IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-1291
POLK COUNTY CASE NO. LACL147358

SANDY SELDEN
Plaintiff-Appellee/Cross-Appellant
vs.
DES MOINES AREA COMMUNITY COLLEGE
Defendant-Appellant/Cross-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE SCOTT ROSENBERG

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

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Statutes:
IOWA CODE § 216.6A(b)
IOWA CODE § 216.18.
IOWA CODE § 216.15(9)(a)-(c)

ROUTING STATEMENT

Plaintiff's retaliation claim applies existing legal principals but agrees her wage discrimination claim and recovery thereunder involves issues of first impression, so the case may be retained by the Iowa Supreme Court. *See* IOWA R. APP. P. 6.1101(2)(c).

STATEMENT OF THE CASE

The jury unanimously found that Defendant discriminated against Plaintiff Sandy Selden because of her gender and then retaliated against her because she complained about wage discrimination.

The District Court properly denied Defendant's post-trial motions but erroneously held that Iowa Code section 216.6A does not allow for emotional distress damages for sex-based wage discrimination.

STATEMENT OF FACTS

In 1998, DMACC hired four Administrative Support Analysts (ASAs), three women and one man. They paid them as follows:

Julie Gleason	$30,702
Diane Wood	$35,000
Carole Bebout	$40,000
Bryan Tjaden.	$46,000

ASAs work in the IT Department and support various software programs. Though the ASAs had the exact same job responsibilities, Defendant classified the

women as ASA 1s and Tjaden as an ASA 2. Tr. Ex. A-4, A-10, A-17, A-24 (App. 48-50, 61-63, 76-77, 93-94). Only in 2000 did it reclassify the women as ASA 2s. (T-Day 2, 15:5-17, 15:21-22:20, 107:7-11, 120:21-14) (App. 389-396, 481, 494); Tr. Ex. A-12, A-25, A-26 (App. 69, 95-98, 99). Even then, however, the women were still paid far less than the male. Tr. Ex. E-1AMD, p. 3 (App. 333). And the problem worsened because even while percentage raises were identical, the male worker gained an ever-growing advantage.

DMACC hired Sandy Selden as an ASA 2 in 2013. Sandy had every quality the position desired and more. She had a bachelor's degree, a master's degree, and a certificate in non-profit leadership. (T-Day 3, 99:18-100:3, 100:14-109:19) (App. 712-13, 713-22); Tr. Ex. B-2 (App. 140-57). She had prior experience in higher education, knew both the technical and functional side of IT, and had worked with the specific computer software used by DMACC, a program called Banner. *Id.* In short, she fit the position perfectly.

Defendant hired Sandy at a salary of $70,000. By then, DMACC was paying her colleagues the following amounts:

Julie Gleason	$73,223[1]
Diane Wood	$76,742

[1] Gleason was actually working part-time, making $58,578, but this translates to $73,222.50 for full-time hours.

Carole Bebout $82,048

Bryan Tjaden. $92,449

A few years later, Sandy learned Defendant was paying Tjaden far more money than her. In 2018, Sandy complained to Registrar Rachel Erkkila, Interim Director of Enrollment Services Wade Robinson, and Chief Innovations Officer Karen Stiles. (T-Day 3, 139:8-15) (App. 752). Stiles encouraged Sandy to go to her supervisor, Linda Fiderlick. (T-Day 3, 139:16-140:10) (App. 752-53).

In January 2019, Sandy told Fiderlick she knew DMACC was paying Tjaden more money for the same job and complained about sex-based wage discrimination. (T-Day 3, 141:11-14) (App. 754).

Fiderlick forwarded Sandy's complaint to HR Director Kim Lacey. Fiderlick insisted that if Sandy deserved a raise, the other women did too. Fiderlick also reported that Defendant had given an equity raise to the women back in 2006, after Fiderlick expressed concern at how much more money Defendant was paying Tjaden than his female colleagues.

Behind the scenes and unbeknownst to Sandy, Lacey scrambled to respond. She sent Sandy's complaint to Executive Director of HR Jenifer Owenson and Compliance Officer Carrie Haefner. Eventually, Lacey came up with a sanitized response, which Fiderlick sent to Sandy. Lacey did not attempt to justify the pay disparity other than to say the other ASA 2s had worked there longer. Even though

she knew it wasn't true, Lacey also claimed Defendant didn't give raises other than annually.

Sandy's January 2019 pay complaint caused a flurry of activity but no action. After learning that Sandy was disappointed by Defendant's response, Lacey emailed Owenson, saying, "hopefully no more will come of this."

A few months later, Fiderlick retired, and her position opened. Sandy applied. None of the other ASA 2s applied, though they supported Sandy. (T-Day 2, 20:8-18) (App. 394); (T-Day 3, 143:13-144:16) (App. 756-57). Fiderlick also supported Sandy, believing she was fully qualified for the promotion. (T-Day 3, 145:8-13) (App. 758).

Sandy was an ideal candidate. She had excelled at her job, becoming a go-to person for both supervisor and coworkers. At this point, Sandy had worked in higher education for 22 years, worked with Banner for 17 years, and worked for DMACC six years. Sandy had also taken additional computer language courses and had been teaching computer science courses as a DMACC adjunct professor for three years. (T-Day 3, 145:14-148:8, 155:14-21) (App. 758-61, 768); Tr. Ex. C-10 (App. 227-28).

But Defendant didn't hire Sandy. Lacey, the same person who received Sandy's pay complaint, screened Sandy out so the hiring committee could not even review her application. Defendant ultimately hired Mike Jocic, who had never

worked for DMACC. Jocic held a bachelor's degree in management, had worked in higher education for 18 months, and had never worked with Banner.

On May 29, 2019, Sandy visited Owenson. She complained again about pay inequity. She mentioned her previous complaint, unaware that Owenson already knew about it. Sandy also expressed concern about not being interviewed for the Supervisor position. Afterwards, Owenson emailed Lacey that they needed to discuss "the Sandy Selden issue."

Sandy learned that the pay disparity between her and Tjaden was in large part due to a disparity in how their starting salaries compared to the salary range for the position. Defendant's policy said that new hires should start at the low end of a pay scale. Nevertheless, Defendant hired Tjaden at 54% of the salary range and hired Sandy at just 15% of the salary range.

Despite Sandy's internal complaints in 2018 and 2019, her civil rights complaint, her lawsuit, and a unanimous jury verdict in her favor, *Defendant has still not taken any steps to fix the pay disparity*. (T-Day 3, 162:22-163:16) (App. 775-76).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S REJECTION OF DEFENDANT'S AFFIRMATIVE DEFENSE

Plaintiff agrees Defendant preserved error on this issue.

"When considering a motion for judgment notwithstanding the verdict, the district court must view the evidence in the light most favorable to the party against

whom the motion is directed." *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 617 (Iowa 1990); *see also Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010).

Defendant agrees Sandy proved every element of her case and cannot win its appeal by pointing to a lack of evidence on Sandy's side. To overturn the will of the jury, Defendant must show it proved its affirmative defense as a matter of law. The "problem with [Defendant's] argument is that it is fact-driven, and it is a rare case when a party proves its defense as matter of law." *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 860-61 (Iowa 2001)

So long as there was "sufficient evidence to generate a jury question" on Defendant's defense, Defendant's appeal must be denied. *See Konicek*, 457 N.W.2d at 617.

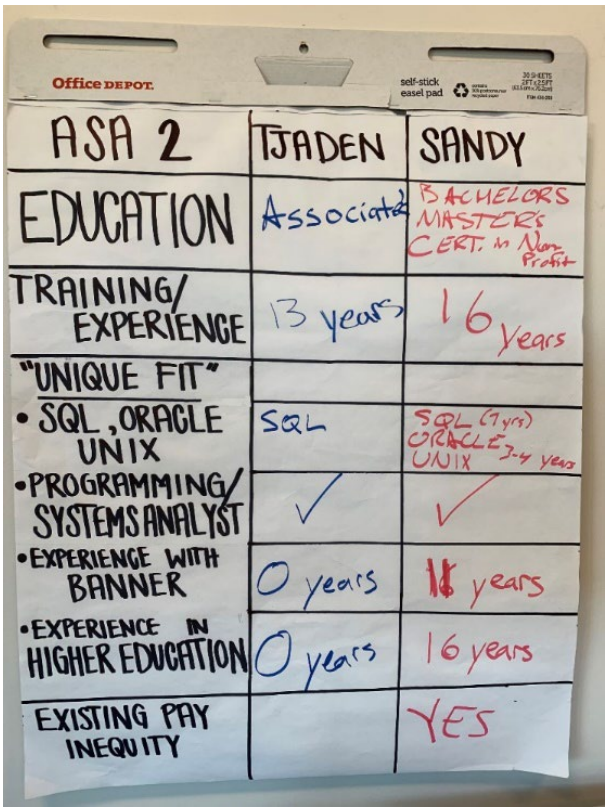
A. DMACC FAILED TO PROVE THE WAGE DIFFERENTIAL WAS BASED ON A FACTOR OTHER THAN SEX

The "factor other than sex" exception requires that sex play no role in the wage differential. *Hodgson v. Sec. Nat. Bank of Sioux City*, 460 F.2d 57, 59 (8th Cir. 1972). Defendant attempted various arguments to convince the jury that gender was not a factor, but all fell flat.

B. DEFENDANT DID NOT PROVE DIFFERENCES IN QUALIFICATIONS EXPLAINED THE HIRING RATE DISPARITY

"To counter a prima facie case, an employer must prove 'not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.'" *Rizo v. Yovino*, 950 F.3d 1217, 1223 (9th Cir. 2020) (citing *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018) (emphasis in original)). "[T]he burden of proving that a factor other than sex is the basis for a wage differential is a heavy one." *Brennan v. Owensboro-Daviess County Hosp.*, 523 F.2d 1013, 1031 (6th Cir. 1975); *Rizo*, 950 F.3d at 1228 (employer "failed to carry its heavy burden to establish, as a matter of law, that it is entitled to the affirmative defense").

Defendant's hiring policy says it may offer a salary above the midpoint of the hiring range (an "advanced rate") "if warranted by education, training and/or experience which exceeds or uniquely meets the minimum requirements of the job." Ex. F-4, p. 1 (App. 368-70). Defendant argues Tjaden's "superior" experience justified his initial pay rate of 54% of the pay scale. D. Br. 49. It was the jury's job to compare the qualifications Tjaden and Sandy possessed when they were hired against the qualifications DMACC said it was seeking:



This demonstrative exhibit was filled out in front of the jury based on live testimony.[2] There was no category in which Tjaden's qualifications exceeded Sandy's, and for most categories, the opposite was true.

Beyond failing to show Tjaden had some quality Sandy lacked, Defendant never proved it gave him an advance rate because of his experience. *See Rizo*, 950 F.3d at 1223; *Brennan v. Cherokee State Bank*, 1974 WL 264,

[2] Defendant claims "DMACC assessed Sandy's prior relevant experience as 5-7 years." D. Br. 24, 48. However, the conclusion lacks foundation because the witness on whose testimony DMACC relies had no personal knowledge about how Sandy's credentials were assessed by her hiring committee. T-Day 5, 195:15-22 (App. 1273).

at *4 (N.D. Iowa May 22, 1974) (employer failed to prove that male's experience and education justified the pay differential). None of Defendant's witnesses could say why Defendant first decided to pay Tjaden more than Sandy. (T-Day 2, 227:13-16) (App. 601) (Linda Fiderlick); (T-Day 3, 55:17-20) (App. 668) (Bryan Tjaden); (T-Day 3, 15:3-8) (App. 628) (Kim Lacey); (T-Day 4, 17:8-20) (App. 842) (Jenifer Owenson); (T-Day 4, 92:3-11) (App. 916) (Mark Clark); (T-Day 5, 96:2-5) (App. 1187) (Erica Spiller); (T-Day 5, 185:15-23, 188:3-10, 195:15-22) (App. 1263, 1266, 1273) (Carrie Haefner). Because Defendant's witnesses denied having personal knowledge of what factors went into Tjaden's salary, they could not opine, guess, or speculate about why he was paid more. *See* IOWA R. EVID. 5.602.

DMACC's policies for hiring rates are intended to be objective to prevent discrimination, and courts have long held that an employer's failure to follow its policies may indicate a discriminatory motive. *See Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1024 (8th Cir. 1998); *Floyd v. Missouri Dept. of Soc. Serv*, 188 F.3d 932, 937 (8th Cir. 1999); *Davis v. Wisconsin Dept. of Corr.*, 445 F.3d 971, 977 (7th Cir. 2006). Defendant's pay grades are intended to determine compensation over the course of an employee's career: the employee starts at the beginning and hopefully reaches the top of the pay grade at the end of their career. (T-Day 3, 7:8-22) (App. 620); (T-Day 5, 154:18-155:6) (App. 1233-34); Tr. Ex. F-4 (App. 368-70). The problem was not the pay range itself; the problem was that Defendant gave the male employee a huge head start over his female colleagues. Defendant's policy may be *facially* neutral,

"however, as applied [to Tjaden] it is not a valid defense because it was applied in a discriminatory fashion." *Marshall v. J. C. Penney Co., Inc.*, 464 F. Supp. 1166, 1195 (N.D. Ohio 1979) (cleaned up).

C. SUBSTANTIAL EVIDENCE SQUISHED DEFENDANT'S "Y2K BUG" THEORY

Defendant speculates the Y2K crisis "necessarily bore on the starting salaries offered" and impacted DMACC's hiring needs and decisions. D. Br. 50-53. This argument is stated with far more certainty than in Defendant's JNOV motion, where it argued that "a reasonable factfinder *could infer*" that the labor market impacted its decisions. Defendant's newfound confidence is undermined by its own witnesses, who testified Y2K had no impact on its hiring decisions in 1998 (when Tjaden and the other women were hired). Tjaden testified Y2K never came up in his interview. (T-Day 2, 105:10-106:4) (App. 479-80). Fiderlick helped hire Tjaden and confirmed that Defendant was <u>not</u> worried about Y2K:

> Q. You weren't hiring any of them because you were worried about Y2K, were you?
>
> A. No.

(T-Day 2, 236:3-5) (App. 610).

The Y2K crises involved computer systems and older, legacy software installed "back in the 60s." (T-Day 2, 105:10-106:13) (App. 479-80); (T-Day 5, 18:18-22:14) (App. 1109-13). DMACC's Banner Software was installed in 1995,

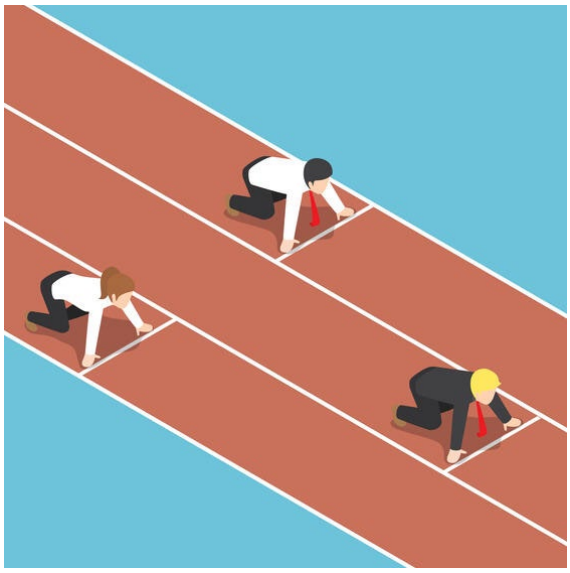
making it insusceptible to any Y2K glitches. (T-Day 2, 105:10-106:13) (App. 479-80).

Defendant's only support is testimony from Compliance Offer Haefner and expert economist Jon Guryan. Haefner did not work at DMACC in 1998 and had no idea whether Y2K affected the college, but admitted no one's file mentioned Y2K. (T-Day 5, 187:22-188:10) (App. 1265-66). Guryan had no clue what software DMACC used and admitted he could not say what actually influenced Defendant's hiring decisions. (T-Day 5, 32:22-24, 33:4-18) (App. 1123, 1124).

D. "LONGEVITY;" THE RED HERRING OF TRIAL AND THIS APPEAL

Defendant argues that Tjaden's years of employment with DMACC justified the pay differential. Guryan's ultimate conclusion was that Tjaden was paid more money because "the fact that DMACC gives the same . . . percentage raise to all of the application support analysts … [and] that Tjaden had worked at DMACC for 15 years before Ms. Selden got there and had received substantial raises over that period of time." (T-Day 5, 31:15-25) (App. 1122). Again, this is no help in explaining the disparity in *hiring rates*, something Guryan never analyzed. (T-Day 5, 36:22-25) (App. 1127); (T-Day 5, 39:7-15) (App. 1130). Everyone agreed tenure could not impact employees' hiring rates. D. Br. 47-50. The whole point in isolating hiring rates was to account for Tjaden's longevity and ***eliminate it*** as a possible explanation for the pay disparity.

Sandy's claim was not about tenure, it was about an illegal disparity in hiring rates. The massive head start Defendant gave to the male ASA ensured that he would win every race from then on out.



E. POLICIES, NOT SUPERVISORS, GOVERN HIRING DECISIONS AT DMACC

Defendant says different supervisors hired Sandy and Tjaden. D. Br. 33, 62-63. But the evidence showed compensation decisions at DMACC are governed by policies, not individuals, to ensure similar and equitable decisions regardless of supervisor. (T-Day 3, 7:8-22; 42:11-15) (App. 620, 655); (T-Day 4, 20:25-21:16) (App. 845-46); (T-Day 5, 218:15-23) (App. 1296); Tr. Ex. F-2 (App. 345-67); Tr. Ex. F-4 (App. 368-70).

Defendant claims to know how Hiring Supervisor Art Phares "felt" about Tjaden's qualifications back in 1998. D Br. 21; (T-Day 3, 64:13-19; 68:4-9) (App. 677, 681). But Phares was not a trial witness, nor was he ever identified in discovery

as someone with knowledge. Defendant's affirmative defense could not have been proven by "evidence" Defendant never offered. Although Phares wrote a written not about Tjaden's salary, but it was *not* a "request for an advanced rate," as the policy required. Instead, the note Phares wrote regarding Tjaden's pay was nearly identical to one he wrote for Diane Wood:

The PAN for Bryan Tjaden requests an annual salary of $46,000. This is the salary that Bryan indicated he would require to leave his present position. This salary is requested because of the skills that Bryan would bring to this position.

Bryan has an associates degree in computer programming and 13 years of experience in information systems. He has a strong technical background and the interpersonal and communication skills that this position requires.

Bryan would be a strong addition to the staff of the Information Systems department and would fit nicely into the role of supporting the student services staff.

(Tr. Ex. A-4, p. 3) (emphasis added) (App. 50).

The PAN for Diane Wood requests an annual salary of $35,000. This salary is requested because of the skills that Diane would bring to this position.

Diane has an BS from Iowa State graduating with a GPA of 3.38. For the past five years she has worked at Drake University in the computer department as the academic services coordinator. Her experience in an educational environment dealing with software installation and web applications should prove to be a valuable asset to DMACC.

On the Programmer Aptitude test, Diane scored a perfect 100% - the only candidate to do so.

Diane will be a strong addition to the staff of the Information Systems department and will fit nicely into the role of supporting the Financial Aid department in their use of Banner.

(Tr. Ex. A-10) (emphasis added) (App. 61-63). Haefner admitted that Wood's note was not a request for an advanced rate. (T-Day 5, 215:20-216:11) (App. 1293-94). If Wood's was not, then neither was Tjaden's.

F. DEFENDANT CANNOT RELY ON MARKET FORCES OR PRIOR SALARY AS A FACTOR OTHER THAN SEX

Defendant argues "the market" demanded that it pay Tjaden a higher salary than Plaintiff and the other women. But the Eighth Circuit and U.S. Supreme Court have explicitly held that market forces cannot be considered a factor other than sex. *See Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 424 (8th Cir. 2017); *Corning Glass Works v. Brennan*, 417 U.S. 188, 205-06 (1974) ("Congress declared it to be the policy of the Act to correct" the "unfair employer exploitation of this source of cheap labor"); *Glenn v. Gen. Motors*, 841 F.2d 1567, 1570 (11th Cir. 1988) (supply and demand excuse perpetuates the kind of evil that the EPA was designed to eliminate); *Rizo v. Yovino*, 887 F.3d 453, 466-67 (9th Cir. 2018), *vacated on other grounds*, *Rizo v. Yovino*, 139 S.Ct. 706 (2019); *Dindinger v. Allsteel, Inc.*, 2016 WL 7426580, at *3 (S.D. Iowa Jan. 4, 2016), *aff'd in part, remanded in part*, 853 F.3d 414 (8th Cir. 2017); *Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003) ("it is important to ensure that employers do not rely on the prohibited 'market force theory' to justify lower wages for female employees").

Even if there was some gender-neutral reason to look at the market, Defendant failed to prove it was actually a factor. The existence of any market demand factor (apart from sex) would have benefitted the women hired at the same time as Tjaden. (T-Day 5, 35:1-4) (App. 1126). Yet they were hired at rates far less than him. So either market forces were not at play, or they were used to benefit only the male. The *Dindinger* court approved a jury instruction saying the defendant could

not rely on market factors because it failed to present any evidence that economic conditions caused the pay differential. *Dindinger*, 853 F.3d at 423-24.

Defendant's notes reference Tjaden's prior salary, but Defendant does not attempt to defend Tjaden's hiring rate on this ground—for good reason since prior salaries have been routinely held to be an impermissible justification. *Glenn*, 841 F.2d at 1570-71; *Rizo*, 950 F.3d 1217, 1219 (9th Cir. 2020) (reliance on "prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate"); *White*, 321 F.3d at 718 ("it is important to ensure that reliance on past salary is not simply a means to perpetuate historically lower wages").

Defendant's last gasp argument was that its hiring needs in 1998 "necessarily bore on the starting salaries." This again departs from Defendant's JNOV stance that hiring needs "could" explain the pay gap. D. Br. 50. Either way, Defendant failed to prove it had any "urgent need" justified the disparities in hiring rates. *See Rizo*, 950 F.3d at 1222. Defendant presented ***zero evidence*** that it offered Tjaden an elevated hiring rate due to some "urgent need." In fact, the evidence showed the opposite. Tjaden appears to have been one of the first, if not the first, person to apply for the job, and his hiring documents make no reference to an urgent need. (T-Day 3, 212:17-19) (App. 825). Defendant relies on Guryan for its "market forces" theory, but Guryan could not even say how confident he was in his position, telling the jury "you all can judge for yourself about how confident you should be based on exactly what I showed." (T-Day 5, 43:10-44:17) (App. 1134-35).

In closing argument, Defendant emphasized that Tjaden's 1998 job posting said they wanted someone "as soon as possible." (T-Day 5, 182:10-13; Ex. A-2) (App. 1260). However, the posting for Sandy's job in 2013 said the same thing. Ex. B-1 (App. 138-39).

In short, there was a multitude of evidence (and a lack thereof) from which the jury could have rejected Defendant's capricious theories. Defendant admits this case came down to factual disputes. D. Br. 64 (saying the jury "bought Selden's theory wholesale").

The point of the jury is to resolve those disputes, and they have been resolved.

II. THE JURY PROPERLY DETERMINED DEFENDANT'S DISCRIMINATORY PRACTICE

Defendant did not preserve error that comparing hiring rates within pay scales is "not a pay practice regulated under Section 216.6A" or that Plaintiff "challenges a pay practice outside the scope of the governing statute." Defendant's objections were whether Plaintiff could *calculate damages* by comparing hiring rates. Defendant also did not preserve error on its claim that Plaintiff failed to administratively exhaust her administrative remedies. Plaintiff agrees Defendant preserved error on its other arguments.

A. COMPARING HIRING RATES IS NOT A "NOVEL THEORY"

Defendant's accusation that Plaintiff "concocted a novel theory, which was revealed to DMACC's counsel two weeks before trial" is unfair and untrue. *See* D.

Br. 31. Plaintiff's initial settlement offer (sent nearly 18 months before trial) used hiring rates to calculate damages. Plaintiff also calculated damages by comparing hiring rates in her Interrogatory Answer served almost a year before trial.

Defendant tries to make wage discrimination claims far more complex than they are or need to be. Courts and juries have always been tasked with determining pay differentials in different scenarios. Calculating damages in wage discrimination cases involves just two steps: (1) identify the "discriminatory practice" and (2) calculate the wage differential caused by that practice. *See* IOWA CODE § 216.15(9)(a)(9). 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." IOWA CODE § 216.6A.

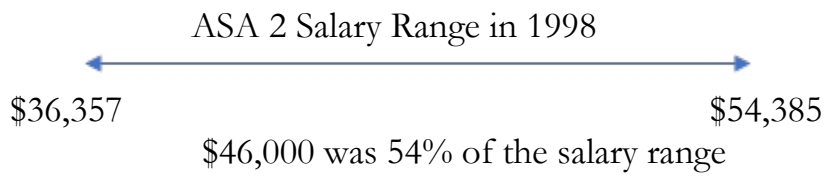
The law's broad definition of a "discriminatory practice" recognizes that wage discrimination occurs in a broad range of circumstances. For instance, discrimination may result from offering men a higher sales commission than women, s*ee Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1026 (6th Cir. 1983), or from allowing certain men to continue receiving a night shift wage differential initially available to only men. *See Corning Glass*, 417 U.S. at 188.

Paying men a higher starting wage than women or women a lower starting wage than men is obviously discriminatory. Because a discriminatory practice occurs

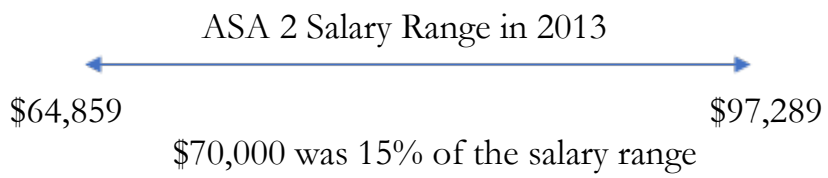
"when an individual is affected by application of a discriminatory pay decision," the law contemplates comparing hiring rates for employees hired at different times. Contrary to Defendant's claim, comparing hiring rates and where they fall on a salary scale is nothing new. *See, e.g., Hodgson*, 460 F.2d at 58 (analyzing starting rates for women compared to men across a period of six years); *Marshall*, 464 F. Supp. at 1181, *amended*, 1979 WL 179 (N.D. Ohio Mar. 26, 1979) (comparing hiring rates and salaries at various dates). Employers often compare hiring rates within pay rates to ensure equity. *See EEOC v. Reichhold Chemicals*, 988 F.2d 1564, 1567 (M.D. Ala 2014); *Cooper v. United Airlines, Inc.*, 82 F. Supp. 3d 1084, 1103 (N.D. Cal. 2015). Comparing hiring rates can sometimes be complicated by non-discriminatory factors like inflation or employees having varying years of service. That dilemma is solved by comparing starting salaries *within the applicable pay scale.*

Each job at DMACC has a minimum and maximum salary. Both ends of the salary range for the ASA 2 job have increased over time, so the only way to compare starting salaries fairly is to pinpoint how they ranked on the salary range that applied at the time of hire. "The 'penetration range' is the position of a salary within the pay range in relation to the minimum and maximum of that range." *Ledbetter v. Alltel Corp. Servs., Inc.*, 437 F.3d 717, 725 n.1 (8th Cir. 2006). This widely accepted metric to ensure pay equity is calculated by subtracting the range minimum from the salary and dividing that number by the range minimum subtracted from the range maximum.

Despite Defendant's policy that new hires should start at the low end of a pay scale, Defendant hired Tjaden at 54% of the salary range. It hired Sandy at just 15% of the salary range.



(Tr. Ex. E-1AMD) (App. 331-34).



(Tr. Ex. E-1AMD) (App. 331-34).

Following the same model, the court in *Marshall* analyzed male and female employees' starting pay within their pay scale across a nine-year period. *Marshall v. J. C. Penney Co., Inc.*, 464 F. Supp. at 1183. The court found a discriminatory "hiring rate disparity," which it used to calculate the wage differential. *Id.* at 1189. In *Ledbetter*, 437 F.3d at 724-25, the Eighth Circuit affirmed a trial court's calculation of lost wages using the same principles.[3]

Defendant claims Iowa law requires a wage differential be calculated solely by comparing "wages actually paid" at the time of trial. D. Br. 59. This would make

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[3] The court found that, but for race discrimination, the plaintiff would have been promoted and started with a salary equal to 26% of the range. *Id.* at 724.

it impossible to account for and eliminate independent variables, such as differences in tenure. In Defendant's ideal world, equal pay claims would be available only to workers hired on the very same day as their comparator.

Defendant's argument also contradicts its expert, who testified wage differentials between two employees can generally be explained by four things: (1) differences in the size of raises; (2) differences in the number of raises; (3) differences in their starting pay; or (4) discrimination. (T-Day 5, 16:21-17:9, 39:2-6) (App. 1107-08, 1130). Here, Tjaden and Sandy received the same number and percentage of raises during their overlapping employment, eliminating the first two explanations. That leaves starting pay and discrimination. But one cannot simply compare Sandy's 2013 starting salary to Tjaden's in 1998 because all wages have risen over time. (T-Day 5, 19:11-20:17) (App. 1110-11). The only way to compare apples to apples is to compare each employee's starting pay in light of the salary range Defendant had adopted at the time.

Comparing Sandy's and Tjaden's hiring rates within applicable pay scales was the simplest and clearest way to identify the discriminatory practice. Defendant has specific hiring rate policies and specific rules for deviating from those policies. *See* Tr. Ex. F-4 (App. 368-70). These policies, consistent in ink (if not application) from 1998 to 2013, provided the perfect way to compare Sandy and Tjaden.

Even if Sandy had used Defendant's theory of comparing Sandy's and Tjaden's salaries at the time of trial, we would have ended at the same conclusion—

albeit less precisely. To eliminate all non-discriminatory factors, Plaintiff would have to compare her 2013 salary to Tjaden's 2013 salary, then reduce Tjaden's 2013 pay by his 15 additional raises, leaving the jury to compare starting salaries.

III. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S DETERMINATION THAT DEFENDANT'S VIOLATIONS WERE WILLFUL

After rejecting Defendant's affirmative defense, the jury was tasked with deciding whether Defendant's sex-based wage discrimination was willful. *See* Instruction 14. There was substantial evidence supporting the finding that it was.

- Defendant knew that all the female ASAs were making far less than the male ASA.
- In 1998, Defendant classified the female ASAs at pay grade A5, but the male ASA performing the same job duties at A6.
- In 2000, Defendant raised the females to pay grade A6, but failed to raise their wages even though Tjaden was making 67.5% of the salary range compared to Bebout (37.3%), Wood (6.6%), and Gleason (0%). Tr. Ex. E-1AMD, p. 3 (App. 333).
- Fiderlick went to Human Resources in 2006, concerned the women were still being paid less than Tjaden to do the same job. (T-Day 2, 177:5-18)

(App. 551). Defendant did not fix it, instead giving small adjustments to only Gleason and Wood.[4] (T-Day 2, 178:13-17) (App. 552).

- Defendant took no action to fix the pay differential after Sandy's complaints in 2018 and 2019.
- Defendant took no action to fix the pay differential even after Sandy's civil rights complaint, lawsuit, jury verdict, and judgment.
- Although Defendant's policies allowed raises to remedy internal pay disparities, Defendant repeatedly chose not to fix the problem. (T-Day 4, 20:25-21:16) (App. 845-46).

In *Perdue v. City University of New York*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998), a jury found the employer willfully violated the EPA. In denying JNOV, the court noted the public employer reviewed and approved salaries, so the "jury could have appropriately concluded that [the employer] was aware of the salary discrepancies." *Id.* at 335. Viewing the evidence in the light most favorable to the jury's finding, the

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[4] Defendant is not entitled to any assumption that any minor pay adjustment demonstrated any *lack* of bad faith. Defendant vehemently denied any connection between the "equity increases" and remedying discrimination and an employer does not deserve any credit even for "steadily decreasing a sex-based disparity. The statute contemplates that discriminatory behavior will immediately be corrected." *See Reichhold*, 988 F.2d at 1571 n.5.

jury properly found that when Defendant decided what to pay Sandy in 2013, it was fully aware of its ongoing discriminatory hiring rates.

Defendant also argues Sandy could not have proven willfulness because there was no evidence that anyone on her hiring committee discriminated against her. But Sandy's case was based on ***DMACC's*** discriminatory practice in paying Tjaden a higher starting rate than her. To the extent Fiderlick's involvement was relevant, it supported that, just like in 2006 and late in 2019, Fiderlick advocated (albeit unsuccessfully) for higher pay for the female ASA 2s.

In taking on the responsibility of proving willfulness, Sandy may have gone ***above*** what the law requires. The law provides for triple damages "in instances of willful violation," but does not clearly state whose burden it is to prove willfulness. IOWA CODE § 216.15(9)(a)(9)(b). Damages in federal EPA claims are liquidated *unless the employer* can show good faith. *See* 29 U.S.C. § 260. DMACC never pleaded good faith and never requested a good faith instruction, and so has waived any such argument.

The jury could not return a verdict for Sandy just because they "might disagree with the Defendant's decision or believe it to be harsh or unreasonable." Final Jury Inst. No. 22. (App. 1488). Knowing this, the jury found Defendant had failed to prove the wage differential was explained by a "factor other than sex," **and** that DMACC's actions were willful. *See* Final Jury Inst. Nos. 13, 14 (App. 1477,

1478); *Brown v. Fred's, Inc.*, 494 F.3d 736, 743 (8th Cir. 2007) (upholding finding of willfulness).

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN DECIDING EVIDENTIARY ISSUES

Defendant preserved error on this issue.

A. PLAINTIFF'S METHOD OF CALCULATING SANDY'S DAMAGES WAS NOT NOVEL, MISLEADING, OR UNFAIRLY PREJUDICIAL

The jury's next job was to value the harm Defendant's discriminatory decisions caused. Defendant's pay scales provided an accurate method to calculate this differential, no speculation required. Defendant failed to justify its decision to give Tjaden a starting salary at 54% of the pay scale compared to hiring Sandy at just 15%. The 39% difference was the "wage differential," and then it was basic math to calculate what Sandy would have earned had she started off on the same place on the salary scale as Tjaden.

Defendant's argument that Plaintiff's wage differential calculation was inadmissible relies entirely on its argument that it proved its affirmative defense, which it did not. If Defendant had applied its hiring rate policy equally and equitably, it would not have violated the law.

If Defendant did not like Plaintiff's calculation, it should have presented the jury with something different. *See Bertroche v. Mercy Physician Assocs., Inc.*, 2019 WL 4307127, at *10 (N.D. Iowa Sept. 11, 2019) (finding "the deficiencies defendant has

alleged would be more properly addressed through vigorous cross examination and presentation of contrary evidence than through exclusion of … calculation, opinions, or testimony"). Defendant never offered an alternative way to calculate Sandy's damages or an alternate number for back pay.

B. EVIDENCE OF EMOTIONAL DISTRESS WAS NOT UNFAIRLY PREJUDICIAL

Defendant next argues that, although the District Court vacated the jury's emotional distress award based on sex-based wage discrimination, it was abuse of discretion to even allow the testimony. Defendant takes the District Court to task for "fail[ing] to instruct the jury that any emotional-distress damages must be directly related to the conduct associated with each claim." D. Br. 67. Defendant never made that argument at the District Court level, so has not preserved it for appeal.

Regardless, the Court *did* instruct the jury to award items of damages separately and for those items of damages not to overlap:

FINAL INSTRUCTION NO. 23

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage.

Inst. No. 23 (App. 1489). The verdict form also directed the jury to differentiate the emotional distress caused by each claim with different lines on the verdict form. Any possibility of prejudice on account of the testimony about emotional distress was eliminated when the district court vacated that award.

V. DEFENDANT IS NOT ENTITLED TO A NEW TRIAL

Plaintiff agrees Defendant preserved error. The Court reviews the denial of amotion for new trial "for a 'clear' abuse of discretion, with the key question being whether a new trial is necessary to prevent a miscarriage of justice." *Dindinger*, 853 F.3d at 421.

A. EVIDENCE ABOUT THE OTHER FEMALE ASAs WAS ADMISSIBLE AND NECESSARY TO PROVE WILLFULNESS AND REBUT DEFENDANT'S AFFIRMATIVE DEFENSE

In *Dindinger*, the jury heard evidence of the employer's pay decisions concerning five other women across a 13-year period. *Id.* at 424. The employer argued the evidence should have been excluded because some of the women worked at different times, in different jobs, and for different supervisors. *Id.* The Eighth Circuit rejected this argument. After noting that other acts evidence "should normally be freely admitted at trial," the court held the evidence was specifically relevant to rebut the employer's "factor other than sex" affirmative defense. *Id.* at 424-25. The evidence was also "probative of whether Allsteel willfully violated the Iowa Civil Rights Act or Equal Pay Act." *Id.* at 426.

Sandy used her evidence in the exact way approved by *Dindinger*. Defendant claimed Tjaden's "longevity" justified the hiring pay disparity. Evidence that three women hired with Tjaden did not similarly benefit from their longevity was obviously relevant to this defense. Defendant argued circumstances in 1998 justified

the hiring rate disparity between Tjaden and Sandy. Evidence that Bebout, Wood, and Gleason have all been doing the same job as Tjaden for the same amount of time, and yet all are paid less, directly refutes that defense. (T-Day 2, 7:14-19, 111:5-13, 118:13-119:6, 148:19-149:1) (App. 381, 485, 492-93, 522-23).

Defendant argued Tjaden's 13 years' IT experience and an associate's degree justified an advanced hiring rate. (T-Day 2, 48:4-12) (App. 422); Tr. Ex. A-1 (App. 17-21). Plaintiff was entitled to rebut that argument with evidence that the women had comparable qualifications but were all paid less. Bebout had nine years' experience and a bachelor's degree. (T-Day 2, 9:2-21) (App. 383); Tr. Ex. A-22 (App. 88-91). Wood had a bachelor's degree, experience with higher education, and scored 100% on the programmer aptitude test. (T-Day 2, 115:11-116:14) (App. 489-90); Tr. Ex. A-10 (App. 61-63). Gleason had 10 years' IT experience, an associate's degree, and a bachelor's degree in computer science. (T-Day 2, 150:20-151:19) (App. 524-25); Tr. Ex. A-15 (App. 70-73).

Plaintiff used evidence of the hiring rates, the reclassification in 2000, and the 2006 equity pay adjustments to prove Defendant's violations were willful. *See Dindinger*, 853 F.3d at 426; JNOV Order, p. 14 (Selden introduced the information partially to establish that DMACC had a known pattern of gender wage discrimination, but nonetheless took no action to correct it.").

B. EVIDENCE OF PEDRO NAVARRO'S HIRING WAS IRRELEVANT AND UNFAIRLY PREJUDICIAL

Evidence that Defendant hired Navarro was post-lawsuit conduct. Any slight probative value was outweighed by the danger of unfair prejudice, confusion, and a waste of the jury's time.

This lawsuit was filed on February 25, 2020. Almost exactly one year later, Defendant hired Pedro Navarro, a male Application Support Analyst 2 at an annual salary of $80,000. Before trial, Defendant argued it could not have discriminated against Plaintiff because it hired Navarro at a lower percentage of the salary range. D. Br. pp. 71-73. The court ultimately excluded evidence of Navarro's hiring as it "would not undo or otherwise erase whatever grievances Selden suffered." JNOV Order, p. 21-22. It had no bearing on why Defendant gave Tjaden an advanced hiring rate compared to Sandy or whether Defendant acted willfully back in 2013.

Evidence about Navarro's hiring was also inadmissible because Defendant's hiring decisions occurred while this case was being actively litigated. An employer's supposed "good faith" post-lawsuit conduct is "rarely" relevant: "Given the obvious incentive in such circumstances for an employer to take corrective action in an attempt to shield itself from liability, it is clear that nondiscriminatory employer actions occurring subsequent to the filing of a discrimination complaint will rarely even be relevant as circumstantial evidence in favor of the employer." *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1561 n.17 (9th Cir. 1994); *see also Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1377 n.36 (5th Cir. 1974).

"In a long line of Title VII cases, other circuits have recognized that the fact that improvements or advancements undertaken after lawsuits have been initiated drastically reduces the probative value of such evidence." *Gonzales v. Police Dep't, City of San Jose*, 901 F.2d 758, 761 (9th Cir. 1990). "Curative measures simply do not tend to prove that a prior violation did not occur." *Id.* at 762; *see also Hodgson v. Am. Bank of Comm.*, 447 F.2d 416, 421 (5th Cir. 1971) (finding the employer was not immune from liability simply because it eventually paid a few women the same as men); *Shaw v. Titan Corp.*, 1998 WL 277045, *1, 2 (4th Cir. 1998) (employer added a white male to a reduction in force as a "sacrificial lamb" to try and offset the layoff of minority employees); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 561 (10th Cir. 1996) (plaintiff's replacement was chosen in order to be a defense against age discrimination and to ward off threatened discrimination suit); *Redford v. KTBS, LLC*, 135 F. Supp. 3d 549, 561 (W.D. La. 2015) (denying summary judgment to employer who fired white male on the same day as it fired black woman to make it seem like she was fired for a legitimate reason unrelated to her race and sex).

It would have been misleading for Defendant to argue to the jury that actions it undertook ***after*** Plaintiff's lawsuit showed that its decisions eight years earlier were not discriminatory. Irrelevant, post-suit testimony tends to confuse jurors and distract them from the determinative issue of whether Defendant could justify the hiring rate disparity. The question is **not** whether Defendant's treatment of women as a whole has been comparable to its treatment of men as a whole. Treating one

man unfairly does not cancel out one instance of sex discrimination against a woman. *Marshall*, 464 F. Supp. at 1193Civil rights are the birthright of individuals—not classes of people. *See Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978); *see also Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579 (1978) (a racially balanced workforce does not immunize employer from liability for specific acts of discrimination). Simply because a company changes its stripes and improves its EEO practices does "not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it." *Int'l Bro. of Teamsters v. U.S.*, 431 U.S. 324, 341-42 (1977).

The timing of Navarro's compensation decision "eliminate[s] any probative value the evidence might otherwise have." *Chuang v. Univ. of Calif. Davis*, 225 F.3d 1115, 1129 (9th Cir. 2000). In remanding the case for trial, the *Chuang* court instructed the trial judge to exclude "evidence of Davis's post-complaint hiring of Asian-American professors, unless the university can prove that it made its hiring decisions before it became aware that the Chuangs intended to pursue their complaints." *Id.* at 1130.

Defendant has stressed repeatedly that the relevant question for the jury was whether Plaintiff was paid differently than Tjaden, making its insistence that Navarro's hiring rate was relevant ring hollow.

Defendant also fails to disclose that it used the admissibility of other acts evidence to full effect. The district court allowed Defendant to introduce several

instances of female employees being hired at advanced rates and hired at higher rates than male employees. (T-Day 3, 67:13-22) (App. 680); (T-Day 5, 176:11-19, 177:17-24, 178:21-25, 179:5-15) (App. 1254-57).

The relevant issue for the jury was Defendant's pay practices at the time it hired Tjaden and at the time it hired Plaintiff. Talking about pay decisions that occurred eight years later during litigation was properly excluded as irrelevant, unfair prejudicial, confusing, and a waste of time.

VI. THE RECOVERY PERIOD FOR DAMAGES UNDER SECTION 216.6A IS THE ENTIRE PERIOD OF DISCRIMINATION

Plaintiff agrees Defendant preserved error on this issue.

A. THE PLAIN LANGUAGE OF THE STATUTE ALLOWS RECOVERY FOR THE ENTIRE PERIOD OF THE VIOLATION

If the "'text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction.'" *Commerce Bank v. McGowen*, 2021 WL 935002, at *3 (Iowa Mar. 12, 2021) (*quoting In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996)); *see also State v. Richardson*, 890 N.W.2d 609, 616 (Iowa 2017) ("If the language is unambiguous, our inquiry stops there."). There is nothing ambiguous about the limitations period set forth in section 216.15(9)(a)(9)(a)-(b). While the two subsections include a different wage multiplier depending on the employer's willfulness, both calculate the wage differential "for the period of time for which the complainant has been

discriminated against." IOWA CODE § 216.15(9)(a)(9)(a)-(b). (emphasis added). This Court has already held that this language allows "the employee to recover for the entire period of discrimination." *Dindinger v. Allsteel, Inc.,* 860 N.W.2d 557, 572, n.7 (Iowa 2015).

Defendant's theory that damages under 216.6A go back just 300 days directly contradicts the plain language of the statute and binding Supreme Court precedent. *Id.*; *see* D. Br. 74-79. Defendant's position would rewrite the statute to omit half of subsections (a) and (b). Such an "interpretation" would "conflict with our maxim of statutory evaluation that laws are not to be construed in such a way as to render words superfluous." *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999); *In Interest of G.J.A.*, 547 N.W.2d 3, 6 (Iowa 1996) (Iowa courts must "presume the legislature enacted each part of the statute for a purpose and intended that each part be given effect" and "will not presume that the legislature intended words in the statute be given a redundant meaning.") (citing IOWA CODE § 4.4(2)).

In adopting section 216.15(9)(a)(9)(a)-(b), the Legislature enhanced the remedies for wage discrimination and extended the time frame for which wage violations are recoverable.[5] As further proof, in 2015, the Iowa Senate introduced

[5] Although it is not the Court's job to second-guess the policy determinations made by the Legislature, sound reasons exist for all portions of section 216.6A. A law

Senate Study Bill 1231, which would limit in wage discrimination claims to two years. https://www.legis.iowa.gov/legislation/BillBook?ba=SSB%201231&ga=86 (last accessed February 17, 2023). The legislature considered the proposal and rejected it.

Also instructive is the Legislature's deviation from federal law. Just months before Iowa passed section 216.6A, Congress passed the Lilly Ledbetter Fair Pay Act of 2009 ("FPA"). The FPA and Iowa's wage discrimination law almost identically state that an "unlawful employment practice occurs . . . each time wages, benefits or other compensation is paid." 42 U.S.C.A § 2000e-5(e)(3)(A); IOWA CODE § 216.6A(2)(b). But whereas the FPA awards back pay for "two years preceding the filing of the charge," Iowa's wage discrimination law allows recovery for the "period for which the complainant was discriminated against." 42 U.S.C.A § 2000e-5(e)(3)(B); IOWA CODE § 216.15(9)(a)(9)(a)-(b). The Iowa Legislature chose to mirror federal language in defining an unfair employment practice but opted for a different remedies provision. This is clear evidence of legislative intent.

B. THIS COURT HAS ALREADY DETERMINED UNEQUAL PAY IS A CONTINUING VIOLATION

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which limited the look-back period to 300 days would *encourage* unequal pay practices since employees could only receive 300 days of back pay at best. Even with multipliers on damages, an employer who has gotten away with wage discrimination for several years would always be better off financially than an employer who followed the law. *See Featzka v. Millcraft Paper Co.*, 405 N.E.2d 264, 267 (Ohio 1980).

The *Dindinger* plaintiff brought equal pay claims in federal court under Iowa Code sections 216.6 and 216.6A. The federal court certified two questions to the Iowa Supreme Court, the second concerning "the ability of plaintiffs to recover damages for wage discrimination under the preexisting law, namely, section 216.6." *Id.* at 566-67. This Court held "an employee can assert a wage discrimination claim under Iowa Code section 216.6," meaning existing law banning gender discrimination also covered discriminatory pay based on gender. *Id.*

The "real question in controversy" was "the time period for which damages are recoverable" for a section 216.6 claim. *Id.* at 567. Discriminatory paychecks were considered "discrete acts" under 216.6, thereby subjected damages to a 300-day limitations period. Section 216.6A claims were different and came with an enhanced remedies provision that allowed an employee "**to recover for the entire period of discrimination.**" *Dindinger*, 860 N.W.2d at 572, n.7 (emphasis added).

This Court could not have been clearer: **wage discrimination is a continuing violation of section 216.6A and a 216.6A plaintiff may recover damages for all violations so long as she filed her civil rights complaint within 300 days of the last discriminatory paycheck.**

Here, Plaintiff included a separate question asking the jury to decide the period of discrimination:

Question 4: What is the period that you find Plaintiff was discriminated against? For your answer, please include a beginning date and an end date. The end date should not be a date that is after the date of your verdict.

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VII. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FINDING THAT DEFENDANT RETALIATED AGAINST SANDY

Because Defendant failed to preserve error, the Court should decline to address Defendant's invitation to adopt a new test for retaliation claims using a "a confluence of the *McDonnell Douglas* burden-shifting analysis for failure-to-promote claims and the elements of a retaliation claim under Iowa law." D. Br. 80. Plaintiff agrees Defendant preserved error on its other arguments.

A. THE COURT SHOULD REJECT DEFENDANT'S MADE-UP ANALYSIS FOR RETALIATION CLAIMS UNDER THE ICRA

Retaliation claims under the ICRA are analyzed using a "motivating factor" standard. *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 272 (Iowa 2019); *Rumsey v. Woodgrain Millwork et al.*, 962 N.W.2d 9, 31 (Iowa 2021). Instruction 16 set out five elements for Sandy's retaliation claim: (1) she engaged in protected activity, (2) she was qualified for the Supervisor position, (3) she was subjected to an adverse action, (4) her protected activity was a motivating factor in Defendant's adverse employment action, and (5) if Sandy had not been screened out, she would have been interviewed and hired for the position. This instruction was given ***nearly***

verbatim as requested by Defendant. Nonetheless, Defendant now challenges elements 2 and 4.

Defendant argues for another new test but did not make this argument at the District Court level and therefore waived it on appeal. Even if it had not, this Court has made clear "we no longer rely on the *McDonnell Douglas* burden-shifting analysis" for ICRA retaliation claims. *Hawkins*, 929 N.W.2d at 272.

B. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FINDING THAT SANDY WAS QUALIFIED FOR THE SUPERVISOR POSITION

Sandy's coworkers all testified she was qualified for the Supervisor position. (T-Day 2, 20:8-18, 56:1-18, 129:5-9) (App. 394, 430, 503). Linda Fiderlick, *who held the Supervisor position for more than 20 years*, said Sandy was qualified. (T-Day 2, 191:4-5) (App. 565). For three years, Sandy taught computer science classes at DMACC. (T-Day 3, 121:16-122:1) (App. 734-35). Hiring Manager Clark agreed that Sandy sounded like an "attractive candidate" for the Supervisor position. (T-Day 4, 94:23-95:8) (App. 918-19). Hiring Committee member Craig Brown testified he would have liked to interview someone with Sandy's credentials. (T-Day 5, 119:23-120:3) (App. 1210-11).

The jury saw Defendant's rubric to score Supervisor applicants and heard evidence that Sandy would have scored higher than any other applicant. *See* Tr. Ex. D-7AMD (App. 262-73); (T-Day 3, 158:24-161:20) (App. 771-74). This evidence was unchallenged. While Defendant says Sandy's "personal beliefs" about being

qualified are insufficient; it was the jury, not Sandy, who determined she was not only qualified, but the most qualified. *See* D. Br. 85.

Plaintiff also showed that Defendant was selective when applying educational criterion for job applications. Clark and Fiderlick testified experience can trump a degree and Defendant has used an "either/or" format when considering education and experience. (T-Day 2, 189:14-190:7) (App. 563-64); (T-Day 4, 93:7-11, 135:25-136:10) (App. 917, 959-60). Defendant used this format when hiring Tjaden, deciding his work experience qualified him for the ASA 2 role despite lacking the required bachelor's degree. (T-Day 2, 48:4-12, 49:2-24) (App. 422-23); Tr. Ex. A-2 (App. 22). Defendant also chose experience over education with Clark, who has been the IT Director for more than a decade even without an IT degree. (T-Day 4, 88:21-89:20) (App. 912-13). Fiderlick, who Defendant repeatedly praised as an eminently qualified Supervisor, does not have a bachelor's degree in computer science degree or related field. (T-Day 2, 174:2-16, 173:19-174:16) (App. 548, 547-48). (T-Day 4, 92:12-93:2) (App. 916-17). As a member of Supervisor hiring committee, Tjaden thought he could value experience over a specific degree. (T-Day 2, 57:10-16) (App. 431). Finally, in the interim between Fiderlick's retirement and replacement, Clark wanted to appoint Tjaden as interim Supervisor. (T-Day 4, 105:12-107:8) (App. 929-31). Clark's desire to appoint Tjaden, who lacks a bachelor's degree of any kind, further evidences Defendant's flexibility in applying educational "requirements."

The jury also heard Defendant is typically flexible with what counts as a "related field." For example, Jocic holds a Bachelor of Science in Management.[6] (T-Day 5, 51:21-24, 55:1-9) (App. 1142, 1146); D-41 (App. 291-93). Sandy holds a Master of Science in Management, as well as a Bachelor of Psychology and Political Science Degree and a Certificate in non-profit leadership. (T-Day 3, 99:23-100:3) (App. 712-13). HR Director Lacey determined Jocic's bachelor's degree in management was job-related while insisting that Sandy's master's degree in management was not. (T-Day 3, 25:15-26:3, 84:18-22) (App. 638-39, 697).

Finally, there was evidence that the hiring committee normally decides whether a degree is related enough; yet when it came to Sandy, Lacey personally eliminated Sandy. (T-Day 5, 90:5-91:4) (App. 1181-82). Lacey normally defers to the hiring committee's thoughts on relatedness but did not do so here. After hiring committee member Erica Spiller reached out to Clark *twice* about Sandy's management degree being "related," Clark approached Lacey to ask whether Sandy's degree in Management should have been considered. (T-Day 5, 88:20-91:4) (App. 1179-82); Tr. Ex. D-32 App. 285-86). Lacey did not defer to Clark; instead, Clark

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[6] Defendant mischaracterizes Jocic's degree as a "bachelor's degree in Management of Information Systems." D. Br. 29. Jocic has a "two and two" bachelor's degree that utilized an associate's degree in information systems. (T-Day 4, 101:1-9) (App. 925); Tr. Ex. D-1, p. 18 (App. 254).

said "HR was pretty rigid with the requirements." This directly contradicted Lacey's testimony that she is ***not rigid*** with educational requirements:

> Q. Sure. So would you agree with me that HR is pretty rigid about only letting candidates into the interview pool who meet the minimum requirements to the job, meaning the required education and the required experience?
>
> A. I wouldn't say we're rigid. We -- if we have a question about the education, we'll ask the supervisor.

(T-Day 3, 21:3-9) (App. 634). HR Director Lacey applied the "relatedness" concept flexibly for Jocic's degree yet inflexibly for Sandy's. The district court held there was substantial evidence for the jury to find Defendant "could use the discretion inherent in the phrase 'or a related field' to retaliate against an otherwise qualified candidate in the screening process." JNOV Order, p. 13.

C. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FINDING THAT PLAINTIFF'S PROTECTED CONDUCT WAS A MOTIVATING FACTOR IN DEFENDANT'S DECISION

Defendant claims that because Plaintiff lacked direct evidence, there was no evidence of causation. D. Br. 80. This contradicts Iowa law, which "eliminated the distinction between direct and circumstantial evidence over forty years ago." *State v. Ernst*, 954 N.W.2d 50 (Iowa 2021). Circumstantial evidence is given equal weight to direct evidence, and a wealth of it supported the jury's verdict. *See id.*

In *Ernst*, a man was convicted of attempting to burglarize his parole officer's garage based on a highway camera depicting a car that looked like the defendant's and some damage to the weather stripping around the garage door. *Id.* at 53-54. From this evidence, the jury was allowed to infer that (1) the car was the defendant's, (2) the defendant was in the car, (3) the defendant drove to his parole officer's house, (4) the defendant tried to break into the garage, and (5) the defendant did so with intent to commit theft. *Id.* at 54.

In upholding Ernst's conviction, this Court recognized specific intent is "seldom capable of direct proof" and "will often be shown by circumstantial evidence and the reasonable inferences drawn from that evidence." *Id.* at 55. Juries "must necessarily make inferences," which are no less legitimate even when stacked on other inferences. *Id.* at 59. "[T]he relevant inquiry is whether a fact finding is a legitimate inference 'that may fairly and reasonably be deduced from the record evidence.'" *Id* (quoting *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017)). In concurrence, Justice Appel emphasized that using circumstantial evidence to prove intent and stacking inferences "applies with equal force in civil contexts such as tort or employment cases." *Id.* at 61-62.

Sandy's claims required far fewer inferences than those used to uphold a crime of specific intent. Sandy complained to Fiderlick about sex-based wage discrimination in January 2019, who forwarded the complaint to Lacey. (T-Day 3, 140:11-141:6) (App. 753-54). Lacey scrambled to respond, emailing at least five

individuals, including Defendant's Compliance Officer and Executive Director of HR. (T-Day 3, 18:6-19:5) (App. 631-32); Tr. Ex. 14 (App. 12-13). Lacey told her boss she was "not sure if this will go anywhere" and said "hopefully no more will come of this." (T-Day 3, 16:20-17:6, 18:6-16) (App. 629-30, 631); Tr. Ex. 14 (App. 12-13).

Sandy was prevented from interviewing for a job for which she was objectively qualified by the same decisionmaker who received her wage discrimination complaint just weeks before. (T-Day 3, 24:11-13) (App. 637). In screening Sandy out, Lacey (1) did not follow protocol in using a screening committee, (2) flexibly applied the rules to one candidate but not to Sandy, (3) failed to follow her normal practice of deferring to the hiring committee on "relatedness," and (4) refused to value Sandy's experience—unlike Defendant had done for Fiderlick, Clark, and Tjaden.

"While the defendant has an alternative explanation for the evidence, '[t]he jury [was] not required to accept the defendant's version of the events.'" *State v. Jones*, 967 N.W.2d 336, 343 (Iowa 2021) (quoting *State v. Helm*, 504 N.W.2d 142, 146 (Iowa Ct. App. 1993)). The jury rejected Defendant's alternate explanations when deciding Sandy was qualified and when finding Defendant failed to prove its same decision defense:

"The success of [Sandy's] claim at trial hinged on the facts as viewed by the fact-finder, and it is not for us to interfere with the finding made when supported

by substantial evidence, even though the evidence may have also supported a finding favorable to the defendant." *State v. Keeton*, 710 N.W.2d 531, 535 (Iowa 2006). The evidence supporting Sandy's claim was clear enough that eight jurors decisively concluded that Defendant engaged in illegal retaliation.

VIII. THE TRIAL COURT PROPERLY HELD THE JURY'S CALCULATED WAGE DAMAGES FOR RETALIATION

Plaintiff agrees Defendant preserved error on this issue.

Defendant argues that the jury allowed Plaintiff to "double-dip" her back pay. That is objectively false. Plaintiff's counsel told the jury if it found on both claims, "obviously, the wage discrimination numbers will just go through when Jocic was hired right at the beginning of this school year, 2020. From that point through now, you'll calculate the difference between Sandy's base pay and what Jocic testified about his pay." Tr. Day 6, 167:1-7 (App. 1443). The jury calculated Plaintiff's wage discrimination damages through only July 2019. The wages awarded after that time frame were based on what she would have earned as Supervisor.

Instruction 23 also told jurors that "a party cannot recover duplicate damages," and they followed that instruction. Lastly, in accordance with the law, "any uncertainties in computing lost wages should be resolved against the Defendant." *See* Inst. 15. In the end, Plaintiff is not sure what Defendant's complaint entails. Defendant claims Plaintiff requested an incorrect back pay award,

but also admits that the District Court corrected any mathematical errors. D. Br. 16-17, 38.

Defendant argues there should have been multiple lines for backpay. That would have been terribly confusing, especially if the jury found for Sandy on both claims. During argument, Plaintiff's counsel said he would provide the jury with three specific numbers for back pay, one for each potential outcome. Plaintiff did this at her peril; had the jury came up with a random figure, the parties may have been confused about what wages went with which claim. As it happened, the jury awarded the exact amount of back pay requested for both claims. While Defendant argues there should have been multiple lines, it does not explain how it was unfairly prejudiced.

Defendant is incorrect that retirement benefits are a component only of "actual damages." D. Br. 90. Wages include "any payments to the employee . . . including but not limited to payments for . . . pension . . . due an employee under an agreement with the employer or under a policy of the employer." IOWA CODE § 91A.2(7)(c); 29 C.F.R. § 1620.11 (defining "retirement benefits" as compensable under the EPA). Additionally, courts have discretion to fashion broad remedies in calculating back wages. For example, in *Perdue*, 13 F. Supp. 2d at 341, the jury found a female coach was paid less than two male comparators. To "fashion a full remedy," the court took the wage differential from each comparator and added them together. *Id.*

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO SECOND-GUESS THE JURY'S VALUATION OF PLAINTIFF'S EMOTIONAL DISTRESS

The right to have citizen jurors decide questions of fact like damages is enshrined in the Iowa Constitution. IOWA CONST. art. 1, § 9. Jury verdicts are entitled to deference and respect—not merely lip service. The Court cannot ordinarily disturb the jury's valuation of damages. *Kuta v. Newburg*, 600 N.W.2d 280, 284 (Iowa 1999). It must view the evidence in the light most favorable to the plaintiff, keeping in mind that the trial judge had the advantage of seeing and hearing all the evidence in person. *Id.*

Civil rights violations cause a special kind of anguish:

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

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

Civil rights violations deprive us of interests critical to our sense of self. Reliance interests, expectancy interests, lost opportunity interests, and relational interests have been recognized to have immense intrinsic value. The heart of contract law is protecting reliance and expectancy interests, the loss of which "are not prospective damages but current injuries to the things that people care most about: stability, security, trust, and promise." Nancy Levit, *Ethereal Torts*, 61 Geo. Wash. L. Rev. 136, 184 (1992). Harm to relational interests "can have profound psychological and physiological consequences." *Id.* at 184-85. Courts agree, upholding large relational interest awards in defamation cases. *See, e.g., Hoffmann v. Clark*, 975 N.W.2d 656, 668 (Iowa 2022) ($1 million in *per se* damages for libel were not excessive). Being "[deprived of] the benefit of public confidence or social intercourse" is considered so important that reputational harm can be *assumed without proof*. *Id.* at 664.

Emotional distress damages serve the same remedial function as any other element of damage. We are all endowed with the right to pursue an occupation unfettered by discrimination because of immutable characteristics. Defendant's retaliation destroyed Sandy's reliance interest on that principle. Losing employment opportunities because of a clerical error or plant closing is very different than losing opportunities because of one's race or gender. The former can be chalked up to "stuff happens." Most people experience the latter as a demeaning betrayal and a fundamental rejection of their full personhood.

Defendant did not just cost Sandy a promotion; it harmed her reputation in the eyes of her peers and caused immense humiliation. Sandy cried while testifying about friends and colleagues who approached her, confused about why she didn't apply for the Supervisor position. Each time, Sandy was forced to explain that she did apply but was never considered, and then would go back to her desk and cry. (T-Day 3, 164:19-165:15) (App. 777-78).

The jury heard extensive evidence about Sandy's emotional harm in response to the retaliation. Sandy and a variety of other witnesses testified about her emotional distress. Sandy stopped interacting with other people and stopped attending church. (T-Day 4, 147:4-16) (App. 971). The jury witnessed Sandy break out into tears throughout the trial. Sandy's father, a Marine who retired a full Colonel in the Army Reserves, testified that his daughter was upset all the time and was short with her own daughters. He said she lost her "joy" and that she is just not the same person he had known before. (T-Day 4, 145:12-147:4-16) (App. 969-71). **Imagine how devastating something must have been for a father to say he does not recognize his own daughter.**

Defendant dismisses all this evidence, distrustful that citizen jurors can recognize human pain when they see it. In fact, this ability is one of juries' super-powers. The possibility of reaching an excessive verdict unsupported by the evidence is checked by the fact that eight jurors, sworn to render dispassionate justice, have agreed on the amount.

Sandy's husband Richard explained to the jury that after Sandy reported her concerns about equal pay, she triple-checked all her work—fearful about giving Defendant an excuse to fire her. (T-Day 4, 152:20-153:17) (App. 976-77). Everything at work became a potential danger. *Id.*

The jury heard that Sandy is not the wife or mother she was before she worked for Defendant. *Id.*; (T-Day 4, 152:20-153:17) (App. 976-77). Sandy and her family testified that she had trouble sleeping and was often up at 3 a.m. *Id.* Sandy is constantly crying and on-edge, even with the people she loves the most. (T-Day 4, 152:20-153:17) (App. 976-77); (T-Day 4, 145:12-146:12) (App. 969-70). Her husband testified through tears that he missed the Sandy he married; that he didn't think the distress she'd experienced would magically end after the trial, but he was desperate "to get my Sandy back." (T-Day 4, 153:18-154:3) (App. 977-78).

In valuing her emotional distress, the jury was charged with understanding how Sandy's life would have been different had she never experienced the illegal retaliation and placing a dollar value on the loss. It appropriately valued that figure at $188,000 in past losses and $246,375 in future losses.

A. THE JURY'S AWARD SHOULD BE RESPECTED, AS PROMISED

"*The scrutiny of twelve honest jurors provides defendant and plaintiff alike a safeguard from arbitrary perversion of the law.*" – Winston Churchill.

"[T]he amount of an award is primarily a jury question, and courts should not interfere with an award when it is within a reasonable range of evidence." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009) (citing *Kautman v. Mar-Mac Cmty. Sch. Dist.*, 225 N.W.2d 146, 147 (Iowa 1977)); *see also Riniker v. Wilson*, 623 N.W.2d 220, 230 (Iowa Ct. App. 2000) (citing *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999)) ("The amount of damages awarded is peculiarly a jury, not a court, function."). Generally, a court should "not disturb jury verdicts pertaining to damages unless they are flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support." *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799 (Iowa 1984).

B. EMOTIONAL DISTRESS AWARDS DO NOT REQUIRE EXPERT TESTIMONY

Defendant claims "expert testimony – or lack thereof – is a consideration in reviewing awards for emotional distress under the ICRA," citing *Simon Seeding & Sod, Inc. v. Dubuque Hum. Rts. Comm'n*, 895 N.W.2d 446, 472 (Iowa 2017). In *Simon Seeding*, on the same page cited by Defendant, this Court noted:

> **We disagree that expert testimony was required to support this award for emotional distress.** ***Under different circumstances***, we have reversed awards made without supporting expert testimony.
> …
> **Under the ICRA, however, we have allowed emotional distress damages without expert testimony**. *See, e.g., City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 537 (Iowa 1996)

Simon Seeding, 895 N.W.2d at 472 (emphasis added). Defendant's argument is incredibly misleading and omits that the Court's reference to expert testimony being needed **only** to prove causation between emotional distress and physical symptoms. The court granted Defendant's motion in limine to prevent Plaintiff from discussing her physical symptoms of emotional distress, so this argument is moot.

It is firmly established that expert or other medical testimony is not required to establish a plaintiff's emotional distress in a discrimination case. *Kim v. Nash Finch Co.*, 143 F.3d 1046, 1065 (8th Cir. 1997); *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 724 (1st Cir. 1994). The proof in most cases comes from the plaintiff herself, in addition to family and friends. *See, e.g. Christensen v. Titan Dist., Inc.*, 481 F.3d 1085, 1097 (8th Cir. 2007); *Wilmington v. J.I. Case Co.,* 793 F.2d 909, 922 (8th Cir. 1986). In fact, the plaintiff's testimony alone is sufficient. *Christensen*, 481 F.3d at 1097; *Williams v. Trans World Airlines, Inc.,* 660 F.2d 1267, 1272-73 (8th Cir. 1981); *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 78 (2d Cir. 2004); *Turic v. Holland Hospitality, Inc.,* 85 F.3d 1211, 1215 (6th Cir. 1996).

This is not to say that emotional distress does not need to be proven. It "must be supported by competent evidence of a genuine injury." *Christensen*, 481 F.3d at 1096-97. However, emotional distress may also be inferred from the circumstances of the civil rights violation itself. *Berger v. Ironworkers Reinforce Rodmen Loc. 201*, 170 F.3d 1111, 1138 (D.C. Cir. 1999); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974). In addition, "[b]ecause of the difficulty of evaluating emotional

injuries which result from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries." *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Tallarico v. Trans World Airlines*, 881 F.2d 566, 561(8th Cir. 1989).

C. THE COURT SHOULD LOOK TO THE FACTS OF THIS CASE WHEN CONSIDERING THE JURY'S AWARD

Comparing verdicts in different cases is not terribly helpful in determining the propriety of an award in each case—each must be determined upon the evidence therein. *Wagaman v. Ryan*, 142 N.W.2d 413, 420 (Iowa 1966). After all, even if it was possible to find a factually identical case with which to compare this verdict, we still would not know which jury had pinpointed the "right" amount of damages. *Cuevas v. Wentworth Group*, 144 A.3d 890, 905 (N.J. 2016). While any exact comparisons to other cases are impossible, the award given by Sandy's jury is not unusual in civil rights cases. Not surprisingly, the most egregious cases are more likely to settle before trial, let alone before an appellate decision is reported. But in the past three decades, emotional distress awards have ranged from $35,000 (*Rumsey v. Woodgrain Millwork LACL138889 (Rumsey II)*) to $2.5 million (*McElroy v. State*, CL74459 (2003)) across dozens of cases. The vast range of awards is further proof against Defendant's fearmongering.

In the end, comparison of verdicts is of limited value, but it does show the award in this case is relatively modest. "Our legal system has not attempted to set

schedules of presumptive awards for various types of injuries, and a court cannot and should not do that under the guise of determining 'comparability.'" *Zurba v. United States*, 247 F. Supp. 2d 951, 962 (N.D. Ill. 2001). The Court is required to consider this verdict on its own merits—on the evidence presented in the courtroom—not by comparing it to fact patterns in other cases where it did not see the witnesses and hear the evidence.

The jury based its damage award on objective evidence, carefully separated by claim and timeframe:

- Past Emotional Distress for Discrimination: $ 474,600
- Future Emotional Distress for Discrimination: $ 246,375
- Past Emotional Distress for Retaliation: $ 188,000
- Future Emotional Distress for Retaliation: $ 246,375

D. DEFENDANT HAS NO EVIDENCE THE AWARD WAS SO OUT OF REASON AS TO SHOCK THE CONSCIENCE OR SENSE OF JUSTICE

"We come to a claim of an excessive award disinclined to disturb the jury's verdict and will only intervene if we find it 'flagrantly excessive or inadequate,' 'so out of reason as to shock the conscience or sense of justice,' 'a result of passion, prejudice or other ulterior motive,' or 'lacking in evidentiary support.'" *Hoffmann*, 975 N.W.2d at 666 (quoting *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). Appellate courts are generally "reluctant to interfere with a jury verdict and give

considerable deference to a trial court's decision not to grant a new trial." *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594 (Iowa 1999) (internal citations omitted).

"In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict." *Clarey v. K-Products, Inc.*, 514 N.W.2d 900, 903 (Iowa 1994); *Estate of Long v. Broadlawns Med'l Ctr.*, 656 N.W.2d 71, 90 (Iowa 2002). The evidence must be considered in the light most favorable to the plaintiff. *Ort v Klinger*, 496 N.W.2d 265, 269 (Iowa Ct. App. 1992). The court must uphold an award of damages "so long as the record discloses a reasonable basis from which the award can be inferred or approximated." *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982). If "the verdict has support in the evidence the [other factors, including prejudice,] will hardly arise." *Estate of Long*, 656 N.W.2d at 90; *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 944-45 (N.D. Iowa 2003) ("'the issue to be decided here is not the size of the award alone, but the evidence supporting the award.'") (*quoting Evans v. Port Auth. of N.Y. & N.J.*, 273 F. 3d 346, 354 (3d Cir. 2001)).

A new trial may be granted only if Defendant shows that its substantial rights were materially affected by excessive damages appearing to have been influenced by passion or prejudice. IOWA R. CIV. P. 1.1004(4). "Passion is the state of mind produced when the mind is powerfully acted upon and influenced by something external to itself [and] ... is one of the emotions of the mind known as anger, rage,

sudden resentment, or terror." *WSH Prop., LLC v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008) (quoting *Collins v. State*, 102 So. 880, 882 (1925)).

There is no evidence or indication the jury's award was motivated by passion or prejudice. In closing arguments, Plaintiff's counsel directly and firmly told the jury "it's important that you do not award damages to punish the defendant. It's not what Sandy's after, and this is not that kind of case." (T-Day 6, 171:17-19) (App. 1446). Defendant's only argument that the jury was motivated by passion or prejudice is to point at the size of the award. "[T]he fact that a damage award is large does not in itself . . . indicate that the jury was motivated by improper considerations in arriving at the award." 58 AM. JUR. 2D New Trial § 313, at 313 (2002). "In considering the contention the verdict is so excessive as to . . . show it is the result of passion and prejudice we must take the evidence in the aspect most favorable to plaintiff which it will reasonably bear." *Townsend v. Mid-Am. Pipeline Co.*, 168 N.W.2d 30, 33 (Iowa 1969). An "evidentiary basis for the jury's assessment of damages dispels any presumption that the excessiveness of the verdict was motivated by passion." *Id.* at 50-51. Plaintiff has identified substantial evidence supporting the jury's award. By contrast, Defendant points to no facts showing passion or prejudice.

E. AMICI ARE NO FRIENDS OF THE COURT

The Brief filed by the ICC and ABI claims discrimination victims treat the civil justice system like "a slot machine, paying off in jackpots." A.C. p. 32. This is incredibly insulting to plaintiffs, their counsel, and especially to the Iowans who serve on civil juries and take an oath to do justice. Amici talk about jurors like they are a homogenous mob, rather than a group of eight Iowans summoned at random then chosen by both parties. The jurors on DMACC and Sandy's jury spent two weeks of their lives away from their families, jobs, and friends to sift through the evidence and render a fair verdict. This jury included Iowans from all walks of life:

A. A former Executive Director of the Des Moines Metropolitan Planning Organization
B. A realtor
C. A diesel mechanic
D. A retiree who spent 37 years with Principal Financial Group
E. An employee of Amerigroup
F. A nurse
G. A warehouse worker who makes vending machine parts
H. An employee of The Waldinger Corporation

Multiple jurors work or worked at business who are members of the ABI or received degrees from the community colleges that signed this brief. How disappointing that those business organizations treat their own alumni and members like impassioned rabble, incapable of rational thought. But the jurors in this case were firm, thoughtful, and reasoned. Because their decision was unanimous, only the foreperson needed to sign the verdict. Yet all eight jurors signed the form, and when individually polled by Defendant, confirmed their commitment to the verdict.

Amici argue for a return to 19th-century biases against mental trauma as "imaginary injuries," warning that victims are encouraged to "exaggerate and aggravate . . . their emotional distress." A.C. p. 29. Although they quote at length from Nancy Levit's law review article to support their attacks (A.C. pp. 27-28), she actually describes their views as ignorant and inconsistent with data. Levit, 61 GEO. WASH L. REV. at 139. The article advocates ***full compensation for emotional distress injuries***. *Id.* at 189.

Amici also claim jurors are incapable of "monetizing emotional distress," but we ask jurors to answer these kinds of question in every case. In criminal cases, we ask juries to get inside a person's mind and decide intent. In personal injury cases, we trust juries to award sometimes very large damages for physical pain and suffering. Amici's position is not about evidence or causation, but rather about the kinds of harm they believe are valuable and what kinds of harm they deem worthless.

Their position "start[s] from the premise that any quantum of pure emotional disturbance is intrinsically less serious than any physical injury." *Levit*, at 172. This "creates a mythology about what qualifies as valid injuries. Injuries—to be considered 'real'—must be physical, visible, or discernible." *Id.* at 174. **But to reduce "the dignity and worth of human beings to body parts is tangibly to reduce people to physics and chemistry, and to deny value to life other than base physical existence."** *Id.* at 189. Devaluing emotional injuries also "speaks volumes about the types of people who are worthy of recompense," an attitude

"undoubtedly related to the broader paradigm within which society views mental illness." *Id.* at 174-75.

Not content with attacking plaintiffs, lawyers, and jurors, Amici point a finger at this Court, charging it with creating "a significant moral hazard" by daring to believe in judicial non-interventionism. A.C. p. 29. The ABI blames the Court for leaving "the door open to higher awards," and then denounces Justice Mansfield's opinion for "[walking] through that door only five years later." Amicus, p. 31 (citing *Smith v. Iowa State University of Science and Technology*, 851 N.W.2d 1, 31 (Iowa 2014).

District Court judges are empowered with broad discretion to reverse or remit awards that lack evidentiary support. After a scrupulous analysis in this case, an experienced district court judge found the jury's award supported by substantial evidence.

Plaintiff will credit amici with one thing: they don't shy away from saying the quiet part out loud. Amici casts jurors as malleable idiots, discrimination victims as rapacious charlatans, lawyers as snake oil salesmen, and Iowa judges as passive enablers. John Adams believed, "Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds." In describing juries as unbroken horses who need to be "reined in," Amici advocate for what Adams feared: a populous that ignores its duty to the community and instead gives blind deference to the interests of those in

power. The naked aggression displayed by the ABI and community colleges makes clear they are not interested in a functioning civil justice system, but a neutered one.

William Blackstone said, "Trial by jury is the principal bulwark of our liberties." Iowa judges tell jurors their duty is to accept and apply the law as given by the Court. We tell jurors they are making important decisions and they must base their decisions on the evidence and not on "generalizations, gut feelings, prejudices, fears, sympathies, stereotypes, or biases." We tell them, "the law demands that you return a just verdict, based solely on the evidence, your reason and common sense." Implicit in the charge that a juror's "sole duty is to find the truth and do justice" is a promise that the parties, the judge, and the civil justice system will respect their decisions unless they are shockingly out of bounds. Plaintiff respectfully asks the Court to allow the voices of this jury to drown out the din of those who seek to undermine our civil justice system for their own bottom line.

X. THE DISTRICT COURT ERRED IN VACATING THE JURY'S EMOTIONAL DISTRESS AWARD FOR SEX-BASED WAGE DISCRIMINATION

The jury found Defendant's willful sex-based wage discrimination caused $474,600 in past and $246,375 in future emotional distress. The district court vacated this award, holding that because 216.6A claims have fewer elements, awarding emotional distress damages for 216.6A claims would render claims under 216.6 "superfluous." JNOV Order, p. 16.

Disallowing emotional distress damages for sex-based wage discrimination undermines the legislature's recognition that discrimination "leads to low employee morale . . . [and] threatens the well-being of citizens of this state and adversely affects the general welfare." *Id.* Emotional distress damages are a reasonable and expected result of legislative intent. "[T]he Iowa Legislature enacted § 216.6A to ensure that all forms of discrimination would be exposed and addressed—even those that were falling through the cracks under traditional discrimination analysis." *Dindinger*, 860 N.W.2d at 564. Section 216.6A was drafted to combat wage discrimination "based on . . . sex." IOWA CODE § 216.6A(b). But "rather than requiring discrimination based on protected status to be *independently proved*, section 216.6A *defines* discrimination as the act of paying lower wages." *Dindinger*, 860 N.W.2d at 564 (emphasis in original). This framing fit the legislation's goal to "correct and, as rapidly as possible, to eliminate, discriminatory wage practices based on . . . sex." IOWA CODE § 216.6A(b).

The Iowa Civil Rights Act must be liberally construed to eliminate unfair and discriminatory acts and practices in employment. IOWA CODE § 216.18. Section 216.15(9)(a) says remedial action "includes but is not limited to the following" and lists nine subsections. Subsection eight discusses payment of actual damages. Subsection nine states that if there is a violation of Iowa's wage discrimination law, damages additionally "shall include, but are not limited to court costs, reasonable attorney fees," and either two or three times the wage differential. The term "not

limited to" is a clear message that the enumerated remedies are not the only ones available.

It is clear that several subsections of 216.15(9)(a) can apply in the same case. For instance, subsection 1 says remedial action includes hiring. A person denied a job because of his disability may be entitled to hiring under subsection one, as well as actual damages under subsection eight. Section, 216.15(9)(b) says that "in addition to the remedies provided in the preceding provisions of this subsection," the commission may issue a cease-and-desist order. Section 216.15(9)(c) makes clear "the election of an affirmative order under sub (b) shall not bar the election of affirmative remedies provided in paragraph (a)." (emphasis added). In *Dindinger*, this Court said the legislature added the wage multiplier language because it was not already included among the various remedies then available under section 216.15. Thus, the wage multiplier is an *additional* damage applicable if the claim involves wage discrimination.

Furthermore, pay discrimination based on sex is sex discrimination. *See, e.g., EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 360 (8th Cir. 1994); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992); *McKee v. Bi-State Dev. Agency*, 801 F.2d 1014, 1019 (8th Cir. 1986); *Strecker v. Grand Forks County Soc. Serv. Bd.*, 640 F.2d 96, 99 (8th Cir. 1980). When the jury found Defendant failed to prove its decisions were not motivated by sex, it also found Defendant violated the sex discrimination provision of the Iowa Civil Rights Act. *See Broadus v. O.K. Indus., Inc.*,

226 F.3d 937, 943 (8th Cir. 2000) ("Certainly the right to hold employment without discrimination on the basis of gender encompasses the right to be paid for that employment without discrimination on the basis of gender."). As the district court recognized, the jury "could reasonably conclude" that the factor explaining the hiring rate disparity "was gender discrimination." JNOV Order, p. 7. However, the district court erred in finding that 216.6A's provision for treble damages replaced emotional distress damages.

Because Plaintiff proved that Defendant violated Iowa Code section 216.6 as well as 216.6A, Plaintiff is entitled to the emotional distress damages available under 216.6.

CONCLUSION

For the reasons articulated above, Plaintiff requests the Court affirm the jury's verdict and the district court's denial of Defendant's JNOV and New Trial Motions, reinstate the jury's verdict for emotional distress suffered as result of sex-based wage discrimination, and remand the case for consideration of the attorney fees and costs incurred since the last order.

REQUEST FOR ORAL ARGUMENT

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

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ATTORNEY'S COST CERTIFICATE

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

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I, Cheryl Smith, hereby certify that on the 27th of March, 2023, I electronically filed the foregoing Final Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

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