stated the Law

Defendants' proposed instructions were, frankly, a confusing mess. Although they included 18 separate special interrogatories, they did not allow the jury to find that Mallaney and Coppock failed to accommodate Ron's disability or retaliated against him in violation of the ICRA. They presupposed that it was "Defendant Windsor's decision to terminate him." (Def. Prop. Spec. Int. 2, 3, 5, 6, 8, 9, 11, 12, 13).

Proposed Instruction 23 was especially problematic. In addition to requiring Plaintiff to prove all elements of each of his claims with respect to the individuals, it would have required Ron to prove "Mallaney and Coppock had decision-making authority to terminate Plaintiff." The instructions already required Plaintiff to prove that "Defendants"—a plural term that includes Mallaney and Coppock—engaged in the adverse actions with the requisite illegal motives.

It did not matter whether Defendants had specifically granted them actual authority to do so. "An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, *with actual or apparent authority*, or within the scope of employment." RESTATEMENT (THIRD) OF AGENCY § 7.01 (2006) (emphasis added).[5]

C. Proposed Instruction 23 Had No Application to the case

Courts can only give jury instructions with "application to the case;" they must be relevant and supported by "substantial evidence." *See Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009); *Kirkpatrick v. Gilbert*, 695 N.W.2d 333 (Iowa Ct. App. 2004); *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996) ("Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion."). Because Defendants entered zero support for their proposed instruction on individual liability, it lacked "application to the case." *See Deboom*, 772 N.W.2d at 5.

Defendants admit that employees with "some significant control over employment decisions affecting the plaintiff" are subject to individual liability. (Def.

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[5] Court have used the Restatement to inform their interpretations of civil rights laws. *See, e.g. Burlington Indus. v. Ellerth*, 524 U.S. 742, 758, 763 (1998); *Deeds v. City of Marion*, 914 N.W.2d 330, 349 (Iowa 2018).

Brief 32-34). The "employment decisions" in this case were (1) the decision to fire Ron and (2) failing to accommodate Ron's disabilities. Before Defendants could get their requested instruction, they first needed to enter substantial evidence that Mallaney and Coppock lacked "some significant control" over these decisions. *See Bride*, 556 N.W.2d at 452. Because the evidence firmly established that Mallaney and Coppock controlled both decisions, they are liable under any definition, making Defendants' proposed instruction unsupported and irrelevant. *See id; Deboom*, 772 N.W.2d at 5.

i. Mallaney and Coppock Fired Ron

Plaintiff's Introduction set forth just one example of the individual Defendants admitting they fired Ron. Defense counsel also asked Mallaney if she had "fired *other* employees at Windsor for using foul language" and emphasized that Coppock had "terminated other employees for getting enraged." (T-Day 2, 187:6-20) (App. 322); (T-Day 5, 71:21-72:3) (App. 715). When Plaintiff's counsel asked Mallaney, "And you made the decision to fire Ron shortly after he left; correct?" Mallaney responded "Yes." (T-Day 2, 123:4-9) (App. 258). Coppock testified he and Mallaney "chose and made the decision to fire Ron before [they] spoke to Pete Crivaro." (T-Day 2, 248:14-22) (App. 383).

Defendants may have disputed the illegality of their firing decision, but they never questioned who made that decision. In opening, defense counsel claimed, "Mr. Coppock and Ms. Mallaney didn't even consider [Ron's] hearing impairment

or the request for interpreter when the decision was made to terminate him." (T-Day 1, 224:19-225:3) (App. 146-47). In closing, Defendants argued they had "discretion" over discipline and said "Here, what they decided, Mr. Coppock and Ms. Mallaney that day, was it warranted full discharge, not just a suspension." (T-Day 5, 84:2-6) (App. 718). Defendants told the jury that Ron needed to prove "discrimination or retaliation played a part in Ms. Mallaney and Mr. Coppock's decision to terminate" and argued Ron failed to present evidence that discrimination was "in the minds of Ms. Mallaney or Mr. Coppock at the time they made their decision." (T-Day 5, 89:15-25)(emphasis added) (App. 719).

Defendants never say who—if not Mallaney and Coppock—made the decision. The only other person who even knew about it was Divisional HR Manager Pete Crivaro, but he was not there. Crivaro had "more strategic responsibilities, leadership development, safety and environmental, employee culture, those type of larger things." (T-Day 3, 74:19-75:2) (App. 463-64). Crivaro said he "supported" Mallaney and Coppock's decision, but "their decision was made" before he even got to work. *Id.* (T-Day 3, 65:6-20) (App. 456).

ii. Mallaney and Coppock Controlled Ron's Accommodations

As HR Manager, Mallaney received employees' medical restrictions and worked with Production Manager Coppock to identify accommodations. (T-Day 2, 136:24-9) (App. 271). Mallaney was the gatekeeper to Ron's requests to

accommodate his deafness and back impairment. (T-Day 3, 143:7-151:3) (App. 487-95); (T-Day 2, 103:16-25) (App. 238). Coppock was directly involved with Ron's accommodation requests. (T-Day 2, 218:3-23; 225:13-16; 255:6-14) (App. 353; 360; 390). This undisputed evidence demonstrated Mallaney and Coppock's control over Ron's accommodations.

D. Any Failure to Give Defendants' Requested Instruction is Harmless

i. The District Court did not Mislead the Jury

Reversal is warranted only "if the instructions have misled the jury." *Deboom*, 772 N.W.2d at 5. That did not happen here. The district court explained, "the jury was not improperly instructed regarding individual Defendants Mallaney and Coppock, nor, *under the facts and circumstances of this case*, was a special interrogatory required regarding their individual liability." JNOV Ruling, p. 2 (emphasis added). An additional instruction on liability was pointless; the jury was already instructed that Woodgrain's liability hinged on Mallaney and Coppock's liability. (Inst. 13) (a corporation "acts only through its agents or employees."); *see Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000).

There was no confusion that when the instructions said "Defendants," they were referring to the three Defendants. Ron's case boiled down to Mallaney and Coppock's conduct. Defendants agreed; they told the jury it could not find Defendants liable unless it first decided that Mallaney and Coppock were motivated

by discrimination or retaliation. (T-Day 5, 89:15-25) (App. 719). Defendants argued that Woodgrain exercised its disciplinary discretion through Mallaney and Coppock. (T-Day 5, 83:4-84:6) (App. 717). The jury's decision against all three Defendants does far more than "*impl[y]* that Rumsey's alleged disabilities played a part in the decision to terminate him;" it concretely establishes Mallaney and Coppock's culpability. *See* Def. Brief 21, n. 2); (Verdict Form).

Defendants wrongly claim *Fox v. District of Columbia*, 990 F. Supp. 13, 23 (D.D.C. 1997) says an individual could not be held liable in her individual capacity by the verdict, as it failed to require a separate finding of liability for [the individual]." (Def. Brief 23). In *Fox*, the court was deciding whether a plaintiff named a public official in her individual, as opposed to official, capacity. *Id.* at 21. The plaintiff had not done so in her pleadings, but argued the official was, "in the course of the proceedings, tried in her individual capacity." *Id.* The court rejected this argument, finding the complaint did not give the official notice that she was being tried individually, and the official did not act like she was being tried individually. *Id.* Use of the plural "defendants" in the jury instructions was just one factor, significant only because the official had been listed in her official capacity. *Id.* at 23.

This case did not include any of the issues or confusion in *Fox*. Defendants Coppock, Mallaney, and Woodgrain were all specifically named in pleadings and were always referred to as "Defendants." The court and all attorneys called them "Defendants." In opening statements, defense counsel said they represented "the

defendants" and discussed legal positions of "the defendants." (T-Day 1, 223:19-24) (App. 145). Even Defendants' failure to mitigate instruction lumped together the three defendants. (Inst. No. 35) ("The *Defendants* contend that Plaintiff failed to mitigate his damages . . . The burden remains on *the Defendants* to show that the Plaintiff failed to mitigate his damages.").

ii. Defendants Did Not Enter Any Evidence Supporting Their Same Decision Defense

The same decision defense is an affirmative defense on which Defendants had the burden of proof. *Hawkins v. Grinnell Regional. Med. Ctr.*, 929 N.W.2d 261, 270 (Iowa 2019). Defendants needed to enter "substantial evidence" they would have made the same decision to fire Ron absent consideration of his disability or requests for accommodation. *See Bride*, 556 N.W.2d at 452. Defendants not only failed to enter substantial evidence; they *never even asked witnesses the question*.

The district court instructed the jury three times, once after each of Ron's claims, to ask whether Defendants would have "made the same decision to terminate Plaintiff's employment." (Inst. 18, 20, and 22). The jury said no all three times. "Defendants" obviously referred to all the Defendants. If the jury thought one would have made the same decision, it could have answered "Yes" to one or more of the questions. It is unnecessary for this Court to decide whether Mallaney and

Coppock needed lines on the verdict form because Defendants' utter lack of evidence makes any error harmless.[6]

iii. Woodgrain Millwork Inc. is Still Liable

Regardless of this Court's holding on the individual liability of Coppock and Mallaney, the judgment against Woodgrain is undisturbed.

II. THE VERDICT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Disability Discrimination

Although Defendants' Brief contains the heading, "Rumsey is Not Disabled Within the Meaning of the ICRA," they admit: "Defendants have never challenged that Rumsey's back, shoulder, and wrist injuries are physical conditions constituting a substantial disability." (Def. Brief 39).

Doublespeak aside, it appears the element Defendants contest is whether Ron was qualified to perform the essential functions of his job with or without reasonable accommodations. Their sole basis is that Ron's physical disabilities prevented him from doing a job he used to have.

i. Ron was Qualified

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[6] Defendants also fail to explain how Mallaney and Coppock could have made the same decision to fire Ron absent illegal motive if, as Defendants argue, Mallaney and Coppock lacked the authority to fire Ron in the first place.

Before Ron's injury, he was a "Material Handler II," performing "IG Wrap." (T-Day 3, 161:12-15) (App. 505). After Ron's injury, Defendants moved Ron out of IG Wrap. (T-Day 2, 12-15) (App. 154-57). For the next 11 months, Ron performed multiple jobs within his restrictions, including beading, maintenance, cleaning, floor scrubbing, glass quality inspection, putting screws in hinges, and organizing hardware. (T-Day 2, 146:7-25) (App. 281); (T-Day 3, 30:22-31:3; 164:12-17) (App. 421-22; 508).

Sometime after Ron's restrictions became permanent in July 2015, Defendants made Ron a "Fabricator," rather than a "Material Handler II," assigning Ron to the "beader" position. (T-Day 2, 50:18-52:7) (App. 185-87). Ron and Mallaney testified this was a fulltime position. *Id*; (T-Day 3, 174:16-19) (App. 518). When Defendants fired Ron, their termination paperwork labeled Ron a "Fabricator." *See* Exhibit 30, p. 1 (App. 792).

Whether a plaintiff is "qualified" requires the factfinder to consider whether the plaintiff has "the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires." *Casey's General Stores, Inc. v. Blackford*, 661 N.W.2d 515, 520–21 (Iowa 2003); *Schlitzer v. Univ. of Iowa Hosp.*, 641 N.W.2d 525, 531 (Iowa 2002); *see also* IOWA ADMIN. CODE 161-8.28 (Employers "shall make every reasonable effort to continue the individual in the same position or to retain and reassign the employee.").

After his injury, Ron requested whatever job was available, and Defendants chose beader. (T-Day 2, 51:16-52:7; 124:25-125:2; 189:14-190:6) (App. 186-87; 259-60; 324-25); (T-Day 4, 112:12-17) (App. 647).; Exhibit 30 (App. 792-94).

Defendants argue Ron had to prove he could perform the essential functions of Ron's pre-injury position— which Ron had not worked in nearly a year. (Def. Brief 40-44). This argument is contrary to established, binding precedent. In *Blackford*, the Supreme Court emphasized:

> [T]he duty to reasonably accommodate a claimant applies not only to an existing job, but also includes a job the claimant desires." *Schlitzer*, 641 N.W.2d at 530–31; *see* 42 U.S.C. § 12111(9) (2000) (reasonable accommodation includes "reassignment to a vacant position"); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161–63 (10th Cir.1999) ('qualified individual' under the ADA includes disabled employees who can perform a desired reassignment job, with or without an accommodation, though unable to perform their existing job); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1300–01 (D.C.Cir.1998). Thus, like the federal ADA counterpart, our statute should not only protect a disabled person who can perform the essential functions of a position the person holds, with or without an accommodation, but also protect a disabled person who can perform the essential functions of a desired job, with or without an accommodation. *Schlitzer*, 641 N.W.2d at 530–31. This means an employer has some obligation, based on the employee's initiation of the process, to reassign a disabled employee who has become disabled and can no longer perform the essential functions of his or her job as a reasonable accommodation. *Id.*

(emphasis added).

Reassignment as an accommodation would make no sense if, to be protected, an employee had to prove he was qualified for the position from which the employer had moved him *as a reasonable accommodation*. Ron was required to show that he was qualified for what he was *actually* doing—beader.

Mallaney conceded Ron was qualified:

> Q: Right. Now, Ron was certainly qualified to do the job as fabricator that he was performing; right?
> A: That one spot there, yes.
> Q: He certainly had the skill, experience, and the know-how to do the beading position; right?
> A: Yes.

(T-Day 2, 54:2-8) (App. 189).

ii. Defendants did not fire Ron because he had a lifting restriction

On July 29, 2015, Dr. Miller issued a permanent 10-pound lifting restriction. (T-Day 2, 49:7-50:2) (App. 184-85); Exhibit 8 (App. 767-76). Mallaney knew Ron's back was "not going to get any better." (T-Day 2, 163:19-164:15) (App. 298-99). Even so, Mallaney agreed Ron's inability to lift 50 pounds "wasn't a problem." (T-Day 2, 124:16-126:2) (App. 259-61). When Ron missed work because of back pain, Defendants actually *reminded* him they had work available. (T-Day 2, 148:6-11) (App. 283).

This is where the facts of this case diverge from Defendants' legal authority. (Def. Brief 41-42). In Defendants' cases, the employers fired the employees *because* of their lifting restrictions. In this case, Defendants repeatedly denied they fired Ron because of his restrictions and swore that, had he not been fired, they would have continued to employ him in the beading position. (T-Day 2, 54:23-25) (App. 189); (T-Day 3, 99:4-6) (App. 469). The jury could reasonably infer Defendants

would not have retained Ron if he were unqualified or could not physically perform his job.

In *Taylor v. Garrett*, 820 F. Supp. 933 (E.D. Pa. 1993), the plaintiff experienced a workplace injury and could not perform the essential functions of his rigger position without reasonable accommodation. The physician returned Taylor to light duty, asking that he be reclassified. *Id.* at 934. The employer eventually fired Taylor and he sued for disability discrimination and failure to accommodate. The court rejected the argument that Taylor was not qualified to return to work as a rigger, partly because this was never the defendants' reason for firing him:

> The cases cited by defendants stand collectively for the proposition that an employee is properly fired if that employee cannot perform the essential features of his job. However, the Navy has never suggested that Taylor was discharged because of his inability to perform the job of rigger or even, more broadly, that his qualifications as a rigger had anything whatsoever to do with his discharge.

Id. at 938–39 (emphasis added). The court held, "If one were to accept the Navy's rigid definition of the 'position in question,' an employer who chose to reassign to light-duty work an employee who had become unable to perform his original job would have an unsettling 'carte blanche' power over that employee." *Id.*

Like *Taylor*, Defendants here did not fire Ron because he was physically unable to do any part of his job. (T-Day 3, 62:20-22) (App. 453); (T-Day 2, 125:3-126:2) (App. 260-61); Exhibit 31 (App. 795).

iii. Lifting 50 pounds was not an essential function of Ron's fabricator job

Essential functions are fundamental duties, not marginal duties. 29 C.F.R. § 1630.2(n)(1). Accomplishing essential functions is the reason a particular job exists. *See* 29 C.F.R. § 1630.2(n)(2); *see also* A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act (1992), § 2.3(a), (b) (EEOC Jan. 1992). "In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed." *Id.* Factors to consider in deciding if a job duty is essential include:

1. The employer's judgment;
2. Written job descriptions;
3. The amount of time spent on the job performing the function;
4. The consequences of not requiring the incumbent to perform the function;
5. The terms of any collective bargaining agreement;
6. The work experience of past incumbents in the job;
7. The current work experience of incumbents in similar jobs;
8. Whether the position exists is to perform the function;
9. Whether there are a limited number of employees available among whom the performance of the function can be distributed; and/or
10. Whether the function is highly specialized and the individual in the position was hired for her expertise or ability to perform the function.

29 C.F.R. § 1630.2(n)(2) and (3); *see also Knutson v. AG Processing, Inc.*, 273 F. Supp. 2d 961, 991 (N.D. Iowa 2003).

Defendants argue lifting 50 pounds was essential based *solely* on their judgment (factor 1) and job descriptions (factor 2). There was substantial evidence to find differently. Ron was a fabricator and beader for months without lifting more

than 10 pounds. Mallaney admitted job descriptions were quite general. (T-Day 2, 212:14-215:8) (App. 347-50); Exhibit GG (App. 754-55). Not every fabricator performed the same tasks or used the same equipment. *Id.* Mallaney agreed the important thing was what the individual employee was actually doing. *Id.* Defendants never identified a single task in those jobs requiring lifting 50 pounds.

If lifting were required, forklifts or other machinery could be used (factor 3 and 4). There was no testimony indicating lifting 50 pounds was something any other employee at Woodgrain did frequently. Factor 5 does not apply, and there was no testimony concerning Factor 6 or 7.

Neither the fabricator nor beader position exists to lift 50 pounds (factor 8). Multiple Woodgrain employees could not lift 50 pounds (factor 9). (T-Day 3, 166:11-167:1) (App. 510-11). Lastly, Ron's expertise was not "lifting;" lifting is not a specialized function, and there was no evidence Ron was hired solely because of his remarkable lifting abilities (factor 10).

If the jury decided that "Plaintiff's job" was a generic "fabricator," he was qualified because Defendants made the reasonable accommodation of assigning Ron to beading. If the jury decided that "Plaintiff's job" was "beader," then no accommodation was needed.

iv. There was substantial evidence of causation

Ron was the only deaf employee of Woodgrain, and Defendants did nothing to make its facility more accessible to him. (T-Day 2, 26:11-16) (App. 161); (T-Day

3, 67:24-68:8) (App. 511-12). Defendants did not educate their employees on working with a deaf coworker, and no one-not even Mallaney-underwent training specific to disability discrimination. (T-Day 2, 36:7-14; 37:8-12; 39:5-7) (App. 171-72; 174).

The jury heard how Ron made multiple *other* accommodation requests, all ignored. (T-Day 3, 143:7-147:4; 148:7-151:3; 154:4-21) (App. 487-94; 498). The evidence showed how on December 15, Mallaney and Coppock talked before speaking with Ron, moving to the side so Ron could not see their lips. (T-Day 3, 188:17-189:4) (App. 532-33). The jury also saw internal emails where Mallaney made fun of Ron's physical struggles. (T-Day 2, 45:23-46:16) (App. 180-81); Exhibit 25 (App. 791). Defendants also treated Ron differently than his coworkers. An employee who threatened, "Hey motherfucker, I'm going to kick your ass," would receive a formal or last chance warning, while Ron (who made no such threat) was fired. (T-Day 2, 222:25-223:24) (App. 357-58). Ron was never allowed to give a statement, even though Crivaro said that was "always" necessary in a dispute. (T-Day 3, 71:18-72:5) (App. 461-62). There was substantial evidence for the jury to decide one or both of Ron's disabilities was a motivating factor in Defendants' decision to fire him.

B. Failure to Accommodate

Failure to accommodate claims impose strict liability; no intent is required. *Peebles v. Potter*, 354 F.3d 761, 767 (8th Cir. 2004) ("The known disability triggers

the duty to reasonably accommodate and, if the employer fails to fulfill that duty, we do not care if he was motivated by the disability."). Defendants make this claim seem confusing, but it was very simple. Between December 11 and December 15, 2015, Ron requested two accommodations: a temporary sit-down accommodation to alleviate his back pain and a sign language interpreter so he could understand what was going on. Defendants' witnesses all agreed they could have, but failed to, provide either accommodation.

i. Ron's request for a sit-down accommodation was reasonable

Ron's need for the sit-down accommodation in 2015 was obvious. Ron could perform the essential functions of the fabricator position standing up or sitting down, but his back hurt less when he sat down, so he asked for the accommodation. (T-Day 3, 181:5-16) (App. 525); (T-Day 4, 106:19-22) (App. 641).

Mallaney told Ron he needed a note from a company doctor. (T-Day 2, 56:6-57:14) (App. 191-92); (T-Day 3, 169:1-170:7) (App. 513-14). Mallaney's response is telling: she never claimed Ron could not do the fabricator job sitting down. She kept saying she needed a note from the company doctor but then refused to schedule Ron with the company doctor who had treated his back.

While Defendants now claim a sit-down accommodation was "unreasonable," they sung a very different tune to the jury:

> **ARMENTROUT**: Would it have mattered to you one way or another if Dr. Harbach had said, "yes, I do want him to have sit-down restrictions"?
> **MALLANEY**: No. That wouldn't have mattered, no.
> **ARMENTROUT**: He had done sit-down work earlier that summer?
> **MALLANEY**: Correct.

(T-Day 2, 171:4-9) (App. 306). Mallaney's testimony is plainly inconsistent with Defendants' current insistence that a sit-down restriction meant Ron could not do his job. Mallaney admitted the same thing to Plaintiff's counsel:

> **ALBRECHT**: Now, when it comes to this accommodation for sit-down work from Dr. Harbach, I just want to make something very clear to the jury. This is an accommodation that you – you could have accommodated that request; correct?
> **MALLANEY**: Yes.

(T-Day 2, 99:13-18) (App. 234).

Unable to rely on evidence, Defendants contortedly argue that Ron's request was not "reasonable" or part of a legitimate interactive process because Ron's *shoulder* restrictions were not permanent until January 2016. (Def. Brief 45). But as Defendants acknowledged, "Clearly, Rumsey was requesting this restriction to ease his back pain." *Id.* (emphasis added). It had nothing to with his shoulder.

Defendants now hypothesize they might have fired Ron after his shoulder reached MMI, but at trial, they denied *this exact thing*. *Id.* Mallaney agreed if an employee could not lift 50 pounds but contributed other value to the company, the company would want to keep that employee. (T-Day 2, 192:16-20) (App. 327). Crivaro testified it was not Defendants' policy to fire an employee with permanent

restrictions. (T-Day 3, 98:10-12) (App. 468). If it were, Defendants would have fired Ron after receiving his permanent lifting restrictions on July 29. Crivaro testified if Ron's shoulder reached MMI and presented additional issues, Defendants and Ron would have gotten together to assess, but "we never got to that point." (T-Day 3, 98:19-99:3) (App. 468-69).

ii. Ron's request for an interpreter was reasonable

Ron requested an interpreter to understand how and why Defendants changed his medical restrictions without his knowledge or permission. This request cannot legitimately be viewed as "unreasonable." "Reasonable accommodations may include . . . the provision of readers or interpreters." IOWA ADMIN. CODE 161-8.27(6)(A)(2); *Noll v. Intl. Bus. Machines Corp.*, 787 F.3d 89, 96 (2d Cir. 2015) ("interpreters are a common form of reasonable accommodation").

Defendants said their policy was to provide accommodations for employees with known disabilities. (T-Day 2, 111:24-112:9) (App. 246-47). Defendants knew Ron used interpreters throughout medical treatment and for past work meetings. (T-Day 2, 43:10-44:5) (App. 178-79); (T-Day 4, 114:20-115:17) (App. 649). It should not be controversial to recognize Ron was requesting a reasonable accommodation.

The ICRA broadly prohibits employers from discharging or otherwise discriminating against "any employee … because of the … disability of such … employee." IOWA CODE § 216.6(1)(a). Regulations promulgated by the Iowa Civil Rights Commission flesh out employers' obligations. *See Goodpaster v. Schwan's Home*

Serv., Inc. 849 N.W.2d 1, 6 (Iowa 2014). The provision requiring reasonable accommodation does not mention "essential functions." IOWA ADMIN. CODE 161-8.27(6). The examples listed also make clear that reasonable accommodations are not limited to those related to essential job functions. They include:

- Making facilities readily accessible to people with disabilities;
- Job restructuring;
- Part-time or modified work schedules;
- *Providing* readers or *interpreters*.

IOWA ADMIN. CODE 161-8.27(6)(a) (emphasis added); *see also* 29 C.F.R. § 1630.9, app. (2016).

Undeterred, Defendants claim a request for an interpreter could never be reasonable *as a matter of law* if the worker did not need an interpreter to perform the essential functions of his job. (Def. Brief 46). In *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010), the court rejected that an accommodation must be needed to perform the essential functions of the job to be reasonable. *Id.* at 1111. Ultimately, it held a reasonable jury could find a sign language interpreter was a reasonable accommodation so that a deaf worker could understand and participate in employee meetings. *Id.* at 1111-14. The meetings sometimes related to job duties, but often did not. *Id.* at 1107; *see also EEOC v. Life Tech. Corp.*, 2010 WL 4449365, *4-5 (D. Md. Nov. 4, 2010) (same).

Defendants also argue the timing of Ron's interpreter request rendered it unreasonable. (Def. Brief 46). Ron has consistently said he requested an interpreter

twice on December 15: once during his meeting with Mallaney and Coppock and in a text message after he left. Defendants denied Ron requested an interpreter in Mallaney and Coppock's presence. Petition ¶¶ 41, 44; Answer ¶¶ 41, 44. They claimed Ron requested an interpreter only after he left the plant and the decision to fire him had been made. This was their position until Mallaney testified.

Mallaney acknowledged Ron's text request *after* the meeting, but initially kept to the company line, denying Ron asked for an interpreter at any point during the meeting. (T-Day 2, 110:7-17; 111:8-112:1) (App. 245-47). Mallaney agreed it would be a "pretty big deal" if Ron had requested an interpreter during the meeting, because she would have needed to consider it. (T-Day 2, 111:24-112:12) (App. 246-47). Ron's counsel then confronted Mallaney about her personal notes showing that Ron had, in fact, requested an interpreter during the meeting. (T-Day 2, 114:8-115:5) (App. 249-50). Mallaney then admitted the truth. (T-Day 2, 114:8-115:5) (App. 249-50).

Defendants now say Ron's request could not have been reasonable because Defendants fired him instead of considering it. (Def. Brief 46-47). This argument defies the foundations of disability discrimination law. Firing an employee for making an accommodation request proves causation of *both* discrimination and retaliation, yet Defendants claim the opposite. They contend an employer can just assume a worker's request is "unreasonable," and then fire the worker for making that unreasonable request. So much for the interactive process. *Cf. Palmer Coll. of*

Chiropractic v. Davenport Civil Rights Comm'n, 850 N.W.2d 326, 341 (Iowa 2014); *Blackford*, 661 N.W.2d at 521, 524 n.5.

C. Retaliation

Requesting a reasonable accommodation is protected activity. *See, e.g. Kirkeberg v. Canadian Pac. Fy.*, 619 F.3d 898, 907-08 (8th Cir. 2010); *Heisler v. Metropolitan Council*, 339 F.3d 622, 632 (8th Cir. 2003); IOWA ADMIN. CODE 161-8.27(6)(c) ("An employer may not deny any employment opportunity to a qualified handicapped employee . . . if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee.").

There was substantial evidence that Defendants' decision to fire Ron was directly motivated by his accommodation requests. During the meeting with Mallaney and Coppock, no one told Ron he was in trouble. (T-Day 2, 108:20-109:4) (App. 243-44). Mallaney admitted the only things that were said between the three of them sitting at a table and her decision to fire Ron were Defendants asking Ron if he wanted to meet with Crivaro, Ron's request for an interpreter, and Ron's complaint about back pain. (T-Day 2, 206:20-208:2) (App. 341-43).

Defendants fired Ron *immediately* after this meeting in which he requested a sign language interpreter and sit-down work for his back condition. Temporal proximity between an employee's protected activity and the employer's termination decision "may 'be a factor weighing in favor of finding causation.'" *Beekman v. Nestle Purina Petcare Co.*, 635 F. Supp. 2d 893, 922 (N.D. Iowa 2009); *see also Dawson v. Entek*

Int'l, 630 F.3d 928, 937 (9th Cir. 2011) ("In some cases, temporal proximity can by itself constitute sufficient circumstantial evidence of retaliation for purposes of both the prima facie case and the showing of pretext."). That the termination occurred in such a short window is highly suggestive of discrimination. *See Dawson*, 630 F.3d at 937.

Mallaney told defense counsel that once she received restrictions, her job was to "accommodate those restrictions per the doctor's note." (T-Day 2, 147:19-24) (App. 282). But on December 11, Defendants did the opposite. In direct response to Dr. Harbach's note, Mallaney demanded, "Action MUST" be taken, and shortly the accommodation was removed, Mallaney triumphantly declared, "the back is not in the equation." (T-Day 2, 69:20-70:16) (App. 204-5); Exhibit 16 (App. 784-85); Exhibit 20 (App. 790).

Mallaney admitted Ron never gave her permission to contact his physician and that she never forwarded the altered restriction or any explanation to Ron. (T-Day 2, 98:23-99:6) (App. 233-34); Exhibit X (App. 741). Defendants knew Ron would question the change and could not figure out how to explain it to him. (T-Day 2, 99:19-23; 100:18-101:1) (App. 234-36); Exhibit 19 (App. 781-89). When Ron refused to sign the release because he believed it were incorrect, Defendants badgered him, refused to let him contact his attorney, and then escalated the meeting by involving Crivaro. (T-Day 3, 187:6-188:3) (App. 531-32); (T-Day 2, 106:11-107:5) (App. 241-42).

D. The Jury Assessed the Value of Ron's Emotional Distress Fairly and Reasonably

Defendants' sole argument regarding damages is that the value the jury placed on Ron's emotional distress was not supported by the evidence, and they preserved error on only this ground. (Def. Brief 53-55). Defendants must prove the district court's discretion was "clearly untenable" or "exercised to a clearly unreasonable degree." *WSH Properties, LLC v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008) (emphasis added).

i. Damage Awards are the Province of the Jury

"A review court does not set aside a verdict simply because it might have reached a different conclusion. It is not for this court to invade the province of the jury." *Ort v. Klinger*, 496 N.W.2d 265, 269 (Iowa Ct. App. 1992) (citing *Cowan v. Flannery,* 461 N.W.2d 155, 157 (Iowa 1990).

"In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict." *Clarey v. K-Products, Inc.*, 514 N.W.2d 900, 903 (Iowa 1994); *Estate of Long v. Broadlawns Med'l Ctr.*, 656 N.W.2d 71, 90 (Iowa 2002). The evidence must be considered in the light most favorable to the plaintiff. *Ort*, 496 N.W.2d at 269. If "the verdict has support in the evidence the [other factors, including prejudice,] will hardly arise." *Estate of Long*, 656 N.W.2d at 90.

The jury found Ron's emotional distress worth a total of $450,000. It apportioned $300,000 to the past and $150,000 to the future. Judge McAllister found this verdict "supported by substantial evidence, is consistent with the jury instructions, and provides substantial justice to the parties." (JNOV Ruling, p. 3).

ii. The jury's emotional distress valuation was based on substantial evidence in the record

Because Defendants' arguments rely almost entirely on *Jasper v. Nizam*, it is important to note what *Jasper* was and what it was not. 764 N.W.2d 751 (Iowa 2009). First, *Jasper* was not a discrimination case; it was a public policy claim based on an employer firing a worker who complained about inadequate staffing. *Jasper*, 764 N.W.2d at 759. Second, the district court in *Jasper* ordered a remittitur and the reviewing court was determining whether it had abused its discretion. *Id.* at 773. That is the exact opposite of the procedural posture in this case, where the district court found the award "was not excessive under the facts presented at trial." JNOV Ruling, p. 3. Finally, *Jasper* upheld the remittitur decision based on the unique facts of the case:

> We are primarily influenced both by Jasper's relatively brief period of employment and unemployment. Her personal identity was not tied to this particular employment, and she found new employment in the same field and in the same position within a relatively short period of time.

Id. at 777.

Defendants misuse *Jasper's* holding to claim the damages in Ron's case were excessive. In *Smith v. Iowa State University*, 851 N.W.2d 1, 32 (Iowa 2014), the Iowa Supreme Court repelled a similar assault on a $500,000 emotional distress verdict. The Court itself denied that "*Jasper* sets an 'upper limit' to the reasonable range for emotional distress damages at $200,000," pointing out that "we actually indicated higher damages amounts may be supported." *Id.*

Like ISU, the Woodgrain Defendants argue *Jasper* applies broadly. The *Smith* Court said no. The illegal conduct in *Jasper* "was directed at a newly employed individual and limited to a single incident with no long-term distress." *Id.* The Court focused on several factors distinguishing *Jasper*, including that the defendants subjected Smith to prolonged wrongful conduct; Smith had been in his job for nearly a decade; Smith was "vulnerable to stress" due to taking care of an incapacitated spouse; and the defendants were aware of and took advantage of that vulnerability. *Id.* The facts (and verdict) in *Smith* bear remarkable similarity to the case at bar.

Ron presented substantial evidence that Defendants subjected him to prolonged discriminatory conduct and ignored years of accommodation requests. (T-Day 2, 31:10-32:24) (App. 166-67); (T-Day 3, 145:19-147:4; 148:7-151:3; 143:7-145:18) (App. 487-95). What the jury did not hear was even worse. *See* Section V. Defendants benefited from the exclusion of this evidence yet claim Ron could not have been severely affected by Defendants' illegal conduct.

Ron also suffered more because his identity was intertwined with his employment. *See Vetter*, 2017 WL 2181191, *16 (Iowa Ct. App. May 17, 2017) (plaintiff's love for his job relevant to value of emotional distress). Ron had worked for Woodgrain for nearly a decade and turned 53 years old just 10 days before Defendants fired him. *Cf. Smith*, 851 N.W.2d at 33. Ron's wife Gabby testified he was so proud when hired fulltime that he ditched the green "temp" shirt and loaded up on Woodgrain logo shirts because "he wanted to be part of the gang." (T-Day 4, 125:20-126:6) (App. 653). Ron "beamed" when he talked about work. He won "Employee of the Month" twice and hung the posters in his house. (T-Day 3, 159:18-161:11) (App. 503-05). Gabby memorably testified Ron was so excited, "You couldn't have wiped that smile off of his face if you slapped him." (T-Day 4, 126:18-127:2) (App. 654).

Also like *Smith*, Ron was vulnerable and Defendants knew it. *See Smith*, 851 N.W.2d at 33. Ron's vulnerability increased after his injury, depending on Defendants to accommodate his new impairments. Like many Iowans with disabilities, Ron struggled to find acceptance. He was bullied by his peers and then expelled from the Iowa School for the Deaf, the one place he thought he would fit in, because he tried to stand up for what was right. (T-Day 3, 137:4-140:6) (App. 481-84).

Given this background, it would have been strange for Ron to seek psychological treatment after Defendants fired him. His experiences taught him he

had to fix himself. Many Iowans share his self-reliance. Those folks do not endure any less pain as Iowans who choose medical treatment. Ron told the jury why he did not go to a mental health provider:

> A: I'm not - - I'm not - - I don't like to share - - I don't - - I feel - - I've picked myself up before when I've fallen, so, I mean, I - - I don't - - I feel that I could - - I picked myself up again. It was just going to take time. But I'm kind of glad that I picked it up before my marriage fell apart.

(T-Day 4, 30:21-31:5) (App. 565). It speaks volumes that Ron, a grown man picked on his entire life, became too choked up to speak about losing his job nearly three and a half years before.

Civil rights violations cause a special kind of anguish:

> The right which is violated by an employer which discriminates on the basis of a protected characteristic is not the employee's right to the job, but the employee's right to equal, fair, and impartial treatment, the violation of which frequently results in a significant injury to the victim's dignity and a demoralizing impairment to his or her self-esteem.

Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1232-33 (3d Cir. 1994) (vacated in part on other grounds, 65 F.3d 1072 (3d Cir. 1995)). "A victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." *Id.; see also U.S. v. Burke*, 504 U.S. 229, 238 (1992) (employment discrimination is "an invidious practice that causes grave harm to its victims.").

At Woodgrain, Ron "found a place where he thought he belonged." (T-Day 4, 127:3-15) (App. 655). It is difficult to overstate how much this meant to Ron, or

how much it hurt when that place was ripped away because of his limitations. When asked about whether Ron would get over his termination, Gabby did not hold back: "how do you ever get over something like that? It was – he took it as hard as you would a death or a divorce. He took it horrible. It – it still rests with him. He thought he was going somewhere." (T-Day 4, 130:20-131:1) (App. 658).

Ron had a factory job that paid well and gave him time at home with his family. He prided himself on providing for his wife, who struggles with lung disease. (T-Day 3, 156:20-23; 158:24-159:3) (App. 500; 502-03). Defendants' illegal conduct shattered that; "he was devastated." (T-Day 4, 127:21-128:10) (App. 655).

Defendants fired Ron two weeks before Christmas. (T-Day 4, 30:12-20) (App. 565). Ron withdrew and would "hide out in the garage," driving a wedge between him and his wife. (T-Day 4, 127:21-128:10) (App. 655). Ron still fought to provide for his family but was "reduced to doing jobs that maybe we don't all respect as much, teenager jobs. And it was - - it's hard to see. It was hard to watch. He went from such a proud man and he got deflated." (T-Day 4, 128:23-129:12) (App. 656). Ron often could only find jobs with opposite schedules than Gabby, so they never saw each other. (T-Day 4, 129:21-130:5) (App. 657).

Defendants took advantage of Ron's vulnerability. *Cf. Smith*, 851 N.W.2d at 33. Ron thought Defendants would understand his need for an interpreter and they did. (T-Day 4, 30:6-11) (App. 565). Defendants knew Ron would question the absence of his restriction and that Ron could not understand multiple people at

once, yet Mallaney and Coppock talked at Ron simultaneously. (T-Day 2, 99:19-23) (App. 234). They knew that Ron used interpreters for important things and admitted they could have scheduled an interpreter if they desired. (T-Day 2, 116:19-117:18) (App. 251-52).

Defendants also knew Ron had missed work due to back pain, had been begging for a sit-down accommodation, and that they had told him he could be seated while he worked if he got a doctor's note. (T-Day 2, 56:6-57:14) (App. 191-92); (T-Day 3, 169:1-170:7) (App. 513-14). When Ron delivered that note, Defendants interfered with his medical care and schemed to remove it. (Exhibit 16, p. 2) (App. 784-85). Ron naturally felt betrayed when he found out what they had done. (T-Day 4, 30:1-5) (App. 565). Defendants held all the cards, kept Ron in the dark, and then fired him after he questioned them and asked for an interpreter. *Id.*

The trial judge had a first-hand view of all this evidence and more. He decided the jury's valuation was supported by substantial evidence. "It is clear that Plaintiff suffered a terrible blow to his feelings of self-worth, self-esteem, and mental well-being as a result of being discriminated against by Defendants." 12.24.19 Order on Equitable Relief, p. 10. That decision must be given considerable deference. *Lee v. State*, 906 N.W.2d 186, 194 (Iowa 2018) ("We will presume the district court's discretionary decisions are correct until the complaining party shows the contrary."). In upholding the $500,000 emotional distress award in *Smith*, Justice Mansfield concluded:

> While a lesser verdict could also have been in the range of reasonableness, "we think the jury was in the best position to judge the credibility of the witnesses and to make the judgment call about what the noneconomic elements of damages were worth," and we will "not set aside a verdict simply because we might have reached a different conclusion." We do not find the verdict excessive.

Id. at 33 (quoting *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 704 (Iowa 1994)).

iii. Iowa courts do not require medical testimony before emotional distress is compensable

On page 53 of their Brief, Defendants claim "existing Iowa case law" does not support a $450,000 emotional distress award without "evidence of medical treatment." Defendants then cite three federal cases, all of which say medical testimony is not necessary. (Def. Brief 53-54); *Kim v. Nash Finch Co.*, 143 F.3d 1046, 1065 (8th Cir. 1997) ("We hold that medical or other expert evidence was not required to prove emotional distress"); *Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1193 (8th Cir. 2000) (emotional distress did not require treatment "for medical, psychological, or emotional problems following his termination"); *Shepard v. Wapello County*, 303 F. Supp. 2d 1004, 1021 (S.D. Iowa 2003) ("Expert medical testimony is not required. The testimony of the plaintiff, members of his family and those who observed him may suffice.").

The proof in most cases comes from the plaintiff himself, in addition to family or friends. *See, e.g. Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1097 (8th Cir. 2007); *Wilmington v. J.I. Case Co.,* 793 F.2d 909, 922 (8th Cir. 1986). The

plaintiff's testimony alone is sufficient. *Christensen*, 481 F.3d at 1097; *Shepard*, 303 F. Supp. 2d at 1021; *Williams v. Trans World Airlines, Inc.,* 660 F.2d 1267, 1272-73 (8th Cir. 1981); *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 78 (2d Cir. 2004); *Turic v. Holland Hospitality, Inc.,* 85 F.3d 1211, 1215 (6th Cir. 1996).

The only Iowa case Defendants mentioned is *Vetter*, involving a $435,000 emotional distress verdict and no medical treatment. *Vetter v. State of Iowa*, 2017 WL 2181191, *13 (Iowa Ct. App. 2017). Defendants say *Vetter* is different because his supervisors said they "would have done things differently had they known what they knew as result of the litigation," but their remorse would not change the emotional distress suffered by Vetter. (Def. Brief 54). To the extent such an admission is relevant, Mallaney said the same thing:

> Q: Knowing what you know now, Ms. Mallaney, you would agree that you should have involved Ron in the process from December 10; right?
> A: Probably. Yes.

(T-Day 2, 127:3-9) (App. 262).

iv. The jury's award is not unique

Defendants assert the size of the jury's verdict alone is proof the jury did not follow the jury instructions. This is preposterous. "[T]he fact that a damage award is large does not in itself . . . indicate that the jury was motivated by improper considerations." *Gray v. Hohenshell*, 2019 WL 325015, *6 (Iowa Ct. App. 2019); *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 944-45 (N.D. Iowa 2003) ("'the issue to

be decided here is not the size of the award alone, but the evidence supporting the award.'") (quoting *Evans v. Port Authority of N.Y. & N.J.*, 273 F. 3d 346, 354 (3d Cir. 2001)).

The verdict should not have come as any shock to Defendants. Prior to trial, Ron provided a discovery answer estimating his emotional distress was worth $575,000. Defendants did nothing with this information.

The verdict is not just unremarkable, but conservative considering many other recent verdicts. On pages 37-38 of Plaintiff's JNOV resistance, Plaintiff provided examples of other damage awards through 2015. Here are a few examples of what has happened since:

- A local police department paid $1.9 million to settle a case involving gender discrimination, harassment, and retaliation against a female sergeant. *Zaglauer v. City of West Des Moines*, LACL132694 (Polk County 2016).

- In 2019, the Iowa Court of Appeals upheld a $127 million award, including $52 million in compensatory and $75 million in punitive damages, to a sexual abuse victim and her parents, finding the award was not excessive, was supported by the evidence, and was not the result of passion or prejudice. *Gray v. Hohenshell*, 2019 WL 325015, (Iowa Ct. App. 2019).

- After a jury verdict including $1,056,000 in emotional distress in one of the cases, the University of Iowa paid $6.5 million to settle *Griesbaum & Meyer v. State*, (Polk County 2017)—claims alleging gender and sexual orientation discrimination, and retaliation.

- The jury in *Anderson v. State,* No. LACL131321 (Polk County 2017) valued a woman's past emotional distress at $1.4 million and her future emotional distress to be worth $795,000. The State settled the claim for $1.75 million.

- A jury awarded $4.28 million in past and future emotional distress damages to a man for age and disability discrimination, and retaliation. *Hawkins,* 929 N.W.2d 261 (Iowa 2019) (reversed on other grounds)

- A jury awarded $575,000 in past emotional distress damages to a former prison guard for retaliation and failure to accommodate her disability. *Sink v. State of Iowa*, LACL134016 (Polk County 2018). The State paid the plaintiff a total of $4 million for these claims, as well as her sexual harassment case. *See also Sink v. State of Iowa*, CL126713 (Polk County 2019).

- In February 2019, the State of Iowa settled the sexual harassment cases of two employees for $2.35 million and $1.8 million, respectively—before any lawsuits had been filed. *Mahaffey v. State* (2019) and *Jared v. State* (2019).

Plaintiff recognizes Iowa courts "have said repeatedly a comparison of verdicts in other cases is of little value." *Hackman v. Beckwith*, 64 N.W.2d 275, 285 (Iowa 1954). But if the State itself recognizes employment discrimination cases can be worth more than $2 million pre-suit, another branch of government cannot fairly find it "excessive" when a jury awards 1/8 that amount.

III. THE AMOUNT OF RON'S WORKERS' COMPENSATION SETTLEMENT HAD NOTHING TO DO WITH HIS DISCRIMINATION CASE

Plaintiff agrees Defendants preserved error.

A. Iowa Law Forbids Any Offset

Two types of settlements exist under Iowa Code Chapters 85 and 86: "agreement settlements" and "compromise settlements." https://www.iowaworkcomp.gov/workers-compensation-settlement-explanations (last accessed June 15, 2020). Agreement settlements resolve the amount and extent of workers' compensation indemnity and medical benefits compensation due, establish the employer's liability for payment, and protect the employee's "right to statutory benefits that accrue in the future." IOWA CODE § 85.35(2); § 86.13. By

contrast, a compromise settlement operates as "full and final disposition of the claim." IOWA CODE § 85.35(3). Under this "contested case" settlement, the employee cannot receive future benefits. Rather than resolving the actual extent and amount of liability, a compromise settlement requires a bona fide dispute (thus, the need for a "compromise."). Importantly, "an approved compromise settlement shall constitute a final far to any further rights." IOWA CODE § 85.35(9).

Ron's settlement was a compromise settlement. Ron and Gallagher-Bassett agreed there was a bona fide dispute over whether a substantial portion of the claimed disability is related to an alleged injury of 1/21/2015 and acknowledged they were entering into a compromise settlement under IOWA CODE § 85.35(3)[7].

The "final bar to any further rights" language in Chapter 85.35(9) is broad, and courts have consistently applied it to employees, employers, and insurance carriers. *Gardner v. Hartford Ins. Accident & Indemn. Co.*, 659 N.W.2d 198, 207 (Iowa 2003) (compromise settlement barred employee's subsequent bad faith claim); *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 167 (Iowa 2003) (same); *Bankers Stand. Ins. Co. v. Stanley*, 661 N.W.2d 178, 182 (Iowa 2003) (compromise settlement barred insurer's Chapter 85.22 indemnification rights); *United Fire & Cas. Co. v. St. Paul Fire*

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[7] Ron's settlement is Defendants' Proposed Exhibit BB (App. 745-47), but that exhibit was not entered at trial, nor have they argued that its exclusion was error, so it cannot be considered.

and Marine Ins. Co., 677 N.W.2d 755, 760 (Iowa 2004) (compromise settlement barred insurer's Chapter 85.21 indemnification rights). As the *United Fire* Court explained:

> "A compromise special case settlement not only precludes the right of the employer and its insurer to be indemnified by the employee when the employee receives funds from a third party, it also precludes the right of the employer and its insurer to pursue any legal right to indemnification against a third party. Once the parties enter into a compromise special case settlement, the employee is free to pursue a claim against a third party without the requirement of reimbursing the employer and its insurer."

United Fire, 677 N.W.2d at 760 (citing *Bankers*, 661 N.W.2d at 182). Gallagher-Bassett and Defendants have no indemnification right, nor are they entitled to any offset on account of the judgment in this case. Ron's compromise settlement did not constitute payment of workers' compensation benefits or compensation for lost wages; it simply *settled the dispute* over his contested workers' compensation claim. *See* IOWA CODE § 85.35(3).

Defendants repeatedly argue that Ron's workers' comp settlement was "designed to resolve Rumsey's claim for TTD benefits," which are "weekly compensation benefits" paid until an employee has returned to work or is placed at maximum medical improvement.[8] (Def. Brief 56, 61). Chapter 85.35(9) specifically

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[8] Ron's back was at MMI prior to his termination, so it could not possibly affect his settlement. Ron's shoulder was placed at MMI roughly three weeks after his termination, but Gallagher-Bassett separately paid the TTD.

precludes this exact argument, mandating that "a payment made pursuant to a compromise settlement agreement shall not be construed as the payment of weekly compensation." (emphasis added); *United Fire*, 677 N.W.2d at 761 ("With respect to a special case settlement, Iowa Code section 85.35 provides that '[s]uch payment shall not be construed as a payment of weekly compensation.'") (J. Carter, concurring and quoting section 85.35). This is why nothing in the four corners of the settlement mentions TTD, let alone lost wages.[9]

Rather than acknowledge controlling Iowa case law and the clear language of Chapter 85.35(9), Defendants cite opinions applying inapposite out-of-state statutes. These cases provide no help in analyzing the express language of Iowa Code Chapters 85 and 86.

The cases are also distinguishable on their facts. In *Fotheringham v. Avery Dennison Corp.*, 2008 WL 726160, *17 (Cal. Ct. App. Mar. 19, 2008), the court imposed an offset only because the plaintiff's lawyer acknowledged part of the plaintiff's damages were for exacerbation of his physical injury. *Id.* at *16. Ron made clear at trial, as did Defendants, that he did not seek damages for physical injuries suffered on January 21, 2015. (T-Day. 3, 104:22-105:4); (T-Day. 4, 87:2-9).

[9] Defendants also cite to their proposed Exhibits EE (App. 749) and FF (App. 750-53). Neither Exhibit is in the record and they may not be considered. Plaintiff does not believe Defendants even offered them.

Spencer v. Wal-Mart Stores Inc., 2005 WL 697988 (D. Del. Mar. 11, 2005) is also inapplicable. That court offset the settlement because the parties agreed to it. *Id.* at *1. No such agreement exists here.

B. The Amount of Ron's Settlement Was Not Relevant to Any Claim or Defense

On January 21, 2015, Ron suffered a workplace injury. Ron's civil rights claims involved the disability that resulted from his workplace injury. This is not uncommon. *See, e.g. Vetter*, 2017 WL 2181191, *8. Disability discrimination and workers comp claims coexist peacefully all the time because the available damages are different and liability is premised on different circumstances.

Prior to trial, the parties agreed it was appropriate for the jury to hear some evidence regarding Ron's workers' comp claim but disagreed on the extent. (Motion in Limine ("MIL") Rulings, 9-11). Ron sought to limit the evidence, while Defendants were more than happy to use Ron's claim to accuse him of being litigious. (T-Day 1, 223:3-18) (App. 145). The main dispute involved the amount of the settlement; Ron argued that the fact and amount of the settlement should be precluded as irrelevant and unfairly prejudicial, while Defendants argued that the settlement and its amount should be admitted. In the end, the district court split the baby, allowing evidence of the settlement but not the specific amount. The court found the amount of the settlement irrelevant and unduly prejudicial. (MIL Rulings, 9-11).

Throughout trial, Ron entered only enough evidence of his comp claim as was necessary. The fact that Ron filed a claim was unavoidable because he had to prove his back and shoulder impairments constituted a disability. If Defendants wanted to minimize medical evidence related to Ron's health conditions, they could have stipulated that he was disabled. They did not. Some communications between Defendants and Gallagher-Bassett were also highly relevant to Ron's discrimination and retaliation claims. However, Plaintiff avoided entering extraneous documents, such as medical records, communications, and any valuations of Ron's injury. The only doctor who testified was Dr. Harbach, asked primarily about how Defendants got Ron's sitting restriction removed.

i. Defendants Highlighted Ron's Workers' Compensation Claim

After spending as much trial time as possible talking about Ron's workers' compensation claim, Defendants now have the temerity to complain that a "large portion of the trial resembled a workers' compensation proceeding before the Industrial Commissioner."[10] Most of the exhibits about Ron's work comp claim were entered by Defendants. Defendants went into great detail about Ron's injury to contend he was unable to work. Defendants entered medical records and asked Mallaney about Ron's back being "too damaged to fix." (T-Day 2, 152:17-153:2)

[10] There has not been an "Industrial Commissioner" in Iowa since 1996.

(App. 287-88). Defense counsel even asked Mallaney about unrelated workplace injuries of other employees. (T-Day 2, 152:24-153:2) (App. 287-88).

Defendants brought Cathy Sams, the Gallagher-Bassett insurance adjuster, all the way from Davenport to testify. Defendants repeatedly asked Sams about the categories and calculations of benefits Ron received. (T-Day 3, 111:2-9; 116:24-117:13) (App. 472-74). Defendants asked about temporary total disability benefits, Ron's medical treatment in 2015 and 2016, and payments for interpreters at medical appointments. (T-Day 3, 117:10-20) (App. 474). Defense counsel also asked Ron about temporary total disability payments and made sure the jury knew Gallagher-Bassett paid Ron for time he could not work after his shoulder surgery. (T-Day 4, 70:9-71:4) (App. 606). If this case at all resembled a workers' compensation proceeding, it was because Defendants wanted it to.

ii. The District Court Gave Defendants Great Leeway

Defendants accuse the district court of tying their hands, leaving the jury with the impression that it was supposed to compensate Ron for his physical injury. (Def. Brief 57). On the contrary, Defendants took every possible opportunity to discuss Ron's workers' compensation claim. They stated in opening:

> Now, this is not a workers' compensation case. You're going to hear a lot about workers' comp, but it's not a workers' comp case. Mr. Rumsey filed a workers' comp claim following his January injury.
>
> You'll hear evidence about how Windsor's carrier handled this claim on his behalf, how they paid for his medical bills related to his January 2015 injury. You'll hear evidence about how the workers'

> compensation carrier for Windsor paid him for the days he was unable to work his light-duty assignment on January 2015. In February of 2017, Mr. Rumsey settled his workers' compensation claim to his satisfaction with Windsor and Gallagher Bassett.
>
> So is this case over? No. You're here today because there is a lawsuit related to his termination on December 15, 2015.

(T-Day 1, 223:3-18) (App. 145).

Defendants brief also omits that the district court allowed Defendants to ask Ron whether he had settled his comp claim "to his satisfaction" and to ask Ron whether he was seeking any damages in this case based on his workplace injury. (T-Day. 3, 104:22-105:4); (T-Day. 4, 87:2-9).

To the extent Defendants had confused the jury about the claims it was to decide, defense counsel cleared it up in his closing argument:

> You can't simply base an award on sympathy. It's got to be based on the evidence of the case. And you must also not award any money to compensate him for his workplace injuries for his back, wrist, and shoulder. The evidence shows and there's an instruction that he already had a WC case and he settled the case to his satisfaction. He also testified he's not seeking any more money for his injuries.

(T-Day 5, 92:3-11) (App. 720). Plaintiff's counsel never mentioned Ron's workers' comp claim in closing.

Finally, the jury was instructed that Ron's workers' compensation claim was settled to "the parties' satisfaction," that evidence related to the claim was offered for "the limited purpose of evidence of the state of mind, motive or intent of the

parties" and the jury "may not consider this evidence for any other purpose." (Inst. 15).

iii. Ron Did Not Have a Workers' Compensation Retaliation Claim

Defendants accuse Ron of putting on evidence, such as medical restrictions, that would be "typical" in a workers' compensation retaliation case. (Def. Brief 39). Medical restrictions are routinely offered in disability discrimination cases as well. Defendants claim Ron entered evidence that he was fired "while pursuing a workers' compensation claim," but overlook that the only time Ron was asked about being fired "while pursuing as workers' compensation claim" was when they asked him. (T-Day 3, 69:24-70:6) (App. 459-60).

Defendants cite *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC.*, 2007 WL 1297002 (N.D. Iowa 2007) and claim they should have been allowed to enter evidence that Defendants provided workers' comp benefits. *They were.* The district court allowed Defendants to put on the same evidence as in *Raymond*—that they paid benefits in response to Ron's claims. (T-Day 2, 7:12-8:20) (App. 152-53).

iv. The Settlement Had No Bearing on Ron's Ability to Work

Defendants claim Ron's workers' comp settlement was for benefits and weekly compensation and that this proves Ron was physically unable to work after his termination. (Def. Brief 63). As discussed earlier, section 85.35(9) makes this legally impossible. *See* IOWA CODE § 85.35(9).

Next, Defendants claim Ron should not have been able to recover backpay because he "testified that he did not seek other jobs and could not work in 2016 following the termination due to his work injuries." (Def. Brief 57). That is quite provocative, but unequivocally false.[11] In 2016, Ron worked for Domino's Pizza and for Panera Bread. (T-Day 4, 98:13-99:3) (App. 633). He also received unemployment compensation, requiring him to be ready, willing, and able to work. Defendants knew about this evidence; after all, *they introduced it*. *Id.* They questioned Ron about working for Domino's and Panera and about his unemployment benefits. *Id.* They even admitted Ron's 2016 tax return as proof of the income he earned. *Id.*; Exhibit PP (App. 762-63).

Finally, Defendants argue, again without citation, that Ron "cannot collect back pay based on what he could have earned in his prior full-time position as Material Handler II." (Def. Brief 63). This directly contradicts Mallaney, who testified that at the time Ron was fired, he was being paid the same as he earned as a Material Handler II. (T-Day 2, 143:17-21) (App. 278). To the extent Ron may have worked fewer hours upon his return, Defendants made this argument in

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[11] As it makes its way through Defendants' filings, the Court would do well to remember President Reagan's mantra with respect to the Soviet Union: "Trust but verify."

closing, and the jury likely listened, as it awarded only a portion of what Ron requested in back pay.

C. The settlement was not relevant to Ron's emotional distress

Defendants argue that the amount of Ron's 2017 settlement was relevant to past and future emotional distress because it "ameliorated Rumsey's financial stress." (Def. Brief 58). Defendants claim the settlement amount should have been admitted to counter Ron's testimony about financial hardship during Christmas 2015 and into 2016. (Def. Brief 58-59). Let's look at a calendar. Ron's 2017 settlement could not have lessened his emotional distress from financial hardship in 2015 and 2016. Neither Ron nor Gabby testified at all about any financial hardship in 2017, 2018, and 2019, so the amount of his 2017 settlement never became relevant.

IV. THE COURT ERRED IN DENYING FRONT PAY

Plaintiff preserved error by requesting front pay in posttrial briefings. The Court reviews a denial of equitable relief de novo. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 540 (Iowa 1996).

Front pay is an equitable remedy under the ICRA when reinstatement "is an infeasible or otherwise inappropriate remedy." *Prine v. Sioux City Cmty. Sch. Dist.*, 95 F. Supp. 2d 1005, 1008 (N.D. Iowa 2000); *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 848 (Iowa 2001). Reinstatement was indisputably inappropriate in this case.

The jury awarded Ron back pay and rejected Defendants' failure to mitigate defense. (Verdict Form). Plaintiff requested front pay to make him whole and restore him, "so far as possible . . . to a position where he would have been were it not for the unlawful discrimination." *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Prine*, 95 F. Supp. 2d at 1007-08. Plaintiff requested $169,821.45 in front pay, calculated as follows:

- $49,821.45 for the first year;
- $30,000 for the second year;
- $20,000 for the third year; and
- $10,000 for each of the following seven years (Ron's anticipated age of retirement).

The district court denied Plaintiff's motion, holding Ron's workers' compensation settlement already compensated him for future loss of earnings. 12.24.2019 Order, p. 8. Because Ron's "compromise settlement" cannot legally be construed as earnings, this decision was error. *See* Section III; IOWA CODE § 85.35(9).

The district court also found Ron's eight years with Defendants was a "relatively short portion of his work life," ignoring that Ron's employment ended only because of Defendants' illegal conduct. Finally, the court held that Ron had already received a "substantial monetary reward" in the form of compensation for emotional distress. 12.24.2019 Order, p. 8. The emotional distress award compensated Ron for his emotional pain. It was inappropriate for the court to deny front pay just because he had suffered in other ways and received compensation for

that. To analogize, no court would say that a plaintiff who inherited a fortune was disqualified from receiving front pay in her discrimination case.

Plaintiff requests the case be remanded for entry of an additional judgment of $169,821.45 in front pay.

V. THE DISTRICT COURT WRONGLY EXCLUDED PRIOR ACTS OF DISCRIMINATION AGAINST PLAINTIFF

Plaintiff preserved error on this issue by arguing against its exclusion throughout trial. Challenges to evidence "implicating the interpretation of a rule of evidence" are reviewed for correction of errors at law. *Hawkins*, 929 N.W.2d at 265. Other evidentiary rulings are reviewed for abuse of discretion. *Id.*

The court mistakenly refused to admit into evidence several instances of prior discrimination against Ron.

- During morning safety meetings, Supervisor Adam Fairchild laughed and made fun of how Ron talked. He mocked Ron's sign language, making fake hand signs behind Ron's back. (T-Day 4, 8:21-10:11; 140:23-141:10) (App. 547; 664). Mallaney and Crivaro ignored Ron's complaints; Mallaney said she did not believe Fairchild had that kind of attitude. (T-Day 4, 8:21-10:11) (App. 547).

- Throughout 2015, many of Ron's bilingual coworkers talked with Ron in English, then intentionally switched languages so he could not read their lips, laughing at his confusion. (T-Day 4, 10:12-11:18) (App. 549). Ron confronted the

employees, told them what they were doing was discrimination, and complained to Mallaney. *Id.*

- While he was inspecting glass for a light-duty assignment 2015, Ron kept thinking he heard a noise behind him. When Ron turned around, no one was there, but coworkers smiled and laughed. (T-Day 4, 12:16-14:14) (App. 551). Eventually, Ron angled the glass reflection and caught a coworker in the act. In response to Ron's complaint, Defendants did not discipline anyone; instead, they moved Ron to a different department. *Id.*

- Ron thought he could advance at Woodgrain and seemed to have all the makings of a group lead. However, when he asked about a promotion, Defendants told Ron he could not be a lead because he could not hear the walkie-talkies or phones. (T-Day 4, 15:2-14) (App. 554).

Mallaney remembered almost all these complaints, admitted that Ron's complaints were connected to his disability, and that Defendants never disciplined anyone. (T-Day 3, 5:22-7:13) (App. 404-06). Mallaney then admitted these contradicted the corporation's position that there had been no complaints. (T-Day 3, 8:7-16) (App. 407). Defendants' failure to respond to Ron's complaints was highly relevant to Ron's claims, the credibility of the parties, and Ron's emotional distress. (T-Day 4, 11:19-12:15) (App. 550).

The district court excluded all this evidence, mainly because the incidents occurred outside the statute of limitations. (T-Day 3, 13:22-14:18) (App. 408-09).

Even so, the evidence was relevant and admissible. Iowa Rule of Evidence 5.404(b) specifically allows admission of prior acts to show motive or intent. The Iowa Supreme Court has made clear that prior and other acts of discrimination are admissible. *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262-63 (Iowa 1991) ("Evidence of 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."). The *Hamer* Court said the defendant's argument that some of the evidence was outside the limitation period was "irrelevant." *Id.* at 263. "The prior acts are relevant to show the general atmosphere of Hamer's workplace; they need not be actionable in themselves in order to be admissible." *Id.*

This evidence was also important and admissible for Ron's retaliation claim, which was based on <u>all</u> his protected activity. Ron did not suffer an adverse action because of his protected activity until December 15, 2015, so that is the limitations date for his retaliation claim–irrespective of when the protected activity occurred. *See Cejka v. Vectrus Sys. Corp.*, 292 F. Supp. 3d 1175, 1193 (D. Colo. 2018); *Hylind v. Xerox Corp.*, 380 F. Supp. 2d 705, 710 (D. Md. 2005); *Meiners v. Univ. of Kan.*, 239 F. Supp. 2d 1175, 1189 (D. Kan. 2002); *Kelley v. City of Albuquerque*, 375 F. Supp. 2d 1183, 1221 (D.N.M. 2004); *Dibbern v. Univ. of Mich.*, 2013 WL 6068808, *14 (E.D. Mich. Nov. 18, 2013); *Kastrul v. City of Lake Oswego*, 2011 WL 846853, *7 (D. Ore. Mar. 8, 2011).

Rejecting *Hamer* and Rule 5.404(b), the district court created its own three-part test for admissibility of prior acts: (1) the evidence must be relevant to a legitimate, noncharacter issue in the case; (2) there must be "clear proof" the acts were committed; (3) the probative value must not be substantially outweighed by the danger of unfair use. (T-Day 3, 13:22-14:18) (App. 408-9). The court then used this test to exclude all the above evidence. This test defied logic, was used to exclude highly relevant evidence, and was an abuse of discretion. In the event the case is remanded for a new trial, Plaintiff requests admission of this evidence.

CONCLUSION

For the reasons articulated above, Plaintiff requests the Court affirm the jury's verdict and the district court's denial of Defendants' JNOV, reverse the district court's ruling regarding its denial of front pay and its exclusion of relevant evidence at trial, and remand the case for consideration of the attorney fees and costs incurred since the last order.

REQUEST FOR ORAL ARGUMENT

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

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ATTORNEY'S COST CERTIFICATE

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