In the Iowa Supreme Court
Supreme Court No. 22-1291

SANDRA SELDEN,

Plaintiff-Appellee/Cross-Appellant,

vs.

DES MOINES AREA COMMUNITY COLLEGE,

Defendant-Appellant/Cross-Appellee.

Appeal from the District Court for Polk County
The Honorable Scott Rosenberg

Appellant's Final Brief
(Oral Argument Requested)

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did DMACC establish factors other than sex (experience, longevity in the position, and market conditions) justify the wage differential as a matter of law?

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Corning Glass Works v. Brennan, 417 U.S. 188 (1974)
Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)
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Galindo v. City of Roma Police Dep't, 265 F.3d 1059, 2001 WL 872779 (5th Cir. July 6, 2001)
Godfrey v. State, 962 N.W.2d 84 (Iowa 2021)
Holder v. City of Cleveland, No. 1:05CV2402, 2006 WL 3421863, (N.D. Ohio Nov. 27, 2006)
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Schottel v. Neb. State Coll. Sys., 42 F.4th 976 (8th Cir. 2022)
Stanley v. Univ. of S. California, 13 F.3d 1313 (9th Cir. 1994)
Taylor v. White, 321 F.3d 710 (8th Cir. 2003)
Vt. Hum. Rts. Comm'n v. State, 136 A.3d 188 (Vt. 2015)

Statutes:
29 U.S.C. § 206
Iowa Code § 216.6A
Iowa Code § 216.15
2009 Iowa Acts ch. 96

II. Did the district court err in awarding treble damages without record evidence to support finding a willful violation of section 216.6A?

Cases:
Boham v. City of Sioux City, 567 N.W.2d 431 (Iowa 1997)
Perdue v. City Univ. of New York, 13 F. Supp. 2d 326 (E.D.N.Y. 1998)
Weidenbach v. Casper-Natrona Cnty. Health Dep't, 563 F. Supp. 3d 1170, 1180 (D. Wyo. 2021)

III. Did the district court commit legal error in admitting Selden's starting-salary range-percentage theory instead of the wage differential contemplated by section 216.6A?

Cases:
Andersen v. Khanna, 913 N.W.2d 526, 535 (Iowa 2018)
Channon v. United Parcel Serv., Inc., 629 N.W.2d 835 (Iowa 2001)
Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)
Fagen v. Grand View Univ., 861 N.W.2d 825 (Iowa 2015)
Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000)
Lovell v. BBNT Sols., LLC, 295 F. Supp. 2d 611(E.D. Va. 2003)
Price v. N. States Power Co., 664 F.3d 1186 (8th Cir. 2011)

Statutes:
Iowa Code § 216.6A
Iowa Code § 216.15
Iowa Code § 216.16

IV. Did the district court abuse its discretion by admitting evidence pertaining to damages unavailable for strict-liability wage-discrimination claims and through other evidentiary rulings?

Cases:
Andersen v. Khanna, 913 N.W.2d 526 (Iowa 2018)
Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987)
Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)
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Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000)
Krekelberg v. City of Minneapolis, 991 F.3d 949 (8th Cir. 2021)
Pexa v. Auto Owners Ins. Co., 686 N.W.2d 150 (Iowa 2004)
State v. Cromer, 765 N.W.2d 1 (Iowa 2009)
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Tornow v. Univ. of N. Carolina, 977 F.2d 574 (4th Cir. 1992)
Wolff v. Berkley Inc., 938 F.2d 100 (8th Cir. 1991)

Statutes:
Iowa Code § 216.6A
Iowa Code § 216.15
Iowa R. Civ. P. 5.103
Iowa R. Evid. 5.401
Iowa R. Evid. 5.402
Iowa R. Evid. 5.403

V. Did the district court err in concluding that there is no statute of limitations period for section 216.6A claims and permitting Selden to recover backpay for the entirety of her employment at DMACC (beginning in 2013)?

Cases:
Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W.2d 291 (Iowa 2015)
Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)

Dindinger v. Allsteel, Inc., No. 3:11-CV-00126-SMR-CFB, 2015 WL 11143144, (S.D. Iowa June 8, 2015)
Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n, 672 N.W.2d 733 (Iowa 2003)
Gardin v. Long Beach Mortg. Co., 661 N.W.2d 193 (Iowa 2003)
Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)
State v. Mathias, 936 N.W.2d 222 (Iowa 2019)

Statutes:
42 U.S.C. § 2000e-5
Iowa Code § 216.6A
Iowa Code § 216.15
Iowa Code § 216.16
2008 Iowa Acts ch. 1028
2009 Iowa Acts ch. 96

VI. **Did the district court commit legal error in allowing the jury to consider, and in refusing to direct a verdict for DMACC on, Selden's retaliatory failure-to-hire claim**?

Cases:
Carter v. George Washington Univ., 387 F.3d 872 (D.C. Cir. 2004)
Godfrey v. State, 962 N.W.2d 84 (Iowa 2021)
Linder v. Amazon.com Servs., LLC, No. 1:21-CV-1211, 2022 WL 3647825, (M.D. Pa. Aug. 24, 2022)
Lyoch v. Anheuser-Busch Co., Inc., 139 F.3d 612 (8th Cir. 1998)
McCrea v. City of Dubuque, No. 16-0183, 2017 WL 936096 (Iowa Ct. App. March 8, 2017)
McIlravy v. N. River Ins. Co., 653 N.W.2d 323 (Iowa 2002)
Merritt v. Iowa Dep't of Transp., No. 03-0858, 2004 WL 434143 (Iowa Ct. App. March 10, 2004)
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Rose-Maston v. NME Hosps., Inc., 133 F.3d 1104 (8th Cir. 1998)
Rumsey v. Woodgrain Millwork, Inc., 962 N.W.2d 9 (Iowa 2021)
Schottel v. Neb. State Coll. Sys., 42 F.4th 976 (8th Cir. 2022)

Sims v. Sauer-Sundstrand Co., 130 F.3d 341 (8th Cir. 1997)
Velez v. Janssen Ortho, LLC, 467 F.3d 802 (1st Cir. 2006)
Whorton-Folsom v. Planned Parenthood of Greater Iowa, Inc., No. CL92966, 2004 WL 3410292 (Iowa District Court, Polk County Oct. 28, 2004)

VII. Is the backpay award supported by evidence?

Cases:
Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)
Landals v. George A. Rolfes Co., 454 N.W.2d 891 (Iowa 1990)
White v. Walstrom, 118 N.W.2d 578 (Iowa 1962)

Statutes:
Iowa Code § 216.15
Iowa R. Civ. P. 1.1004

VIII. Is the jury's emotional distress award for retaliation excessive?

Cases:
City of Hampton v. Iowa Civil Rights Comm'n., 554 N.W.2d 532 (Iowa 1996)
Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190 (8th Cir. 2000)
Goettelman v. Stoen, 182 N.W.2d 415 (Iowa 1970)
Jasper v. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009)
Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997)
Kucia v. Se. Ark. Cmty. Action Corp., 284 F.3d 944 (8th Cir. 2002)
Rees v. O'Malley, 461 N.W.2d 833 (Iowa 1990)
Shepard v. Wapello Cnty., 303 F. Supp. 2d 1004 (S.D. Iowa 2003)
Simon Seeding & Sod, Inc. v. Dubuque Hum. Rts. Comm'n, 895 N.W.2d 446 (Iowa 2017)
WSH Properties, L.L.C. v. Daniels, 761 N.W.2d 45 (Iowa 2008)

ROUTING STATEMENT

In 2009, the Iowa legislature created a new strict-liability wage-discrimination claim under the Iowa Civil Rights Act ("ICRA"), Iowa Code section 216.6A. Since enactment, the Iowa Supreme Court has interpreted this statute on only one occasion. *See Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557 (Iowa 2015) (answering certified questions from federal court). There is little interpretative guidance as to how district courts and parties should handle the multitude of issues presented in a jury trial involving a section 216.6A claim, as evidenced by the host of issues presented in this appeal, all of which present substantial questions of enunciating or changing legal principles. *See* Iowa R. App. P. 6.1101(2)(f). Courts and counsel need guidance from the Iowa Supreme Court for ICRA strict-liability wage-discrimination trials and the types of evidence permitted, particularly when an employer raises the "factors other than sex" affirmative defense.

One such issue raised is whether emotional-distress damages are recoverable for strict liability claims brought under section 216.6A. This is a case of first impression requiring determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

I. Nature of the case.

On February 25, 2020, Appellee/Cross-Appellant Sandra Selden filed a lawsuit against her current employer, Appellant/Cross-Appellee Des Moines Area Community College ("DMACC") in Polk County, Iowa, alleging two claims: (1) sex-based wage discrimination under Iowa Code section 216.6A; and (2) retaliation under section 216.6. (JA.I-14).[1] Selden based her wage-discrimination claim on comparator Bryan Tjaden, who DMACC hired in 1997 at an annual salary of $46,000. (JA.III-48). In September 2013, DMACC hired Selden in the same position at $70,000. (JA.III-176). By then, Tjaden had been with DMACC almost 16 years, and his salary was $92,449. (JA.III-335).

For her retaliation claim, Selden contended that a January 2019 conversation she had with her supervisor regarding pay equity was the reason DMACC did not promote her in April 2019. (JA.I-14).

[1] DMACC refers to the Joint Appendix as "JA," followed by the volume and page number; for example, "JA.I-14" is Joint Appendix, Volume I, page 14.

DMACC screened Selden out from the applicant pool because she lacked the degree required for the position. (JA.III-227; JA.III-294). The candidate selected for the supervisor position, Mike Jocic, had the requisite degree. (JA.III-237).

II. Disposition of the case in the district court.

Following trial, the jury returned a verdict in favor of Selden on both claims and awarded damages:

> Backpay (combined): $223,571
> Past and future emotional distress for wage-discrimination: $720,375
> Past and future emotional distress for retaliation: $434,375

(JA.I-1495). The jury also found a "willful violation" of section 216.6A. *Id.*

After post-trial motions, the district court awarded Selden's counsel $217,966 in attorney fees and costs. (JA.I-1813). As an equitable remedy, the district court ordered DMACC to email its employees about "their right to access their wage information, along with directions on how to access it." The district court denied front pay and Selden's other requests for equitable relief.

The district court struck the $720,375 in emotional-distress damages the jury awarded under section 216.6A. (JA.I-1838). On the backpay award, the district court corrected a mathematical error and tripled the backpay award it found attributable to the wage claim, pursuant to section 216.15(9)(a)(9)(b) and the jury's "willful violation" finding, resulting in a total backpay award of $460,444.

DMACC appealed, and Selden cross-appealed.

STATEMENT OF THE FACTS

A. DMACC's compensation system

As Iowa's largest community college, DMACC prides itself in providing opportunities to students who may not otherwise have means to obtain a college degree. (JA.I-999-1000[175:23-177:6]). With more than 2,000 full-time and part-time employees, in 2021, DMACC was named the #1 Employer in the State of Iowa by Forbes Magazine. (JA.I-862-863[37:23-38:14]).

DMACC uses the "Hay System," a widely-utilized job-evaluation method, to determine employee compensation. (JA.I-863[38:15-21], 1232-1234[153:14-155:11]; JA.III-339). A committee evaluates each position and assigns points based on three factors:

know-how, problem-solving, and accountability. (JA.I-1234-1235[155:12-156:4]). The cumulative point total is used to rank positions and assign each position to a pay grade. (JA.III-368). The pay-grade range reflects the minimum and maximum salary that can be earned in a position assigned within that pay grade. (JA.I-1233[154:21-25]). The pay grade is intended to reflect an employee's "life cycle"; the employee starts his or her career at the minimum and is projected to reach the maximum before retirement. (JA.I-1233[154:20-155:6], 1272-1273[194:20-195:4]). For that reason, standard DMACC policy is to start a new employee at or near the pay-grade minimum. (JA.I-583[209:1-9], 620-621[7-8], 666[53:9-15], 1242[163:9-25]).

A hiring supervisor can request an advanced starting salary by submitting a written justification, explaining why the supervisor feels the candidate's education, training, or experience uniquely meets the position qualifications. (JA.III-368). An advanced rate typically cannot be above the midpoint of the salary grade. (*Id.*; JA.I-621[8:1-5], 1242-1243[163:19-164:12]).

Once hired, an employee usually receives raises only through annual across-the-board salary-percentage adjustments, known as "longevity increases." (JA.III-105, 368; JA.I-651[38:15-25], 869-873[44:16-48:24], 1107[16:9-17], 1108-1110[17:10-19:10], 1244-1245[165:21-166:14], 1282[204:13-20]). DMACC also annually adjusts the upper and lower limits of the pay grade to account for cost-of-living and inflation. (JA.III-105). By design, DMACC's pay structure rewards years of service. (JA.I-864[39:20-22], 892-893[67:8-68:1], 1107[16:9-20], 1237-1238[158:17-159:15], 1242[163:9-14], 1281[203:11-15]). The annual increases have a compounding effect; an employee's salary increases become greater over time, as he or she moves up through the salary grade with longevity. (JA.I-867-868[42:17-43:23], 870[45:12-20], 874-875[49:13-50:7]).

B. In 1997, DMACC hires Tjaden to fill the newly-created SSS2 position.

Like any other business, DMACC has seen vast changes in technology over the past thirty years. (JA.I-1222-1223[143:19-144:9]). Beginning in 1994, one major transition was implementing the "Ellucian Banner" program, a computer software product designed

to be a database for higher-ed institutions. (JA.I-441-442[67:23-68:3], 1037-1039[213:16-215:12], 1205[114:3-14]). The massive undertaking required long hours from those involved in the year-long implementation process, in part because DMACC was grossly understaffed. (JA.I-442[68:17-25], 482[108:18-23], 573-574[199:21-200:16], 1037-1039[213:13-215:12], 1043[219:1-14]). Linda Fiderlick,[2] then a Senior Program Analyst, worked nearly non-stop, writing code to transfer data from the old Legacy system into Banner. (JA.I-573-574[199:21-200:13]).

Even after Banner went live in 1995, DMACC did not have adequate support staff and urgently needed to hire. (JA.I-442[68:17-25], 482[108:18-23], 573-574[199:21-200:16], 1043[219:1-14]). Fiderlick was responsible for supporting each "module," distinct but interrelated aspects of the Banner program, as well as departmental support and troubleshooting, and she could not continue to support the system alone. (JA.I-813-814[200:24-201:8]). Consequently, in 1997, DMACC created two new positions: System Support Specialist 1

[2] Formerly Linda Frakes. (JA.I-516[142:5-9]).

("SSS1") (three vacancies); and System Support Specialist 2 ("SSS2") (one vacancy). (JA.III-22, 59; JA.I-574[200:17-23]). DMACC contemplated each new position would support a different Banner module, and the SSS2 position would also write code to transfer data to the Banner system. (JA.I-443[69:1-15], 574[200:14-23], 1206-1207[115:4-116:1]). The salary range for SSS1 (A5 pay grade) was $30,702-$46,054. (JA.III-59). The salary range for SSS2 (A6 pay grade) was $36,257-$54,385. (JA.III-22).

Finding programmers at this time was no easy task; employees with coding and programming skills were in high demand nationwide due to concerns surrounding the anticipated Y2K crisis. (JA.I-1043-1044[219:19-220:15], 1111-1113[20:20-22:14]). Bryan Tjaden, then a computer programmer at Principal Financial Group, applied for the vacant SSS2 position. (JA.I-421[47:21-24]). At the time he applied, Tjaden had 13 years' computer programming experience. (JA.III-17). The hiring supervisor, Art Phares, felt Tjaden's strong technical background would help him excel in the role. (JA.III-48). Per DMACC policy, Phares submitted a written justification to request an advanced starting salary, $46,000. (JA.III-48, 340; JA.I-

1247[168:11-24]). On January 12, 1998, Tjaden started working at DMACC as the only SSS2. (JA.I-443[69:8-22]).

Also during the 1997-1998 timeframe, Diane Wood, Julie Gleason, and Carole Bebout[3] applied for the three SSS1 positions. (JA.III-53-60, 70, 88). Wood's hiring supervisor, Phares, requested an advanced starting salary based on her background and 6-7 years' experience in information systems. (JA.III-53, 61). Bebout, who had approximately 7 years' experience in information systems, also received an advanced starting salary at the recommendation of her hiring supervisor, Sheryl Lewis. (JA.III-88-94). Lewis did not request an advanced rate for Gleason, and consistent with DMACC protocol, she started at the pay-grade minimum. (JA.III-70-77).

Wood, Gleason, and Bebout continued to hold the SSS1 roles until 2000, when their job responsibilities changed and DMACC promoted them to SSS2 positions, in salary grade A6. (JA.III-64, 78, 95; *see* JA.III-113-136). With the promotion, each received a salary

[3] Formerly Carole McConnell. (JA.I-426[52:9-10]).

increase consistent with DMACC's promotion-pay policy. (*Id.*; JA.III-368).

C. In 2006-2007, DMACC evaluates all job descriptions.

Beginning in 2006, DMACC tasked a Job Evaluation Committee with completing college-wide review and update of all job descriptions. (JA.I-649-650[36:1-37:20], 1175-1177[84:6-86:2]; JA.III-103, 378). As part of that process, in 2007, DMACC updated the SSS2 job title to Application Support Analyst 2 ("ASA2"). (JA.III-51, 100; JA.I-649[36:1-15], 650[37:17-20]). Tjaden, Wood, Gleason, and Bebout remain employed at DMACC as ASA2s to this day. (JA.I-380-381[6:21-7:1], 420[46:16-18], 485[111:7-10], 522[148:17-21]).

By 2007, Fiderlick supervised all four ASA2s. DMACC updated the job description for her position (newly-titled Supervisor, Application Support Analyst) during the job-evaluation process, adding "Bachelor's degree in computer science or related field" as the required education. (JA.III-201-214, 288). Fiderlick herself did not have a bachelor's degree but, consistent with DMACC policy, was not ousted from her position. (JA.I-652[39:3-10], 653-654[40:9-41:7]).

Fiderlick continued to supervise the ASA2s through her retirement in 2019.

D. In 2013, DMACC hires Selden.

In 2013, DMACC posted an opening for the fifth ASA2 position. (JA.I-450-451[76:7-77:17]; JA.III-138). On July 22, 2013, Selden submitted her application. (JA.III-140).

Selden has a bachelor's degree in psychology and political science and a master's degree in management. *Id.* Though she listed prior experience on her resume, from DMACC's perspective, Selden began gaining experience relevant to the ASA2 position in July 2007, when she took a position at Washburn University as a business process analysist, working with the university's information technology ("IT") department programming Banner. *Id.* Selden worked in that position for three years before transferring to another position at Washburn, in which she no longer worked in IT department or with Banner. *Id.* After another transfer, she resumed working with Banner the four remaining months she worked at Washburn. *Id.* She then worked at Kansas Board of Regents as a

project specialist, a position that did not involve Banner, before applying at DMACC. *Id.*

After interviews, the hiring committee recommended offering the ASA2 position to Selden. (JA.III-158, 169-170). DMACC assessed her prior experience requiring advanced IT knowledge (as opposed to simply being a "user" of a program) as 5-7 years of relevant experience.[4] (JA.I-1276[198:3-6], 1298-1300[220:25-222:2]). Fiderlick, the hiring supervisor, felt Selden's prior Banner experience would save DMACC "months of training," and she submitted a written justification to request an advanced pay rate. (JA.III-176).

At the time Selden applied in 2013, the labor market looked very different than it had 16 years prior. (JA.I-1111-1114[20:18-23:20]). The economy was in the early stages of recovering from the Great

[4] Contrary to her 2013 application, Selden claimed at trial that she had 16 years' IT experience when she applied to DMACC. (JA.I-743[130:1-4]). Selden gave herself credit for jobs in which she merely used the Banner program. But as DMACC's internal expert explained, simply "using" Banner is not the same as actually programming or coding Banner to fit a college's needs. (JA.I-1298-1300[220:25-222:2]; *see* JA.I-885[60:10-22], 607-608[233:19-234:1], 1291[213:18-24]). Selden's self-assessment aside, it is undisputed that DMACC assessed her as having 5-7 years of prior relevant experience. *Id.*

Recession, and there was no heightened demand for employees with computer skills, as there had been in the years approaching the Y2K crisis. (JA.I-1113[22:5-14], 1114[23:9-20]). Additionally, DMACC's hiring needs were not as urgent; by then, the Banner system had been in place and adequately supported for nearly 20 years. The salary range for ASA2s (A6 pay grade), which had increased annually since 1997, was $64,859-$81,074. (JA.III-105).

Fiderlick offered Selden an advanced hiring rate of $68,000, and Selden countered with $72,000. (JA.I-794[181:3-15]; JA.III-175). Kim Lacey, who had just started as Employment Director that month, checked with her supervisor, Sandy Tryon, about the offer. (JA.III-172-178). Tyron directed Fiderlick to counter at $70,000, which Selden accepted. (JA.I-675[62:9-11], 677[64:2-23]).

As of September 23, 2013, Selden's first day at DMACC, Tjaden had 29 years of experience in computer programming and systems support, including nearly 16 years with DMACC in that very position. (JA.III-22, 176). From 1998 to 2013, Tjaden received the annual longevity increases, and his salary was $92,449. (JA.III-39). Since Selden first became eligible for the longevity increases in Fiscal

Year ("FY") 2015, she and Tjaden have received identical salary-percentage increases each year (as have all the ASA2s). (JA.III-335).

E. In 2015, Selden discovers that Tjaden's salary is higher than her own.

In 2015, Selden learned that Tjaden's salary was higher than her own. (JA.III-385; JA.I-800[187:9-11], 1322-1323[33:11-34:1], 1324-1325[41:23-42:9], 1326[43:13-23]). She chose not to utilize DMACC's formal complaint process and did not raise the issue or take any action at that time. (JA.I-1325[42:7-9], 800[187:6-14], 832[219:11-25]; *see* JA.III-371-376).

On January 9, 2019, Selden spoke with Fiderlick about "pay equity." (JA.III-179). Fiderlick emailed Lacey, saying: "Sandy and Bryan support the Student module of Banner and she feels her salary should match his." (JA.III-186). Lacey reviewed personnel records and responded:

> Bryan, Carole, and Diane have all been with DMACC since 1998, 15 years longer than Sandy has been here, so they have been receiving the annual increases since they started. I wasn't here in 1998, but I'm assuming Bryan came in with a higher salary than Carole and Diane at the time because of his strong technical background in information systems.

(JA.III-190-194; JA.I-685-686[72:24-73:5]; *see* JA.III-183-189). On January 9, Fiderlick forwarded this information to Selden, who said that she was disappointed but the result was what she expected. (JA.III-195-198; *see* JA.I-687-688[74:13-75:1]; JA.III.179). After January 9, there is no evidence that anyone thought Selden's question regarding "pay equity" needed to be further addressed. (JA.I-686-688[73:25-75:1], 847[22:6-11], 878-879[53:6-54:1]).

F. In March 2019, DMACC posts the open supervisor position.

In early 2019, Fiderlick announced that, after 42 years with DMACC, she was ready to retire. On March 7, 2019, DMACC posted an opening for the Supervisor, Administrative Application Support, position. (JA.III-227). The "Required Qualifications" remained the same as they had since the review process in 2007, including the requirement "Bachelor's degree in computer science or related field." (JA.III-221; JA.I-689-690[76:19-77:6], 936-938[112:18-114:15]). The posting also listed discretionary "Desired Qualifications," including experience in an educational institution and Banner experience. (JA.I-1204[113:20-25]; *see* JA.I-938-940[114:19-116:2]).

The posting was set to close on March 31, 2019, but due to the low number of applicants, DMACC extended the search, closing the posting for the second time on April 21, 2019. (JA.III-227; JA.I-691-692[78:22-79:15]). During the second posting, Selden applied. (JA.III-294; *see* JA.III-274-279; JA.I-979[155:14-16]).

G. In April 2019, DMACC screens out the applicants who did not meet the required qualifications.

Once the posting closed, Lacey screened the applicants' materials for the required qualifications, as she does with any job posting. (JA.I-656-657[43:19-44:1]; JA.III-345, 377, 380). Five of the nine applicants lacked the requisite education for the position. (JA.III-262, 280; JA.I-1202[111:1-17]). Lacey put a "0" next to the names of the applicants who did not qualify on the scoring rubric, and consistent with DMACC policy, she did not forward those applicants' materials to the hiring committee. (JA.III-229, 262; JA.I-1200-1201[109:25-110:7]). Because she does not have a bachelor's degree in computer science or related field, Selden was one of the five applicants screened out. (JA.I-697[84:15-25], 1211[120:10-14], 1218[139:23-25], 1227[148:3-6];

JA.III-316-326; *see* JA.0881-883[56:8-58:6], 1031[207:6-17], 1045[221:17-18], 1177[86:3-16]).

After two rounds of interviews, the hiring committee unanimously recommended offering the position to Mike Jocic, who has a bachelor's degree in Management of Information Systems and was then working at Hawkeye Community College in a role nearly identical to the supervisor position. (JA.III-237, 291; JA.I-931[107:13-25], 948-949[124:22-125:4], 990-993[166:18-169:5], 1042[218:14-25], 1142[51:3-24], 1152-1154[61:7-63:23], 1207-1208[116:12-117:1]; *see* JA.I-927[103:20-25]). Jocic started at DMACC during the next fiscal year, on August 12, 2019. (JA.III-287; JA.I-1155[64:21-65:17]).

H. In 2021, DMACC creates a sixth ASA2 position and hires Pedro Navarro.

In February 2021, DMACC created a sixth ASA2 position. (JA.I-1165-1166[74:19-75:2]). The hiring manager, Jocic, offered the job to Pedro Navarro, who had more than 20 years' IT experience but had not previously worked with Banner or in education. (JA.I-1049-1050[225:7-226:17], 1166[75:3-16]; JA.III-137). At the time, the range for the ASA2s (A6 pay grade) was $76,575-$114,862. (JA.III-327). Jocic

offered, and Navarro accepted, a starting salary of $80,000. (JA.I-1166-1167[75:17-76:2], 1050[226:18-21]; *see* JA.I-1306-1307[228:23-229:2], 829-831[216:14-218:25]). Navarro's first day was February 22, 2021, and his work has kept him busy since. (JA.I-1050-1051[226:22-227:8]).

I. Selden sues.

On February 25, 2020, Selden brought a lawsuit against DMACC, alleging two claims under the ICRA: sex-based wage discrimination, based on the pay differential between her annual salary and Tjaden's, and retaliation based on DMACC screening her out from the supervisor position. (JA.I-14). Selden later clarified that her wage-discrimination claim was based solely on strict-liability under section 216.6A (rather than intent-based sex discrimination under section 216.6).

DMACC raised an affirmative defense to the 216.6A claim: factors other than sex justify the difference in pay between Tjaden and Selden. *See* Iowa Code § 216.6A(3)(d). Specifically, DMACC maintained that Tjaden's longevity, overall years of experience, and the different labor market conditions and hiring needs at the time of his hire supported his higher salary. (JA.I-1336-1337).

J. Selden presents a novel starting-salary range-percentage theory at trial.

From November 1-10, 2021, Judge Rosenberg presided over a jury trial on Selden's claims. There was little dispute that Tjaden and Selden worked the same position (ASA2); Selden's salary is less than Tjaden's; and they performed equal work under similar working conditions. *See* Iowa Code § 216.6A. The trial thus focused on DMACC's affirmative defense that the wage differential was based on factors other than sex: Tjaden's 16 additional years at DMACC; Tjaden's overall 29 years' experience in IT/computer programming, compared to Selden's 5-7 years at the time of her hire; and the different labor market conditions and hiring needs that impacted salary-setting decisions made nearly 16 years apart.

Considering the objective factors justifying the wage differential, Selden's counsel concocted a novel theory, which was revealed to DMACC's counsel two weeks before trial. (JA.I-179-181). Rather than comparing the difference in her salary and Tjaden's salary at time of hire (as the statute requires), Selden's counsel invited the jury to compare the percentage of the salary range in 1997

for Tjaden's $46,000 starting salary (53.75% of the salary range) with the percentage of the salary range in 2013 for her $70,000 starting salary (15.85% of the later salary range). *Id.* Selden's counsel did not explain the relevance of this comparison, given that two different decisionmakers made the starting-salary recommendations (under two different pay-grade ranges) sixteen years apart, and DMACC does not consider another employee's starting-salary pay-range percentage when setting pay for a new hire. (JA.I-679[66:16-25], 747-748[134:25-135:3], 864[39:20-22], 865-866[40:15-41:2], 892-893[67:8-68:1], 1107[16:9-20], 1244[165:3-11], 1260[182:10-12]).

The district court denied DMACC's motion in limine and allowed this "starting-salary range-percentage" claim/theory at trial. (JA.I-132-138, 234-242[36:22-44:2]). Once admitted, this became the focal point of Selden's case, repeatedly emphasized by her counsel throughout trial. (JA.I-349[160:11-20], 352[163:9-12], 359-360[170:10-171:15], 362[173:2-7], 739-740[126:2-127:7], 741-742[128:24-129:2], 745-746[132:1-133:19], 748[135:11-23], 750-751[137:1-138:4], 777[164:12-18], 827[214:12-25], 906[81:3-10], 1127-1128[36:22-37:8], 1130[39:7-15],

1297-1298[219:3-220:14], 1422[146:15-18], 1425[149:1-6], 1427[151:7-19], 1429[153:6-13], 1433-1434[157:19-158:2]; JA.III-16).

The district court also denied DMACC's motion in limine to exclude argument that the other female ASA2s (Wood, Gleason, and Bebout) are "me-too" victims of wage discrimination, ignoring that all three were originally hired into a different position (SSS1), in a different pay grade (A5), by different hiring supervisors. (JA.I-118, 228-230[28:2-30:9]). Simultaneously, the district court granted Plaintiff's motion to exclude any mention that DMACC hired Navarro, a male, in February 2021 into the sixth ASA2 position at 8.95% of the then-existing pay range. (JA.I-205-211[7:21-13:3]). Considering the district court permitted Selden's starting-salary range-percentage theory, including argument about the starting-salary percentages of the other female ASA2s, it was inconsistent to bar DMACC from presenting evidence to rebut the theory.

K. Selden requests improper and overlapping backpay damages.

In its motion for summary judgment, DMACC argued that Selden could not reach back 8 years to recover backpay damages beginning on the first day of her employment in 2013. (JA.I-42 ¶¶5-7). The district court disagreed and denied the motion. (Summary Judgment Ruling (October 10, 2021); *see* JA.I-211-212[13:5-14:9]).

Selden's starting-salary range-percentage theory spilled over into her request for damages. She did not request pay equal to Tjaden. Abandoning the statutorily-provided damages for the actual "wage differential,"[5] she asked the jury to award damages based on the difference in starting-salary pay-range percentages. (JA.III-16). Because her starting salary was 37.9% less in the pay-grade range in 2013 than Tjaden's starting salary in the pay-grade range in 1997, Selden requested damages based on a hypothetical starting salary 37.9% higher in the 2013 pay-grade range. Specifically, Selden contended that her salary at the time of trial should have been

[5] Iowa Code § 216.15(9)(a)(9).

$105,043.36 (not Tjaden's $116,299 salary). (JA.I-795-796[182:20-183:8]).

In closing argument, Selden's counsel requested that the jury award her $127,190.26 in backpay damages on her wage-discrimination claim, which supposedly represented the difference between Selden's actual salary and the salary she would have been making from the first day of her employment in September 2013 through the time of trial, November 2021, had her starting salary been at 53.75% of the A6 pay grade. (JA.III-16). This also included more than $10,000 in lost retirement benefits. (*Id.*; JA.I-1442[166:7-21]).

For the retaliation claim, counsel requested a backpay award of $78,874, which purportedly reflected the wages Selden would have earned if she had been hired into the supervisor position in July 2019 through trial in November 2021. (JA.I-1443[167:14-19]). If the jury found in Selden's favor on both claims, Selden's counsel told the jury to add the two figures together—despite the fact that these calculations overlap the same period, July 2019 to November 2021. (JA.I-1443[167:20-25]). Selden's counsel also told the jury the sum of

the two backpay amounts was $223,571.60, but the sum is actually $206,064.26.

DMACC requested separate jury instructions on backpay for each claim, but the district court refused. (JA.I-66-67, 73-74). Over DMACC's objection, the verdict form included a single line for backpay. (JA.I-320, 1497).

L. The district court allows emotional-distress evidence related to Selden's wage-discrimination claim.

DMACC moved in limine to exclude any evidence or argument related to damages unavailable for strict-liability wage-discrimination claims, including emotional-distress damages and lost retirement benefits. (JA.I-110; JA.I-247; JA.I-326-333[4:8-11:13]). The district court denied the motion, allowing Selden to introduce emotional evidence and argument regarding how she felt about being paid less than a man.

Selden testified at length about how she felt that DMACC got "a discount" on her work because she is a woman. (JA.I-755[142:17-24]; *see* JA.I-751[138:9-18], 752[139:4-7], 777[164:12-25]). She lamented about the emotional distress she experienced due to her belief that

difference in pay was discriminatory. (JA.I-751[138:9-18], 755[142:17-24], 777-778[164:23-165:4], 1444-1447[168:1-171:25], 1449-1450[173:12-174:25]). Her husband, father, and daughter likewise testified as to how Selden felt about "being paid less" than a man. (JA.I-969[145:1-11], 975[151:3-11], 976-977[152:2-153:4], 984[160:11-16], 985[161:17-23]). Plaintiff's counsel expounded in closing that DMACC valued Selden less than a man, causing severe emotional distress that impacted her entire life. (JA.I-1444-1447[168:1-171:25]).

Selden also sought emotional-distress damages for her retaliation claim, which the district court allowed despite the scant evidence supporting such damages. (JA.I-1479). At trial, the emotional-distress evidence related to her retaliation claim was limited to Selden's testimony that it was "humiliating" to have people ask her why she did not apply and her father's testimony that she seemed "pretty upset" about not getting an interview. (JA.I-778[165:5-15], 969-970[145:22-146:2]).

M. The jury returns a verdict in favor of Selden.

Following trial, the jury returned a verdict for Selden and awarded:

> Back Pay: $223,571.60
> Past Emotional Distress for Wage Discrimination: $474,600
> Future Emotional Distress for Wage Discrimination: $246,375
> Past Emotional Distress for Retaliation: $188,000
> Future Emotional Distress for Retaliation: $246,375

(JA.I-1495). The jury also found that DMACC's pay decision was a "willful violation." *Id.*

N. The district court issues its post-trial rulings.

Selden asked the district court to award attorney fees and costs, equitable relief, liquidated damages, and front pay. The district court awarded the exact amount of fees and costs requested by Selden's counsel, $217,966.61, and granted equitable relief by ordering DMACC to inform its employees of "their right to access their wage information, along with directions on how to access it." (JA.I-1803). The district court denied Selden's remaining requests for equitable relief and front pay. *Id.*

In its ruling on DMACC's post-trial motions, the district court corrected the "arithmetic error" in Selden's backpay calculations and tripled the amount of backpay damages it found attributable to her wage-discrimination claim ($127,190.26), for a total backpay award of $460,444.78. (JA.I-1838). The district court reversed its earlier rulings on emotional-distress damages under section 216.6A, finding such damages were not recoverable after all, and removed the $730,375 in emotional-distress damages awarded on that claim. *Id.* The district court denied DMACC's motion on all other grounds. *Id.* DMACC filed a notice of appeal, and Selden cross-appealed.

ARGUMENT

I. Because DMACC Established the Wage Differential Is Based on Factors Other Than Sex as a Matter of Law, the District Court Erred in Denying DMACC's Motions for Directed Verdict and JNOV.

In 2009, the General Assembly created a new strict-liability wage-discrimination claim under the ICRA. 2009 Iowa Acts ch. 96 (codified at Iowa Code §§ 216.6A, 216.15(9)(a)(9)(a)-(b)). Modeled after the federal Equal Pay Act ("EPA"),[6] section 216.6A declares it is an "unfair or discriminatory practice" for an employer to discriminate "by paying wages to [an] employee at a rate less than the rate paid to other employees" on the basis of a protected class characteristic. *Id.*; *see Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 564-65 (Iowa 2015) (noting the similarities and looking to federal EPA cases in interpreting section 216.6A).

Unlike the practices prohibited under other provisions of the ICRA, "which require a showing of intent to discriminate,"[7] section 216.6A provides that an employer paying "lower wages for equal

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[6] 29 U.S.C. § 206(d)(1).

[7] *Bd. of Sup'rs of Buchanan Cty. v. Iowa Civil Rts. Comm'n*, 584 N.W.2d 252, 255 (Iowa 1998).

work to a person in a protected class violates the law *without regard to* the employer's intent." *Dindinger*, 860 N.W.2d at 564 (emphasis original). Thus, the legislature "create[d] an entirely new cause of action: strict liability on the part of employers for paying unequal wages." *Id.*

A plaintiff seeking to establish a strict-liability wage-discrimination claim must prove: "(1) she was paid less than a male employed in the same establishment, (2) for equal work on jobs requiring equal skill, effort, and responsibility, (3) which were performed under similar working conditions." *Mayorga v. Marsden Bldg. Maint. LLC*, 55 F.4th 1155, 1159-60 (8th Cir. 2022) (analyzing ICRA and EPA wage-discrimination claims). If the plaintiff establishes her prima face case, the burden then shifts to the employer to establish that the wage differential is based on one of the delineated statutory defenses: "(1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) 'any other factor other than' the sex of the employee." *Id.* (citing Iowa Code § 216.6A(3)). This requires more than "merely articulating" some possible non-discriminatory reason;

the employer "must prove that the pay differential was based on a factor other than sex." *Mayorga*, 55 F.4th at 1160. But once established, the employer has a complete defense. *Id.* That is, if the employer proves one of the enumerated factors justify the wage differential, it is entitled to judgment as a matter of law. *Id.* at 1160-61 & n.4 (citing *Price v. N. States Power Co.*, 664 F.3d 1186, 1193 (8th Cir. 2011); *Taylor v. White*, 321 F.3d 710, 716 (8th Cir. 2003)).[8]

A. Error Preservation and Standard of Review.

DMACC preserved error by moving for a directed verdict and for judgment notwithstanding the verdict ("JNOV"). (JA.I-1503). The Court reviews the district court's rulings on both motions for corrections of errors at law. *Godfrey v. State*, 962 N.W.2d 84, 99 (Iowa 2021). The Court "consider[s] the evidence in the light most favorable to [the non-moving party]," giving the verdict "[e]very legitimate inference which may reasonably be deduced from the evidence." *Rippel v. J.H.M. of Waterloo, Inc.*, 328 N.W.2d 499, 500 (Iowa

[8] The analysis for a strict-liability wage-discrimination claim differs from the *McDonnell-Douglas* framework in that the burden does not shift back to the plaintiff to attempt to establish pretext. *Mayorga*, 55 F.4th at 1161 n.4.

1983) (internal citations omitted). If "reasonable minds could differ on the issue, it must be submitted to the jury." *Id.* Where the facts "lead to only one conclusion, "however, directed verdict or JNOV is appropriate. *Id.* at 501 (affirming directed verdict based on affirmative defense); *accord Beganovic v. Muxfeldt*, 775 N.W.2d 313, 323 (Iowa 2009); *see also Galindo v. City of Roma Police Dep't*, 265 F.3d 1059, 2001 WL 872779, at *2 (5th Cir. July 6, 2001) (stating "[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable [minds] could not arrive at a contrary verdict… then judgment as a matter of law is appropriate" and reversing jury verdict on EPA claim because reasonable minds could not differ on evidence of male comparators' 6 and 22 years of experience more than plaintiff's).

B. The Evidence at Trial Established That the Wage Differential Between Selden and Tjaden is Based on Legitimate Factors Other Than Sex as a Matter of Law.

In fashioning the new strict-liability claim in section 216.6A, the legislature did not mandate egalitarian pay structures; it afforded employers discretion to exercise business judgment in making pay decisions for gender-neutral reasons—and provided a complete

defense to strict-liability wage-discrimination claims to employers that do. *See* Iowa Code § 216.6A(3).

In *Mayorga*, the Eighth Circuit reiterated that a "differential that is based on education or experience is a factor other than sex" in affirming summary judgment on ICRA and EPA strict-liability wage-discrimination claims. 55 F.4th at 1161 (citation omitted). There, the plaintiff's claims centered on the difference in her pay and the pay of two male comparators. *Id.* at 1159-60. One comparator "had over a decade of experience," and the other had specialized experience relevant to the position. *Id.* at 1161. Though the plaintiff had some general experience, she did not have specialized experience and was not fully trained on the machines used in the position. *Id.* Based on the male comparators' prior experience, the court held the employer proved its affirmative defense as a matter of law. *Id.*

The *Mayorga* court's conclusion aligns with decisions across the country granting judgment as a matter of law for an employer when the evidence establishes a comparator's greater experience justifies the wage differential. S*ee Schottel v. Neb. State Coll. Sys.*, 42 F.4th 976, 981-82 (8th Cir. 2022) (affirming summary judgment on EPA claim

because comparator had "significantly more experience" than plaintiff, justifying higher pay); *Maron v. Va. Polytechnic Inst. & State Univ.*, 508 F. App'x 226, 233 (4th Cir. 2013) (holding employer proved its affirmative defense where starting-salary recommendations "referenced each candidate's education, experience, and comparable market salaries"); *Hutchins v. Int'l Bhd. of Teamsters*, 177 F.3d 1076, 1081-82 (8th Cir. 1999) (affirming summary judgment because male comparators had more experience and formal education); *Galindo*, 2001 WL 872779, at **4-5 (granting JAML and reversing jury verdict on EPA claim because evidence showed male comparators had 6 and 22 more years of experience than plaintiff and plaintiff did not show similar working conditions); *see also Buchanan*, 584 N.W.2d at 257 (recognizing different "credentials, experience, and qualifications may be a nondiscriminatory reason for differing pay rates for employees performing the same tasks").

Further, a comparator's greater experience in the same position, ("longevity" or "seniority") is often a crucial factor other than sex justifying a wage differential. Courts routinely find that comparators' additional years of experience are objective, gender-neutral factors

warranting judgment as a matter of law in favor of employers. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 204 (1974) (stating the EPA "contemplates that a male employee with 20 years' seniority can receive a higher wage than a woman with 2 years' seniority"); *Perkins v. Rock-Tenn Servs., Inc.*, 700 F. App'x 452, 457 (6th Cir. 2017) (affirming summary judgment because comparator's 20 additional years with company and union membership justified wage differential); *Puchakjian v. Twp. of Winslow*, 520 F. App'x 73, 76 (3d Cir. 2013) (recognizing "an employee of one gender with significant years of service may receive a higher wage than an employee of the other gender with fewer years of service" and granting summary judgment based on predecessor's additional 29 years with employer); *Murphy v. Ohio State Univ.*, 549 F. App'x 315, 318 (6th Cir. 2013) (referencing the "well-settled" principle that "industry-related experience is a 'factor other than sex' and may legitimately explain wage differentials"); *Holder v. City of Cleveland*, No. 1:05CV2402, 2006 WL 3421863, at *5 (N.D. Ohio Nov. 27, 2006) (concluding comparator's additional 27 years with company was "plainly a legitimate factor other than sex" and entering judgment for employer); *Ebert v. Lamar Truck Plaza*, 715

F. Supp. 1496, 1501 (D. Colo. 1987), *aff'd*, 878 F.2d 338 (10th Cir. 1989) ("Experience with the employer at issue is a particularly strong, legitimate reason for differing pay").

It is a matter of common sense and basic math—not discrimination—that if a comparator has worked more years with an employer than a later-hired plaintiff, the comparator will have experienced more annual wage increases, resulting in higher pay. *See Blocker v. AT&T Tech. Sys.*, 666 F. Supp. 209, 214 (M.D. Fla. 1987) (granting summary judgment where comparators had 22 years' experience with company, compared to plaintiff's 2 years; "[o]bviously, she had been through many fewer annual pay increases, and her salary consequently was lower"); *Price*, 664 F.3d at 1193-94 (noting "compounding effect" of higher starting salaries and raises and therefore affirming summary judgment).

1. Tjaden's 16 years working in the ASA2 position at DMACC prior to Selden and his 29 total years of experience at the time of Selden's hire constitute "factors other than sex" as a matter of law.

There is no dispute that when DMACC hired Selden in 2013, Tjaden had been working in the ASA2 position for nearly 16 years. (JA.III-48, 176). Tjaden started at DMACC on January 12, 1998; Selden started there on September 23, 2013. *Id.* Selden admitted that Tjaden's pay is higher than hers because he has worked there much longer than she has. (JA.I-755-756[142:25-143:3]; *see* JA.I-739[126:22-25]; JA.I-357[168:7-20], 358-359[169:20-170:1], 604[230:3-8], 888-889[63:20-64:3], 892[67:8-14], 893-894[68:25-69:7], 1107[16:9-20], 1281-1282[203:11-204:5]).[9] Standing alone, Tjaden's additional 16 years at DMACC constitute a "factor other than sex" within the meaning of section 216.6A(3)(d) as a matter of law. *See Schottel*, 42 F.4th at 982; *Holder*, 2006 WL 3421863, at *5.

[9] Likewise, in his opening statement, Plaintiff's counsel acknowledged, given that Tjaden has worked there longer, comparing Selden's salary to Tjaden's just "wouldn't be fair." (JA.I-357[168:7-11], 358-359[169:20-170:1]).

At trial, Selden tried to change the narrative by arguing to the jury that it should only compare Tjaden's years of relevant work *before* DMACC hired him in 1998 (13 years) with Selden's total years of work *before* DMACC hired her in 2013 (16 years). (JA.I-1432[156:19-21] ("But don't get stuck in the weeds. Yes, Mr. Tjaden had 13 years' prior experience, but as we see, Sandy had 16."); JA.I-1433[157:22] (expounding "13 years to 16 years")). There are two flaws with this argument. First, the evidence did not establish that each position Selden held prior to DMACC equated to 16 years' experience relevant for the ASA2 position. Instead, it is undisputed that DMACC assessed Selden's prior relevant experience as 5-7 years. (JA.I-885[60:10-22], 607-608[233:19-234:1], 1291[213:18-24], 1298-1300[220:25-222:2).

Second, and more importantly, Selden's argument ignores the additional 16 years that Tjaden *worked in that very position at DMACC*. Even assuming that Selden brought 16 years' relevant experience to DMACC, this pales in comparison to Tjaden's 29 years of overall experience, considering his 13 years of prior experience and 16 years in the ASA2 position, at the time of Selden's hire. (JA.III-140, 48, 195;

JA.I-1275[197:5-11], 1288[210:16-22]). *See Holder*, 2006 WL 3421863, at *5.

Additionally, DMACC's annual longevity and pay-grade increases, both of which vary from year-to-year, were much larger in the years before Selden's employment began in 2013. (JA.I-870-873[45:12-48:24]; JA.III-105). From FY1999 through FY2014, DMACC employees received salary increases between 2.26% and 7.44%, with most years on the higher end, averaging 4.11% annually. (JA.III-335; JA.III-105). The pay-grade salary range also increased, ranging from 1.76% to 6.9% and averaging 3.67% annually. (*Id.*; JA.I-1126[35:19-22], 1136[45:12-20], 1261-1262[183:1-184:5]).

Since FY2015 (the year Selden was first eligible for the longevity increase), the increases have been less substantial. The annual salary increases ranged from 2.2% to 4%, averaging 3.09% annually. (JA.III-335). The pay-grade range increases were between 1.25% and 3.5%, averaging 2.26% annually. (JA.III-105). Simply put, Selden did not receive the larger-than-average raises DMACC gave in the years before she started, and Tjaden did, which further explains the salary differential and is unrelated to sex. *See Blocker*, 666 F. Supp. at 214.

The uncontested evidence of Tjaden's superior experience leads to only one conclusion: DMACC established its affirmative defense that the wage differential is based on factors other than sex within the meaning of section 216.6A(3). Reasonable minds could not differ on this conclusion. The district court should have directed a verdict for DMACC and declined to submit this issue to the jury. Having failed to do so, the district court should have granted JNOV following the jury's verdict. *See Mayorga*, 55 F.4th at 1161; *Galindo*, 2001 WL 872779, at **4-5.

2. DMACC also established different labor market conditions and hiring needs justify the wage differential.

Perhaps unsurprisingly, hiring supervisors were not the only thing to change over sixteen years. From 1997 to 2013, employers saw vast changes in technology and the number of employees with technological-support skills. During that same time, DMACC's hiring needs evolved. As employment decisions are not made in a vacuum, these factors necessarily bore on the starting salaries offered to employees hired sixteen years apart. (JA.I-1284[206:15-23]).

In 1997, employees with programming and coding skills were in high demand nationwide due to the anticipated Y2K crisis, and pay was competitive. (JA.I-436-437[62:15-63:1]; *see* JA.I-436[62:15-20], 1107-1123[16:21-32:7], 1130-1132[39:22-41:20]). Longtime employees testified about DMACC's concerns as Y2K neared. (JA.I-1043-1044[219:19-220:16], 1223-1224[144:22-145:6]). Although the Banner system was fairly new, the program customizations were not guaranteed, and DMACC wanted to have a strong response plan. (JA.I-1043-1044[219:19-220:16], 1266[188:17-23]). And even if a particular company was not panicked about Y2K, it still needed to offer higher salaries to programmers due to the increased demand. (JA.I-1113-1114[22:15-23:6]; *see* JA.I-1243[164:17-23]). Not to mention, "there weren't many programmers back then," meaning employers "had to pay more to get programmers." (JA.I-1264-1265[186:24-187:5]; *see* JA.I-1266-1267[188:17-189:3], 1284-1285[206:15-207:22]).

Additionally, DMACC urgently needed to fill the new SSS1 and SSS2 positions to support the recently-implemented Banner system. (JA.I-442-443[68:17-69:14], 482[108:18-23], 573-574[199:21-200:23]; JA.I-1038-1039[214:25-215:12], 1034-1035[210:23-211:9]). Both during and

after the Banner transition, DMACC was grossly understaffed. *Id.* The labor market conditions, especially coupled with DMACC's urgent hiring needs, contributed to the advanced rates that four of the five employees hired in 1997-1998 received. (JA.III-48, 61, 76, 93).

In contrast, when Selden's employment began in 2013, the Banner system had been in place for some time, supported by multiple full-time employees (and the Y2K scare had long since passed). At the same time, the economy was just starting to recover from a recession. (JA.I-1114[23:7-20]). Additionally, advancements in computer technology, the number of employees with computer-related skills, and the number of computer and internet users increased from 1998 to 2013. *Id.*

Courts recognize that different market conditions are gender-neutral factors that can justify a wage differential as a matter of law. *See Kalu v. Fla. Dep't of Child. & Fams.*, 681 F. App'x 730, 733-34 (11th Cir. 2017) (holding employer's "critical need" at time of comparator's hire constituted "factor other than sex"); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1322 (9th Cir. 1994) ("Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.");

Ponamgi v. Safeguard Servs., LLC, 558 F. App'x 878, 880 (11th Cir. 2014) (affirming summary judgment on EPA claims where comparator's "superior experience and skill, and market exigencies" justified pay); *Byrnes v. Herion, Inc.*, 764 F. Supp. 1026, 1031 (W.D. Pa. 1991) (entering judgment for employer based on comparator's background and 14 years' experience and employer's "particular needs at the time"); *Vt. Hum. Rts. Comm'n v. State*, 136 A.3d 188, 200 (Vt. 2015) (finding comparator's experience and employer's urgent need were gender-neutral factors substantiating wage differential).

Evidence of the changes in market conditions between 1997 and 2013, combined with Tjaden's greater experience, further underscores that the record in this case leads to only one conclusion: the wage differential is based on factors other than sex within the meaning of section 216.6A(3). The district court committed legal error in denying DMACC's motions for directed verdict and JNOV.

II. Without Any Evidence to Substantiate Finding a "Willful Violation," the District Court Erred in Awarding Treble Damages.

A. Error Preservation and Standard of Review.

DMACC preserved error in its directed verdict and JNOV motions, which this Court reviews for corrections of errors at law. *Boham v. City of Sioux City*, 567 N.W.2d 431, 435 (Iowa 1997). Where a party challenges the sufficiency of the evidence, the Court "examine[s] the record to determine whether substantial evidence exists to support the challenged findings." *Id.*

B. The Record Contains No Evidence of a Willful Violation.

The instructions directed the jury to find a "willful" violation if Selden proved that DMACC: "(1) knew sex played a part in its compensation decisions involving Sandy Selden and [Bryan] Tjaden; or (2) acted with reckless disregard about whether its conduct was prohibited." (JA.I-1478). But no evidence supported a finding that sex played any part in Fiderlick's starting-salary recommendation for Selden or that she (or anyone at DMACC) acted with reckless disregard for Selden's rights. To the contrary, Fiderlick considered Selden's qualifications and prior Banner experience in recommending

the starting salary she did. (JA.I-589-590[215:5-216:7]). She did not consider Tjaden's salary (or Phares' starting-salary recommendation in 1998). As explained above, Tjaden's greater experience eviscerates any suggestion that the pay differential resulted from sex discrimination. (JA.III-22). No evidence supported a finding that DMACC acted with reckless disregard of whether its conduct violated the ICRA.

Additionally, Selden's primary argument regarding a "willful violation" was that Owenson did not substantively respond to Selden's questions about pay in May 2019.[10] But the determination of whether a pay practice amounts to wage discrimination—including whether there is a willful violation—occurs at the time of the allegedly-discriminatory pay decision. *See Weidenbach v. Casper-Natrona Cnty. Health Dep't*, 563 F. Supp. 3d 1170, 1180 (D. Wyo. 2021)

[10] Owenson said she would look into the issue and did, by contacting outside counsel. (JA.III-199, 390). She informed Selden as much by email, saying she was waiting on a response. (JA.III-390; JA.I-1308[230:5-10). Owenson was still waiting to hear back when Selden filed her ICRC charge. (JA.I-887-889[62:9-64:8]). The court's order in limine prohibited DMACC from referencing Owenson's consultation with counsel. (JA.I-214-224[16:6-26:17]).

(holding no reasonable jury could find a willful violation where record lacked evidence "suggesting [the employer] "knew or believed it was violating the EPA by offering and paying [plaintiff] what it did").[11] Events years after-the-fact have no bearing on a violation and cannot retroactively make it "willful."

Without any evidence to support finding a "willful violation" of section 216.6A, the district court should not have submitted this issue to the jury.

III. The District Court Erred in Permitting Selden to Pursue a New Claim not Recognized Under the ICRA: Comparing the Starting-Salary Pay-Grade Percentage of Two Employees Hired 16 Years Apart.

A. Error Preservation and Standard of Review.

DMACC preserved error in its motion in limine, arguing Selden's novel theory[12] challenges a pay practice outside the scope of the governing statute, and by lodging objections at trial. (JA.I-132-

[11] *Cf. Perdue v. City Univ. of New York*, 13 F. Supp. 2d 326, 335 (E.D.N.Y. 1998) (finding employer's knowledge of pay disparity and decisionmaker's comment, "let the women sue," supported finding willful violation)

[12] To the extent Selden's starting-salary range-percentage theory constitutes a practice regulated under the ICRA, such a practice was neither administratively exhausted nor plead in this case.

138, 747-748[134:17-135:7]). For statutory interpretation, the standard is to correct errors at law. *Fagen v. Grand View Univ.*, 861 N.W.2d 825, 829 (Iowa 2015).

B. Selden's Starting-Salary Range-Percentage Theory is Not a Pay Practice Regulated Under Section 216.6A.

Selden elected to pursue her wage-discrimination claim solely under section 216.6A, which defines an unfair or discriminatory practice when an employer discriminates based on a protected class characteristic "by paying wages to such employee at a rate less than the rate paid to other employees" outside the protected class. Iowa Code § 216.6A(2)(a). Whether brought under the ICRA or EPA, the crux of any strict-liability wage-discrimination claim is the concept of equal pay for equal work. *See id.*; *Price*, 664 F.3d at 1192-93 ("Equal pay for equal work is what the EPA requires, and those elements are the focus of the prima facie case."); *Dindinger*, 860 N.W.2d at 564.

Masquerading as evidence to rebut DMACC's affirmative defense, Selden's starting-salary range-percentage theory deviated from damages for "equal pay." (JA.I-795-796[182:20-183:8], 1452[196:11-12]). According to Selden, DMACC had the right to pay

Tjaden more than her in 2013 based on his 16 years of experience in the position, but DMACC nonetheless discriminated against her because her starting salary was a lower percentage of the pay-grade range in 2013 (15.85%) than the percentage of Tjaden's starting salary in the 1997 pay-grade range (53.75%). That is, Selden's "equal pay" claim alleged wage discrimination limited to the 37.9% difference of two different pay grades. This does not constitute an unfair or discriminatory practice as defined by section 216.6A.

The ICRA specifies the relief available for an unfair or discriminatory employment practice, and because the remedies are exclusive and preemptive, a plaintiff is not entitled to relief not explicitly authorized by the ICRA. Iowa Code §§ 216.15(9), 216.16(6); *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 858 (Iowa 2001). Along with the new strict-liability claim, the legislature "simultaneously enacted a separate, enhanced remedy for violations of section 216.6A." *Dindinger*, 860 N.W.2d at 562. The corresponding remedy provision provides that a prevailing plaintiff can recover court costs, attorney fees, and "either of the following" damages:

> (a) An amount equal to two times the wage differential paid to another employee compared to the complainant for the period of time for which the complainant has been discriminated against.
>
> (b) In instances of willful violation, an amount equal to three times the wage differential paid to another employee as compared to the complainant for the period of time for which the complainant has been discriminated against.

Iowa Code § 216.15(9)(a)(9).[13]

The remedy authorized by this "complementary subsection"[14] specifies the formula to calculate any damages awarded on a strict-liability wage-discrimination claim. *Id.*[15] The statute directs the factfinder to compute the "wage differential" by comparing the wages actually paid to another employee (Tjaden) with the wages actually paid to the complainant (Selden), and subtracting the

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[13] "In contrast, plaintiffs prevailing on any other ICRA claim are entitled to recover court costs, reasonable attorney fees, and 'actual damages.'" *Dindinger*, 860 N.W.2d at 562 (citing Iowa Code § 216.15(9)(a)(8)).

[14] *Dindinger*, 860 N.W.2d at 560.

[15] This mirrors the remedy under the EPA. *See Lovell v. BBNT Sols., LLC*, 295 F. Supp. 2d 611, 629 (E.D. Va. 2003) ("In calculating a backpay award, 'the female employee should be awarded the difference between what she was paid and what the comparable male employee was paid.'") (quoting *EEOC v. Liggett & Myers Inc.*, 690 F.2d 1072, 1076 (4th Cir. 1982)).

difference. *Id.* The amount of damages is the "amount equal to" two-times or three-times that wage differential. *Id.*

On its face, Selden's method of computing damages is not based on the wages "paid to another employee" as compared to Selden, and therefore, does not result in the "wage differential" described in section 216.15(9)(a)(9). (JA.III-16). She should not have been allowed to request wage-based damages using any method that deviates from section 216.15(9)(a)(9)(a)-(b); *Channon*, 629 N.W.2d at 858. And to the extent that Selden posits a new claim or remedies under the ICRA, that task is for the legislature. The district court's decision to force DMACC to defend against this novel, un-plead theory was unfairly prejudicial. Should this Court determine such a claim exists, DMACC is entitled to a new trial.

IV. Numerous Evidentiary Errors Deprived DMACC of a Fair Trial.

A. Error Preservation and Standard of Review.

DMACC preserved error through its motion in limine and lodging objections to improper evidence at trial. (JA.I-132-38, 247-252, 737-738[124:21-125:13], 745[132:9-13], 747-748[134:20-135:7], 824-825[211:16-212:3], 826[213:13-16], 1298[220:10-11]). Additionally, DMACC presented multiple offers of proof on improperly-excluded evidence. (JA.I-829-834[216:14-221:25], 909-912[85:8-88:1], 1048-1051[224:20-227:25], 1165-1169[74:19-77:20], 1305-1310[227:25-232:15]). This Court reviews evidentiary rulings for abuse of discretion. *Andersen v. Khanna*, 913 N.W.2d 526, 535 (Iowa 2018). "A court abuses its discretion when its ruling is based on grounds that are unreasonable or untenable." *Id.*

"Relevancy relates to the tendency of evidence to 'make a consequential fact more or less probable.'" *State v. Cromer*, 765 N.W.2d 1, 8 (Iowa 2009). Irrelevant evidence is inadmissible, but the converse proposition—that relevant evidence is admissible—is not assured. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

"To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Iowa R. Civ. P. 5.103(d). "[P]rejudice is presumed," mandating a new trial, "when evidence is erroneously admitted," unless Selden can make an affirmative showing that the evidence did not prejudice DMACC. *Graber*, 616 N.W.2d at 641. She cannot.

B. Selden's Irrelevant Starting-Salary Range-Percentage Theory Confused and Mislead the Jury, and its Inclusion at Trial was Unfairly Prejudicial to DMACC.

Not only is Selden's starting-salary range-percentage theory contrary to law, it was inadmissible under the Rules of Evidence. *See* Iowa R. Evid. 5.402, 5.403. The theory, crafted by Selden's counsel long after DMACC hired Selden in 2013 (and long after filing suit), is not relevant. (JA.I-179). First, it is not based on the record evidence of what the decisionmakers considered; DMACC did not consider Tjaden's starting-salary pay-grade percentage at the time of his hire or when it hired Selden 16 years later. (JA.I-608[234:15-22], 611[237:1-19], 679[66:16-25], 865-866[40:15-41:8], 1244[165:3-18], 1273[195:5-9], 1274[196:14-23]).

Second, the starting-salary decisions were not made under similar circumstances; significant time had lapsed, resulting in different hiring environments. There were different hiring supervisors (Phares for Tjaden in 1997; Fiderlick for Selden in 2013).[16] The labor market conditions had changed. *See* Section I.B.2, *supra*. The pay range had increased each year. (JA.III-105, 335; JA.I-1259-1262[181:23-184:5]). Further, the position itself had changed, including the number of employees in the position. *See Tornow v. Univ. of N. Carolina*, 977 F.2d 574, 1992 WL 237282, at *5 (4th Cir. Sept. 25, 1992) (noting inflationary and market factors necessarily impacted salaries offered to comparators hired 2½ years after plaintiff).

Additionally, the theory was unfairly prejudicial to DMACC. Once admitted, Selden's counsel expounded the novel theory throughout trial. (JA.I-349[160:11-20], 352[163:9-12], 359-360[170:10-171:15], 362[173:2-7]; 739-740[126:2-127:7], 741-742[128:24-129:2], 745-

[16] Only the hiring supervisor can request an advanced starting salary and recommend the appropriate amount. (JA.I-600[226:2-14], 680[67:9-12], 699-700[86:24-87:2], 907-908[82:19-83:23], 1276[198:13-17[; 1278[200:6-18], 1300-1301[222:3-223:3]).

746[132:1-133:19], 748[135:11-23], 750-751[137:1-138:4], 777[164:12-18], 827[214:12-25], 906[81:3-10], 1127-1128[36:22-37:8], 1130[39:7-15], 1297-1298[219:3-220:14], 1422[146:16-17], 1425[149:1-6], 1427[151:7-19], 1429[153:6-13], 1433[157:19-158:2]; JA.III-16).

The jury bought Selden's theory wholesale. It rendered a verdict founded on numbers DMACC does not consider in salary-setting decisions, based on starting-salary recommendations by different decisionmakers 16 years apart, for a claim that challenged no pay practice regulated under section 216.6A. (JA.I-1497). The district court's admission of this theory permitted the jury to disregard the factors actually considered in the starting-salary recommendations and ignore Tjaden's undisputed longevity and experience. Because the inclusion of this theory was unfairly prejudicial, DMACC is entitled to a new trial.

C. Emotional-Distress Damages Are Not Recoverable Under Section 216.6A, and the District Court Abused Its Discretion by Permitting such Evidence at Trial.

Selden's wage-discrimination claim was exclusively a strict-liability claim under section 216.6A. (Plaintiff's Summary Judgment Resistance Brief, p.5 n.1 (filed March 29, 2021)). Over DMACC's objections, the district court allowed evidence and commentary about damages outside the scope of the governing statute and instructed the jury consistent with these improper arguments. Specifically, the district court permitted Selden to present evidence and arguments regarding emotional distress associated with her wage-discrimination claim contrary to the statutory text. (*E.g.,* JA.III-16). *See* Iowa Code § 216.15(9)(a)(9). This evidence tainted the jury's liability finding and unfairly prejudiced DMACC. *Wolff v. Berkley Inc.*, 938 F.2d 100, 103 (8th Cir. 1991) (agreeing "it is prejudicial error for the jury to hear and consider evidence of emotional harm" if emotional-distress damages are unavailable); *Cornell v. Wunschel*, 408 N.W.2d 369, 382 (Iowa 1987) (holding admission of emotional-distress evidence, where such damages were not recoverable, constituted prejudicial error requiring reversal of jury's verdict).

The district court's rulings were inconsistent with the statutory language and contradicted the *Dindinger* court's discussion contrasting the remedies for strict-liability wage discrimination and intentional discrimination. 860 N.W.2d at 562. And while the post-trial ruling ultimately struck the emotional-distress damages awarded on Selden's wage-discrimination claim, the worst of the damage—the injection of improper, inflammatory evidence and argument at trial—had already been done. *See State v. Lacey*, 968 N.W.2d 792, 808 (Iowa 2021) (stating unfair prejudice exists where evidence leads the jury "to reach a decision based on inflammatory and emotional considerations").

At trial, Selden told the jury how hurtful it was to feel like DMACC valued her less than a man. (JA.I-755[142:17-24], 751[138:9-18], 752[139:4-7], 777[164:12-25]). Her husband, father, and daughter echoed this emotional testimony, which Plaintiff's counsel seized on in closing argument. (JA.I-969[145:1-11], 975[151:3-11], 976-977[152:2-153:4], 984[160:11-16], 985[161:17-23]; JA.I-969[145:1-11], 975[151:3-11], 976-977[152:2-153:4], 984[160:11-16], 985[161:17-23], 1444-1447[168:1-171:25], 1449-150[173:12-174:25).

Given that emotional-distress damages are not available for section 216.6A claims, this evidence could have been offered only to "prompt[] the jury to make a decision on an improper basis" and should have been excluded. *Graber*, 616 N.W.2d at 638; *see Krekelberg v. City of Minneapolis*, 991 F.3d 949, 957 (8th Cir. 2021) (holding "it was an abuse of discretion to admit [irrelevant] evidence, as it would have tended to increase the amount of damages on an impermissible basis"); *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 159 (Iowa 2004) (agreeing "evidence that 'appeals to the jury's sympathies' or 'provokes a jury's instinct to punish'" is unfairly prejudicial).

Additionally, the district court failed to instruct the jury that any emotional-distress damages must be directly related to the conduct associated with each claim. Under the ICRA, "[o]nly those damages 'caused by the discriminatory or unfair practice' are compensable." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 894 (Iowa 1996). The district court did not advise the jury to tailor the award to the specific discriminatory practice upon which it based liability finding, nor that it must limit the damages to injuries stemming from administratively-exhausted ICRA violations—instead allowing the

jury to award damages for any "wrongful conduct" it attributed to DMACC. (JA.I-1479). The improper instructions and verdict form thus compounded the legal and evidentiary errors, unfairly prejudicing DMACC.

D. The District Court's Conflicting Evidentiary Rulings on the Other ASA2s Were Unfairly Prejudicial to DMACC.

At trial, Selden devoted much of her case-in-chief to evidence and argument that the other female ASA2s—Wood, Gleason, and Bebout—are victims of wage discrimination.[17] The district court denied DMACC's motion in limine to exclude such argument, but concomitantly, granted Plaintiff's motion to prevent DMACC from even referencing the sixth ASA2, Pedro Navarro, who is the lowest paid ASA2 and was hired at a lesser starting-salary range percentage than Selden. (JA.I-87, JA.I-205-211[7:21-13:3]). The conflicting rulings pertaining to the other ASA2s gave the jury only one side of the story (Selden's) and unfairly prejudiced DMACC.

[17] In doing so, the trial converted from a strict-liability case to a fight over discriminatory intent.

1. The jury should not have been presented with irrelevant evidence and argument regarding the other female ASA2s.

Starting with counsel's opening statement, Selden took advantage of the pre-trial ruling; she repeatedly presented evidence and argument about her female coworkers' salaries throughout the entire trial. (JA.I-349[160:11-20], 352[163:9-12], 359-360[170:10-171:15], 362[173:2-7], 416[42:4-21], 476[102:4-11], 483[109:4-14], 488[114:7-12], 491-492[117:16-118:12], 493[119:9-17], 497[123:20-25], 499[125:6-14], 501[127:23-128:1], 520[146:5-11], 524[150:4-16], 526-527[152:13-153:9], 528-529[154:24-155:2], 533[159:2-10], 535[161:9-24], 557-558[183:16-184:17], 606[232:19-25], 744[131:15-23], 752[139:4-7], 753-754[140:22-141:6], 776[163:7-16], 777[164:12-18], 823-824[210:2-211:20], 826-828[213:5-215:1]; JA.I-844[19:5-12], 906[81:3-12,], 1125-1126[34:22-35:4], 1129[38:11-20], 1291[213:2-5], 1295[217:16-23], 1422-1423[146:21-147:10], 1423-1425[147:16-149:13], 1434-1435[158:13-159:8], 1448-1450[172:21-174:9], 1453[197:8-11], 1455[199:9-22], 1456-1457[200:6-201:1]). The gist of her argument was, because the females who started at DMACC in 1997-1998 make less than Tjaden does, then DMACC must have discriminated against them—and therefore must

have discriminated against Selden. Aside from being improper propensity evidence barred by Rule 5.404, this evidence was irrelevant to the question of whether Tjaden makes more than Selden based on a legitimate factor other than sex. *See* Iowa Code § 216.6A(3).[18]

It was improper and prejudicial to allow argument that the salaries DMACC pays Bebout, Gleason, and Wood are discriminatory. The jury was not asked to decide whether the other female ASA2s experienced wage discrimination. The evidence and argument presented to that effect invited the jury to make a decision on an improper basis, and therefore, should have been excluded as unfairly prejudicial. Iowa R. Evid. 5.403; *Lacey*, 968 N.W.2d at 808.

[18] Further, this evidence could not have been probative of intent on a strict-liability wage-discrimination claim. *See Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1079 (11th Cir. 2003) (upholding exclusion of sexist comments as irrelevant to intent-neutral EPA claim).

2. The exclusion of evidence as to Pedro Navarro further prejudiced DMACC.

While allowing inflammatory evidence and argument about the female ASA2s, the district court excluded any reference to the other male ASA2, Navarro, whose salary is the lowest of all the ASA2s. (JA.I-205-211[7:21-13:3]). Such evidence was relevant, at minimum, to rebut Plaintiff's suggestion that DMACC discriminated against all four female ASA2s. *See* Iowa R. Evid. 5.401. The exclusion of relevant evidence warrants a new trial where, as here, the exclusion impacted a party's substantial rights. *Eisenhauer v. Henry Cnty. Health Ctr.*, 935 N.W.2d 1, 19 (Iowa 2019). Prejudice is presumed "unless the record affirmatively establishes otherwise." *Id.* The trial record here is clear: the exclusion of evidence regarding Navarro substantially and unfairly prejudiced DMACC.

Over DMACC's objection, the district court excluded evidence regarding Pedro Navarro and his gender, hire, and salary. Selden claimed that evidence about Navarro was irrelevant and unduly prejudicial. (JA.I-87-88). Lacking any evidence to support her conclusory accusation, she further argued that DMACC created the

sixth ASA2 position as a sham to generate favorable evidence for this case. *Id.*

DMACC presented several offers of proof regarding Navarro during the course of trial, showing consistent application of its pay practices and a complete portrayal of all the ASA2s. (JA.I-829-831[216:14-218:25], 1048-1051[224:20-227:24]; JA.III-137). DMACC created a sixth ASA2 position in 2021, although the process to add the new position started before that. (JA.I-1165-1166[74:19-75:2]). DMACC ultimately hired Navarro, a male, for the role at a starting salary of $80,000, which was at the lower end of the pay grade, consistent with DMACC protocol. (JA.III-137, 335).[19] Also consistent with DMACC protocol, because Selden has worked at DMACC seven years longer than Navarro, her salary is higher than his. (JA.I-829-831[216:14-218:25]).

Once the trial shifted to a battle of intent, evidence about Navarro was relevant. Iowa R. Evid. 5.401. And though Selden claimed the evidence was prejudicial simply because it was

[19] Navarro's starting salary was 8.95% of the 2021 A6 pay grade. (JA.III-335).

detrimental to her case, Rule 5.403 excludes only evidence that is *unfairly* prejudicial. The evidence was not unfairly prejudicial merely because it contradicted Selden's contention that DMACC pays women less than men. Further, the evidence is highly probative to show consistent application of DMACC's pay practices. *See* Iowa R. Evid. 5.401; *Steger*, 318 F.3d at 1078 (agreeing, in EPA case, "evidence of [an employer's] routine practices is relevant to prove that its conduct at a particular time conformed to its routine practices"). Had the evidence been favorable to Plaintiff's case—for example, if DMACC hired a female at the salary Navarro received—she would surely have insisted it was highly relevant and sought its admission at trial.

The exclusion of evidence related to Navarro substantially and unfairly prejudiced DMACC, especially given Plaintiff's consistent efforts to argue wage-discrimination claims on behalf of the other female ASA2s.

V. The District Court Erred in Concluding That Section 216.6A Claims are Not Subject to the ICRA's 300-Day Filing Window and Permitting Selden to Recover Backpay Damages Beginning in 2013.

A. Error Preservation and Standard of Review.

DMACC preserved error through its motions for summary judgment, directed verdict, and JNOV, arguing the ICRA's 300-day filing window applies to wage-discrimination claims under section 216.6A. (JA.I-42, 1350-1356, 1507 ¶¶18-19, 1561-1563). This Court reviews statutory interpretations for corrections of errors at law and is not bound by the district court's legal conclusions. *Branstad v. State ex rel. Nat. Res. Comm'n*, 871 N.W.2d 291, 294 (Iowa 2015).

B. Section 216.6A Claims are Not Exempt from the ICRA's 300-Day Limitations Period.

Like any plaintiff asserting an ICRA claim, Selden cannot recover damages for any period for which she did not exhaust her administrative remedies. For employment practices, the ICRA sets a 300-day complaint-filing period, a requirement that has been in effect since 2008. Iowa Code § 216.15(13); *see* 2008 Iowa Acts ch. 1028. A timely-filed complaint and administrative exhaustion are prerequisites to filing suit. Iowa Code §§ 216.15(13), 216.16(2)(a). If a

complaint is not filed within the 300-day window, the claim is barred. *Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n*, 672 N.W.2d 733, 743 (Iowa 2003).

The ICRA specifies that the 300-day complaint-filing window begins to run from the time "the alleged discriminatory or unfair practice occurred." Iowa Code § 216.15(13) (emphasis added). Section 216.6A delineates when an unfair or discriminatory practice "occurs" (the same verb used in section 216.15(13)):

> For purposes of this subsection, an unfair or discriminatory practice occurs when a discriminatory pay decision or other practice is adopted, when an individual becomes subject to a discriminatory pay decision or other practice, or when an individual is affected by application of a discriminatory pay decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Id. § 216.6A(2)(b) (emphasis added). This provides multiple options for a triggering event to serve as an "unfair or discriminatory practice" that would start the complaint-filing period (when an employer adopts a discriminatory pay practice, or when an employee becomes subject to, or feels the effects of, a discriminatory pay practice) and comprises events after the triggering event occurs,

"including each time wages, benefits, or other compensation is paid." *Id.*

By providing multiple options for events that might trigger the 300-day complaint-filing requirement, the statute avoids the outcome in *Ledbetter*, a controversial opinion in which the U.S. Supreme Court severely restricted the period for filing pay-discrimination complaints: within 300 days of the discriminatory pay decision. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). The General Assembly clearly intended to avoid the divisive outcome in the *Ledbetter* case, as it used the same statutory language as the Fair Pay Act. *Compare* Iowa Code § 216.6A(2)(b) *with* 42 U.S.C. § 2000e-5(e)(3)(A).[20]

The *Dindinger* court held that "each paycheck is a [discrete] discriminatory practice and a new 300-day limitations period applies

[20] Under 42 U.S.C. § 2000e-5(e)(3)(A), "an unlawful employment practice occurs…when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."

to each check." 860 N.W.2d at 568. While in the context of an intentional wage-discrimination claim under section 216.6, the same rationale applies equally to strict-liability claims brought under section 216.6A. A paycheck is still a paycheck—regardless of whether it is analyzed in the context of an intentional-discrimination or strict-liability claim—and is a discrete discriminatory practice.

The *Dindinger* court posited, in a footnote in dicta, that the language "for the period of time for which the complainant has been discriminated against" allowed an employee to recover for the entire period of discrimination. *Id* at 572 n.7. Now that the issue is squarely before it, the Court should consider whether the legislature intended this language to be merely descriptive, explaining the remedy. The remedy starts with the "unfair or discriminatory practice" and continues into the future, as the statute provides the unfair or discriminatory practice "includ[es] each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." Iowa Code § 216.6A (2)(b); *see State v. Mathias*, 936 N.W.2d 222, 228 (Iowa 2019).

Interpreting section 216.6A to allow recovery dating back to months or years before the filing of an administrative complaint is inconsistent with its strict-liability structure. The legislature imposed an "enhanced remedy"[21] multiplying the wage differential, which already reflects a penalty for wage discrimination. *Id.* § 216.15(9)(a)(9)(a)-(b).

The most logical interpretation of the 2009 amendment is that the legislature intended to provide a remedy of two- or three-times the wage differential for the period beginning 300 days before the filing of an administrative complaint and continuing for any subsequent period of discrimination, as contemplated by the forward-looking language contained in section 216.6A(2)(b); *see Gardin v. Long Beach Mortg. Co.*, 661 N.W.2d 193, 197 (Iowa 2003) (cautioning against statutory construction "that would produce impractical or absurd results"). This approach is "consistent with the language of the ICRA, which requires the complaint to be filed with the ICRC 'within three hundred days after the alleged discriminatory

[21] 2009 Iowa Acts ch. 96, prefatory language.

or unfair practice occurred.'" *Dindinger*, 860 N.W.2d at 572 (citation omitted). It also aligns the *Dindinger* court's conclusion: "Separate discriminatory paychecks should be evaluated separately for limitations purposes." *Id.* at 575. Thus, whether the plaintiff brings a wage-discrimination claim under section 216.6 or 216.6A, the "lost-income recovery is based upon pay that should have been received within the 300-day limitations period set forth in Iowa Code section 216.15(13)." *Id.* at 575-76; *see Dindinger v. Allsteel, Inc.*, No. 3:11-CV-00126-SMR-CFB, 2015 WL 11143144, at *14 (S.D. Iowa June 8, 2015) (conforming to answer of certified question and granting summary judgment on damages outside 300-day complaint-filing window).

Selden filed her administrative complaint on August 8, 2019. (JA.I-800[187:6-8]). The district court should have directed a verdict on all damages outside of the 300-day period—barring recovery of backpay damages prior to October 12, 2018—because the ICRA does not permit damages for a discrete action that was not administratively exhausted.

VI. The District Court Erred in Refusing to Direct a Verdict on Selden's Retaliatory Failure-to-Hire Claim.

A. Error Preservation and Standard of Review.

DMACC preserved this issue in its directed verdict and JNOV motions, arguing that Selden failed to prove each element of her retaliation claim. (JA.I-1377, 1545). This Court's review is for correction of errors at law. *Godfrey*, 962 N.W.2d at 99. "The primary standard is that of substantial evidence; where no substantial evidence exists to support each element of a plaintiff's claim, directed verdict or [JNOV] is proper." *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 330 (Iowa 2002).

B. Selden's Claim Must be Analyzed Under a Combined Standard for a Retaliatory Failure-to-Hire Claim.

Selden presented no direct evidence that DMACC screened her out of the applicant pool for the supervisor position in retaliation for her discussion with Fiderlick about pay equity. Instead, at trial, she attempted to raise an inference that retaliation was the motivating factor. When a plaintiff alleges a failure-to-promote claim based on ICRA retaliation using indirect evidence, the court should assess the claim with a confluence of the *McDonnell Douglas* burden-shifting

analysis for failure-to-promote claims and the elements of a retaliation claim under Iowa law.

To establish a prima facie case on her failure-to-promote claim, Selden must show: (1) she was a member of a protected class; (2) she met the qualifications for an open position; (3) she was not promoted; and (4) DMACC filled the position with a person outside the protected class. *Merritt v. Iowa Dep't of Transp.*, No. 03-0858, 2004 WL 434143, at *3 (Iowa Ct. App. March 10, 2004) (gender); *Ramirez v. Iowa Dep't of Transp.*, 546 N.W.2d 629, 632 (Iowa Ct. App. 1996) (national origin); *Whorton-Folsom v. Planned Parenthood of Greater Iowa, Inc.*, No. CL92966, 2004 WL 3410292, at *3 (Iowa District Court, Polk County Oct. 28, 2004) (age). If Selden establishes her prima facie case, the burden shifts to DMACC to articulate a non-retaliatory reason for its hiring decision; and once it has done so, the burden shifts back to Selden to show pretext. *Ramirez*, 546 N.W.2d at 632.

Here, because Selden styles her claim as one for retaliation, her burden also encompasses a showing that: (1) she engaged in statutorily-protected activity; (2) she experienced an adverse action; and (3) a causal connection exists between the two events. *Godfrey*,

962 N.W.2d at 106-07. For Title VII retaliation claims premised on a failure-to-promote theory, some federal courts have held the second element (adverse action) requires proof that: (1) the plaintiff applied for a particular position; (2) which was vacant; and (3) for which the plaintiff was qualified. *See Velez v. Janssen Ortho, LLC*, 467 F.3d 802, 806-07 (1st Cir. 2006); *Morgan v. FBL Fin. Servs., Inc.*, 178 F. Supp. 2d 1022, 1032 (S.D. Iowa 2001) (agreeing retaliatory failure-to-promote claim requires showing that plaintiff was qualified for open position) (citations omitted).[22]

Here, Selden's claim fails because she did not establish that she met the required qualifications for supervisor position. It was undisputed at trial that the first written requirement was: "Bachelor's degree in computer science or a related field" and that Selden does not hold such a degree. (JA.I-38[64:12-17]; JA.III-227). DMACC screened out five applicants, including Selden, who lacked the requisite education, consistent with its hiring policy. (JA.III-316). And

[22] *Accord Carter v. George Washington Univ.*, 387 F.3d 872, 878 (D.C. Cir. 2004); *Power v. England*, 34 F. App'x 287, 290 (9th Cir. 2002); *Linder v. Amazon.com Servs., LLC*, No. 1:21-CV-1211, 2022 WL 3647825, at *6 (M.D. Pa. Aug. 24, 2022) (collecting cases).

Selden's claim fails on the independent basis that she did not establish that her alleged protected activity caused DMACC to screen her out from the position. *See Godfrey*, 962 N.W.2d at 106-07.

C. The Uncontroverted Evidence at Trial Established Selden Was Not Qualified for the Supervisor Position.

On March 7, 2019, DMACC posted an open position: Supervisor, Administrative Application Support. (JA.III-227). The first "Required Qualifications" listed was: "Bachelor's degree in computer science or related field." *Id.*[23] The posting also included discretionary criteria ("Desired Qualifications"), which included experience in an educational institution and with Banner. *Id.* On April 3, Selden applied for the position. (JA.III-294).

Selden does not have a bachelor's degree in a field "related to" computer science; she has a bachelor's degree in psychology and political science and a master's degree in management. (JA.I-787[174:5-11]; JA.III-294; *see* JA.I-988-990[164:7-166:15]). Lacey screened all applications and eliminated the five applicants that did

[23] "Knowledge of current software applications" was also a Required Qualification, referring to knowledge of Microsoft Office and Windows. (JA.I-918[94:6-12], 926[102:11-15]).

not have the required education, including Selden. (JA.III-316; JA.I-700[87:3-5]; *see* JA.I-761-762[148:25-149:2], 806[193:6-22]).

At trial, there was no dispute that Selden lacked the required education for the supervisor position. (JA.III-227, 283 JA.I-38[64:12-17], 982[158:21-23]). Because proving she was qualified for the position is an essential element of her case, the district court should have granted a directed verdict on this claim. *See Sims v. Sauer-Sundstrand Co.*, 130 F.3d 341, 343-44 (8th Cir. 1997) (affirming judgment as a matter of law on retaliatory failure-to-hire claim because applicant did not have required degree); *Whorton-Folsom*, 2004 WL 3410292, at *3 (following trial, dismissing failure-to-hire claim because plaintiff did not meet the qualifications for the position).

Selden cannot save her claim by postulating that DMACC had the discretion to waive the degree requirement. There is no evidence that DMACC's written requirements were optional; just the opposite, as witnesses repeatedly testified that HR screens out applicants who do not meet the required qualifications as a matter of course. (JA.I-1006[182:11-17], 1193[102:17-24], 1218[139:23-25], 1227[148:3-6]).

Selden herself admits that DMACC should not have made an exception to its standard practices to allow her to move forward in the hiring process. (JA.I-1329-1330[163:24-164:5]; *see* JA.I-39[156:14-20]). Further, the posting itself specified which qualifications were discretionary, negating any inference that all requirements were somehow optional. (JA.III-227).[24]

Finally, while Selden may have considered herself the "most qualified" for the position, her personal beliefs do not make up for the lack of a degree "related to" computer science. *See Merritt*, 2004 WL 434143, at *3 (holding plaintiff's "own self-assessment that she was the most qualified does not suffice"); *Rose-Maston v. NME Hosps., Inc.*, 133 F.3d 1104, 1110 (8th Cir. 1998) (finding plaintiff's "conclusory assertions that she was qualified for the position" insufficient). Likewise, her coworkers' opinions are no substitute for the requisite,

[24] In denying DMACC's post-trial motions the district court noted that Fiderlick did not have a bachelor's degree. (JA.I-1826). But Fiderlick had been the supervisor prior to 2007, when DMACC added this requirement, and remained in the position. (JA.III-201, 207). Further, the suggestion that the "or a related field" language somehow supplied a discretionary vehicle to retaliate against otherwise qualified candidates is pure speculation. (JA.I-1826-1827).

objective qualifications. *See Lyoch v. Anheuser-Busch Co., Inc.*, 139 F.3d 612, 615 (8th Cir. 1998) (differentiating between subjective and objective criteria). Selden wholly failed to establish she was qualified for the supervisor position.

D. Selden Failed to Establish Her January 2019 Discussion About "Pay Equity" Caused DMACC to Screen Her Out of Consideration for the Supervisor Position in April 2019.

Even if Selden had presented evidence that she was qualified for the supervisor position, the lack of any evidence suggesting a causal connection is fatal to her claim. In *Rumsey v. Woodgrain Millwork, Inc.*, this Court reiterated the causation standard required for retaliation: a plaintiff must present evidence that his or her protected conduct was the "motiving factor" in the employer's decision (in this case, not to promote the plaintiff). 962 N.W.2d 9, 31-32 (Iowa 2021). Here, there is simply no evidence that Selden's January 2019 discussion with Fiderlick played any part in DMACC's routine screening of candidates more than three months later.

Glossing over causation, Selden's arguments focused on whether she was qualified for the supervisor position (which, as

discussed, is an element of her failure-to-promote claim). At trial, however, Selden was required to prove that her protected conduct was the cause of DMACC's later screening her out. *See Rumsey*, 962 N.W.2d at 31-32. But she presented no evidence linking the two. The record is devoid of any evidence that the DMACC selectively applied the requirements, that the reason for screening Selden out was false or pretextual, or that DMACC considered her January 9 discussion in any way after that date. (JA.I-697-698[84:15-85:4], 701-702[88:2-89:12], 1020-1021[196:9-197:1], 1039-1040[215:15-216:19], 1193-1194[102:14-103:1], 1200-1202[109:11-111:17], 1215[136:11-23], 1224-1225[145:10-146:1]). Stated succinctly, there is no record evidence supporting causation.

Selden seems to believe it is enough that she asked a question about "pay equity" and DMACC screened her out of the applicant pool three months later. But Iowa courts have repeatedly held that temporal proximity alone is generally insufficient to establish causation. *McCrea v. City of Dubuque*, No. 16-0183, 2017 WL 936096, at *10 (Iowa Ct. App. March 8, 2017) (finding timing alone insufficient to support causation) (citing *Sisk v. Picture People, Inc.*, 669 F.3d 896,

900 (8th Cir. 2012) ("More than two months is too long to support a finding of causation without something more.")); *Schottel*, 42 F.4th at 983-84 (affirming summary judgment where plaintiff solely relied on three-week window between protected activity and investigation). *Cf. Rumsey*, 962 N.W.2d at 33 (finding termination within hours of protected activity may be exception to the general rule).

In short, substantial evidence does not support a conclusion that Selden met the required qualifications for the supervisor position and that her January 2019 discussion caused DMACC to screen her out from the applicant pool in April. Thus, the district court should have granted a directed verdict on the retaliation claim.

VII. The District Court Abused Its Discretion by Entering Judgment on the Backpay Award.

A. Error Preservation and Standard of Review.

DMACC preserved error through its motion for a new trial. (JA.I-1507-1512). This Court reviews the denial of a new-trial motion for an abuse of discretion. Iowa R. Civ. P. 1.1004. A new trial should be granted when a "verdict fails to administer substantial justice," and a party has not received a fair trial. *White v. Walstrom*, 118

N.W.2d 578, 582 (Iowa 1962).

B. The Backpay Award is Excessive.

Selden's counsel asked the jury to award $127,190.26 in backpay for wage discrimination, for wages Selden claimed she should have earned in the ASA2 position from September 2013 to November 2021, and for $78,874 in backpay for retaliation, for wages Selden claimed she would have earned if she had been promoted, from July 2019 through November 2021. (JA.I-1442[166:7-21], 1443[167:1-19]). Obviously, Selden could not simultaneously hold two full-time positions; if DMACC hired her into the supervisor position (assuming she had the requisite qualifications), she would not have also continued working as an ASA2, and DMACC would not have continued to pay her in that role.

DMACC requested separate lines on the verdict form for each backpay award, but the district court refused, setting out only one line for backpay for both claims. (JA.I-1497). Furthermore, the district court declined to instruct the jury that, if it also found in Selden's favor on the retaliation claim, it should not award backpay damages on the wage-discrimination claim after July 1, 2019, as DMACC

requested. (JA.I-66). Consequently, neither the jury instructions nor the verdict form prohibited overlapping backpay damages.

Selden's counsel took full advantage, telling the jury to just add the two backpay calculations together and award a total of $223,571.60.[25] (JA.I-1443[167:20-23]). The jury awarded that amount precisely. (JA.I-1497). The result is a double-dipped award unsupported by evidence.

Additionally, lost retirement benefits are a component of "actual damages," which are not available for a section 216.6A claim. *See* Iowa Code § 216.15(9)(a)(9); *Dindinger*, 860 N.W.2d at 562 (contrasting the remedy for section 216.6A claims with the "actual damages" available for "any other ICRA claim"); *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 895 (Iowa 1990) (recognizing lost benefits are a component of "actual damages"). Yet the district court permitted the jury to award $10,000 in lost retirement benefits over DMACC's objections. (JA.I-310-312, 132-138, 1497; JA.III-16). After the district court tripled those damages as part of the enhanced remedy,

[25] The sum is actually $206,064.26. (JA.I-1816).

Selden received $30,000 in lost retirement benefits on her strict-liability wage-discrimination claim. (JA.I-1838).

VIII. The Emotional-Distress Award on Selden's Retaliatory Failure-to-Promote Claim is Excessive.

A. Error Preservation and Standard of Review

DMACC preserved error in its motion for a new trial. (JA.I-1507-1511). A new trial on damages should be granted if the verdict is "flagrantly excessive, is so out of reason as to shock the conscience or sense of justice; raises a presumption it is the result of passion, prejudice, or other ulterior motive; or lacks evidentiary support." *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). A verdict is flagrantly excessive when "it goes beyond the limits of fair compensation… and fails to do substantial justice." *Id.*

B. The Emotional-Distress Award Lacks Evidentiary Support.

Emotional-distress awards are "not without boundaries." *Jasper v. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009). Under the ICRA, a verdict is excessive "when uncontroverted facts show that it bears no reasonable relationship to the loss suffered." *Simon Seeding & Sod, Inc. v. Dubuque Hum. Rts. Comm'n*, 895 N.W.2d 446, 472 (Iowa

2017). Expert testimony—or lack thereof—is a consideration in reviewing emotional-distress damages awards under the ICRA. *Id.* (collecting cases). Additionally, the "ICRA does not allow for 'punitive damages' disguised as an award for emotional distress." *Id.*

Here, the district court left the jury's $434,750 emotional-distress award for retaliation undisturbed. Based on the scant evidence in the record, this award is excessive. At trial, the evidence suggesting emotional distress attributable to the retaliation claim was limited to two fleeting references: Selden's testimony that it was "humiliating" to have people ask her why she did not apply for the position and her father saying that she seemed "pretty upset" about not getting an interview. (JA.I-778[165:5-15], 969-970[145:22-146:2]). Further, Selden testified she did not seek any professional medical or mental-health assistance for her claimed emotional distress. (JA.I-814[201:5-23]). And Selden has not been terminated; she continues to work at DMACC today.

Comparing the emotional-distress award in this case to awards in other cases (with more egregious facts) demonstrates the flagrantly-excessive size of the award; as noneconomic damages are

subjective, a comparative analysis of other verdicts provides the only meaningful review. *Jasper*, 764 N.W.2d at 772-73 (ordering remittitur or new trial on $100,000 award) (citing *Kucia v. Se. Ark. Cmty. Action Corp.*, 284 F.3d 944, 948 (8th Cir. 2002) ($50,000 presented "close" question of excessiveness); *City of Hampton v. Iowa Civil Rts. Comm'n.*, 554 N.W.2d 532, 537 (Iowa 1996) (reducing $50,000 award to $20,000 due to "the relatively small amount of evidence supporting the award and the total lack of any medical or psychiatric evidence"); *Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1193 (8th Cir. 2000) ($40,000 "generous" but not excessive where plaintiff suffered involuntary loss of employment)).[26] These awards are a far cry from the $434,750 award in this case.

A new trial should be granted when a verdict results from passion and prejudice. *Goettelman v. Stoen*, 182 N.W.2d 415, 421 (Iowa 1970). Here, the jury awarded more than $1.2 million in emotional-distress damages. (JA.I-1497). While the district court ultimately

[26] *Accord Simon*, 895 N.W.2d at 473; *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067 (8th Cir. 1997); *Shepard v. Wapello Cnty.*, 303 F. Supp. 2d 1004, 1023-24 (S.D. Iowa 2003).

struck those awarded for wage discrimination, the sheer size of the jury's award is indicative of passion and prejudice, especially given the minimal evidence. *See WSH Properties, L.L.C. v. Daniels*, 761 N.W.2d 45, 50 (Iowa 2008) ("[A] flagrantly excessive verdict raises a presumption that it is the product of passion or prejudice"). This Court should accordingly remit the emotional distress award to $10,000 or remand the case for a new trial.

CONCLUSION

As a matter of law, DMACC established that the wage differential between Bryan Tjaden and Sandy Selden is based on facts other than sex, providing a complete defense under Iowa Code section 216.6A. The district court should have directed a verdict in DMACC's favor or granted JNOV. Likewise, the district court should have directed a verdict on Selden's retaliation claim because she failed to prove she met the required qualifications for the supervisor position and offered no evidence of causation.

Alternatively, the district court's legal and evidentiary errors deprived DMACC of a fair trial and prejudiced its substantial rights, mandating a new trial.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellant/Cross-Appellee respectfully request oral argument regarding the issues presented in this appeal.

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Certificate of service and filing

I hereby certify that on March 24, 2023, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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