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IN THE SUPREME COURT OF IOWA

No. 22-1291

Polk County No. LACL147358

SANDRA SELDEN,

Plaintiff-Appellee,

vs.

DES MOINES AREA COMMUNITY COLLEGE,

Defendant-Appellant.

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

FINAL BRIEF OF AMICUS CURIAE IOWA COMMUNITY COLLEGES AND IOWA ASSOCIATION OF BUSINESS AND INDUSTRY

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STATEMENT OF IDENTITY AND INTEREST

This amicus brief is submitted on behalf of two groups. The first group consists of fourteen Iowa community colleges (all of the community colleges except DMACC); specifically, Southeastern Community College, Iowa Western Community College, Northeast Iowa Community College, Northwest Iowa Community College, Iowa Valley Community College, Kirkwood Community College, Southwestern Community College, Indian Hills Community College, Iowa Lakes Community College, Eastern Iowa Community College, North Iowa Area Community College, Western Iowa Tech Community College, Hawkeye Community College, and Iowa Central Community College. Many of these colleges have pay scales similar to DMACC which reward employee longevity. These colleges are also significant employers in the state. Iowa's community colleges employ more than 11,000 full-time and part-time employees and spend more than $500 million annually on payroll and benefits for these employees.

The second group is the Iowa Association of Business and Industry ("ABI"). ABI was founded in 1903 to serve as the state's uniform voice for business. ABI is the largest business network in the state, representing over 1,500 business members that employ more than 330,000 Iowans. ABI's mission is to nurture a favorable business, economic, governmental, and social

climate within the state of Iowa so the citizens of Iowa can have the opportunity to enjoy the highest possible quality of life. Among other things, ABI represents the interests of its members by filing amicus curiae briefs in cases involving issues of vital concern to the business community.

This case present issues of first impression concerning the elements and proof necessary to establish an equal pay violation under Iowa Code § 216.6A; the statute of limitations applicable to such claims; the availability of emotional distress damages for such claims; and the necessary proof and appropriate size of emotional distress damage awards in cases brought under the Iowa Civil Rights Act. The answers to these questions will have an impact on Iowa's community colleges, the business community, and the state as a whole.

RULE 6.906(4)(d) STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned counsel certifies that no party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person other than amicus curiae, contributed money that was intended to fund the preparation or submission of this brief.

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ARGUMENT

I. TJADEN WAS NOT AN APPROPRIATE OR USEFUL COMPARATOR BECAUSE OF HIS MANY MORE YEARS OF EXPERIENCE THAN PLAINTIFF

In 2009, the legislature amended the Iowa Civil Rights Act ("ICRA") to add a new section 216.6A. *See Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 561 (Iowa 2015). That section, entitled "Additional unfair or discriminatory practice—wage discrimination in employment," created a new strict liability cause of action for paying unequal wages. *Id.* at 564. It states:

> It shall be an unfair or discriminatory practice for any employer or agent of any employer to discriminate against any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such employee by paying wages to such employee at a rate less than the rate paid to other employees who are employed within the same establishment for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

Iowa Code § 216.6A(2)(a).

If a plaintiff makes a prima facie case showing that they were paid less than someone outside of their protected class for the same job under similar working conditions, then the burden shifts to the employer to establish one of several affirmative defenses. Iowa Code § 216.6A(2)(a), (3). These defenses include that the wage differential was the result of a seniority system, merit system, a system which measures earning by quantity or quality of production,

or is "based on any other factor other than the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such employee." *Id.* Unlike other claims of discrimination under the ICRA, a claim brought under section 216.6A "requires no showing of discriminatory intent." *Dindinger*, 860 N.W.2d at 564-65. The legislature also enacted a separate, enhanced remedy for violations of the new section, allowing plaintiffs to recover two or three times the wage differential depending on whether the violation was willful. Iowa Code § 216.15(9)(a)(9). Section 216.6A is modeled after the federal Equal Pay Act much like other provisions of the ICRA are modeled after Title VII, and thus federal law provides guidance in evaluating these claims. *Dindinger*, 860 N.W.2d at 565; *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 10 (Iowa 2009).

"Claims for wage discrimination under the Equal Pay Act and discrimination under Title VII are similar in that both require a plaintiff to establish that she was treated differently than those similarly situated." *Andrus v. Dooney & Bourke, Inc.*, 139 F. Supp. 3d 550, 557 (D. Conn. 2015). "The purpose of the 'similarly situated' requirement in both Equal Pay Act and Title VII cases is to isolate other variables that may account for differing treatment," *Barney v. Zimmer Biomet Holdings, Inc.*, No. 3:17-CV-616-JD-MGG, 2020 WL 4368359, at *4 (N.D. Ind. July 30, 2020), and to "ensure that

employers do not incur liability for legitimate wage disparities owing to differences." *Andrus*, 139 F. Supp. 3d at 557. Under the ICRA, "the test to determine whether employees are similarly situated is a 'rigorous' one." *Caldwell v. Casey's Gen. Stores, Inc.*, 977 N.W.2d 117 (Table), 2022 WL 610362, at *4 (Iowa Ct. App. March 2, 2022) (quoting *Beasley v. Warren Unilube, Inc.*, 933 F.3d 932, 938 (8th Cir. 2019)). "The compared employee must be 'similarly situated in all relevant respects….'" *Id.* (quoting *Beasley*, 933 F.3d at 938). "In the absence of evidence of a similarly-situated person being treated differently," evidence of how the employee was treated "is evidence of nothing." *Fed. Exp. Corp. v. Mason City Hum. Rts. Comm'n*, 852 N.W.2d 509, 514 (Iowa Ct. App. 2014).

In equal pay claims, "[a] comparison to a specifically chosen employee should be scrutinized closely to determine its usefulness." *Heymann v. Tetra Plastics Corp.*, 640 F.2d 115, 122 (8th Cir. 1981). The comparator employee should be "performing substantially equal work and similarly situated with respect to any other factors, *such as seniority*, that affect the wage scale." *Hein v. Oregon College of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983) (emphasis added). Factors such as seniority and job performance can "undermine the reliability and persuasiveness" of the plaintiff's comparison. *Heymann*, 640 F.2d at 122.

In the present case, it is not disputed by DMACC that Plaintiff and the male comparator, Brian Tjaden, were performing the same job under similar conditions. DMACC's Brief at 31. However, the evidence established that Plaintiff and Tjaden were *not* similarly situated with respect to their experience and seniority. Tjaden was hired as an Application Support Analyst on January 12, 1998. App. III at 14. Plaintiff was not hired into that position until September 23, 2013. *Id.* Thus, Tjaden had been performing the job *for more than fifteen years* by the time Plaintiff started, and Tjaden had received annual pay increases in each of those fifteen years. *Id.* Given this significant gap in experience and years of service, Tjaden and Plaintiff were not similarly situated and, therefore, Tjaden was not an appropriate comparator for Plaintiff's wage discrimination claim.

The evidence of Tjaden's greater seniority and experience as compared to Plaintiff established as a matter of law DMACC's affirmative defense that the wage differential was based on factors other than sex. *See* Iowa Code § 216.6A(3). Amicus curiae would submit, however, that employers should not be put to the burden and expense of proving an affirmative defense without some baseline showing by the plaintiff that the comparator is similarly situated with respect to other factors such as seniority. It would be absurd for every brand-new employee to be able to establish a wage discrimination claim

merely by pointing to the higher salary of someone outside of their protected class who had been working in the position for a decade or more.

Because Tjaden was not an appropriate comparator, and because Tjaden's years of service and experience established DMACC's affirmative defense as a matter of law, there was insufficient evidence to support Plaintiff's equal pay claim and the adverse judgment against DMACC should be reversed.

II. COMPARING STARTING SALARY PERCENTAGES IS NOT CONTEMPLATED BY SECTION 216.6A

Plaintiff rests her equal pay claim on a novel theory of her own creation. Instead of focusing on wage or salary differential, as set forth in Iowa Code section 216.6A, she contends she was discriminated against by being hired at a different *percentage* of the applicable pay grade range than Tjaden. App. I at 358-59 (169:4–19, 169:20–170:1); 1453 (197:3–6). Specifically, Plaintiff's equal pay claim is premised on being hired at 15.85% of the A6 pay grade in 2013 while Tjaden was hired at 53.75% of the A6 pay grade in 1998. *Id.* Plaintiff argued at trial that this difference in pay range percentage is what the jury should focus on in assessing her wage discrimination claim. App. I at 1453 (197:3–6) ("Longevity doesn't have anything to do with hiring rate. That is the number that matters. That's the number that Sandy's asking for, that percentage on the hiring rate, not these annual increases.").

Contrary to Plaintiff's argument, a difference in pay grade range percentage does not constitute an unfair or discriminatory practice under section 216.6A. Rather, the relevant comparison is the salaries of the two employees at a given point in time. Under section 216.6A, an employer commits an unfair or discriminatory employment practice by "paying wages" to the plaintiff at a "rate" less than the rate paid to other employees outside of the protected class performing the same job under similar working conditions. Iowa Code § 216.6A(2)(a). In short, section 216.6A "prohibits employers from paying *unequal wages* to employees on the basis of their sex." *Mayorga v. Marsden Bldg. Maint., LLC*, 55 F.4th 1155, 1160 (8th Cir. 2022) (emphasis added). Thus, a plaintiff must show that she "was *paid less* than a male employed in the same establishment." *Id.* (emphasis added).

Contemplating that the difference in salaries or wages is the relevant comparison, section 216.6A goes on to provide:

> It is an affirmative defense to a claim arising under this section if any of the following applies:
>
> . . .
>
> d. *Pay differential* is based on any other factor other than … sex….

Iowa Code § 216.6A(3)(d) (emphasis added). Similarly, the remedy provision for violations of section 216.6A is also congruous with a showing of a

difference in pay, providing for damages in an amount two or three times the "*wage differential* paid to another employee…." Iowa Code § 216.15(9)(a)(9)(a)–(b) (emphasis added). A comparison of the pay grade range percentage of two employees' starting salaries does not constitute "wage differential," "pay differential" or "unequal salaries" as contemplated by section 216.6A. Accordingly, the appropriate comparison is the salaries of the comparative employees at a given point in time. *See* Iowa Code § 216.6A; Iowa Code § 216.15(9)(a)(9)(a)–(b).

Of course, the reason Plaintiff has resorted to the use of a percentage of pay range comparison is because Tjaden is not an appropriate comparator in the first place. As discussed above, Plaintiff is not similarly situated to Tjaden because he was hired more than fifteen years prior and received annual pay increases over those fifteen years. App. III at 14. This makes it impractical for Plaintiff to support her claim by a comparison of salaries as contemplated by section 216.6A because Tjaden's starting salary ($46,000) was significantly lower than Selden's ($70,000). *Id.* As a result, Plaintiff instead uses a comparison of her own creation.

In addition to being incompatible with the language of section 216.6A, comparing starting salary range percentages makes little sense. As is the case here, employers utilizing this system alter the pay grade ranges on a regular,

often yearly basis at fluctuating rates. App. I at 871-874 (46:8–49:12). These adjustments are separate and apart from salary increases, both of which change independently from one another at different amounts. *See id.* There is, therefore, a complete lack of comparability of the two employees' starting pay grade range percentage, especially as is here, where the hiring dates are many years apart.

Finally, Plaintiff's request for an award of backpay based on the difference between her actual salary and what she contends her starting salary in 2013 should have been at 53.75% of the A6 pay grade was improper. App. I at 1442 (166:7–21). Section 216.15(9)(a)(9)(a)–(b) explicitly provides that damages for a violation of section 216.6A consist of an "amount equal to two times [or three times] the wage differential paid to another employee compared to the complainant." Iowa Code § 216.15(9)(a)(9)(a)–(b). To compute the wage differential, the factfinder must take the difference between the wages actually paid to another employee (here, Tjaden) and the amount actually paid to the complainant (here, Selden). *See id.* Utilizing within this calculation a salary which an employee believes they should have been paid does not result in wage differential as set forth in section 216.15(9)(a)(9)(a)–(b). It improperly fails to consider the wage differential "paid to another

employee compared to the plaintiff" and instead replaces that number with a fictional amount that is contended should have been received. *See id.*

Because Plaintiff's wage discrimination claim was based on an improper and prejudicial comparison of starting pay grade range percentages, and because Plaintiff's backpay damages were calculated in a manner inconsistent with the statute, the adverse judgment against DMACC should be reversed.

III. THE ICRA'S 300-DAY LIMITATIONS PERIOD APPLIES TO IOWA CODE SECTION 216.6A AND RESTRICTS RECOVERY TO 300 DAYS PRIOR TO THE FILING OF A WAGE DISCRIMINATION COMPLAINT

Statute of limitations play an essential role in our legal system. They are "heralded bastions of legal certainty . . . found and approved in all systems of enlightened jurisprudence." Alyssa B. Minsky, *Employment Discrimination Law in the Wake of Ledbetter: A Recommended Approach*, 42 Suffolk U. L. Rev. 239, 242 (2008). Statutes of limitations provide an important balance between the rights of a plaintiff and a defendant. Katie E. Johnson, *A Practical Solution to the Courts' Broad Interpretation of the Lilly Ledbetter Fair Pay Act*, 71 Ohio St. L.J. 1245, 1251 (2010). On one hand, they aim to provide enough time for plaintiffs to assert a just claim. *Id.* On the other, they prevent unfairness to the defendant of being indefinitely vulnerable to the threat of legal action and ensure that claims are brought and

trials occur when witnesses' memories are fresh and evidence is still available. *Rivera v. Woodward Res. Ctr.*, 830 N.W.2d 724, 730 (Iowa 2013); Joseph G. Theis, *The Application of the Federal Five-Year Statute of Limitations for Penalty Actions to Wetlands Violations Under the Clean Water Act*, 24 N. Ky. L. Rev. 1, 7 (1996). Even where one has a just claim, "it is unjust to not put the adversary on notice within the period of limitation." *Harrington v. Toshiba Mach. Co.*, 562 N.W.2d 190, 192 (Iowa 1997).

Importantly, statute of limitations are not creations of judicial intervention. Theis, 24 N. Ky. L. Rev. at 7. Rather, the determination of what the reasonable period is for the filing of a complaint or claim rests with the legislature. Jonathon Wright, *The Problematic Application of Title VII's Limitations Period in the Pay Discrimination Context: Ledbetter v. Goodyear, the Ledbetter Fair Pay Act, and an Argument for A Modified Balancing Test*, 42 Ind. L. Rev. 503, 520 (2009). Thus, statutes of limitations constitute legislative judgments—considering the above policies—about what the appropriate amount of a time a party has to bring an action. *Id.*

In the case of employment discrimination claims under the ICRA, the Iowa legislature has clearly made that determination. The ICRA sets a 300-day complaint-filing period for each discriminatory act. Iowa Code § 216.15(13). This period must be met as a prerequisite to filing a lawsuit

alleging a discriminatory employment practice under the ICRA. Iowa Code § 216.16(2)(a) (referencing Iowa Code § 216.13(15)). If a complaint is not filed within the 300-day period after each act, the claim is barred. *Farmland Food v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 743 (Iowa 2003).

This limitations period is not an arbitrary obstacle to the vindication of claims. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990). Instead, it represents a deliberate, calculated choice on the part of the Iowa legislature to set a remedial period which balances the interests of both the employer and employee. Johnson, 71 Ohio St. L.J. at 1251. The abbreviated nature of the period clearly indicates that the Iowa legislature intended, and has a strong preference for, the prompt resolution of employment discrimination actions. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 630 (2007); *Hill v. Georgia Power Co.*, 786 F.2d 1071, 1076 n. 9 (11th Cir. 1986). Moreover, it reflects the legislature's belief that 300 days is the point at which the interests in protecting valid employment discrimination claims are outweighed by the interest in prohibiting the prosecution of stale ones. *See Union Pacific RR Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir. 1998).

As discussed earlier, in 2009 the Iowa legislature amended the ICRA to add a new strict liability cause of action under the chapter for paying

unequal wages, Iowa Code section 216.6A. *Dindinge*r, 860 N.W.2d at 564; Iowa Code § 216.6A. The legislature also enacted an "enhanced" remedy for violations of section 216.6A. Iowa Code § 216.15 (9)(a)(9)(a)–(b); *Dindinger*, 860 N.W.2d at 561. In enacting this amendment, there is nothing to suggest the legislature intended to exclude such claims from the ICRA's 300-day complaint-filing period. To the contrary, the 300-day limitations period broadly applies to "a claim under this chapter." Iowa Code § 216.15(13). An equal pay claim pursuant to section 216.6A is a "claim under this chapter." Nothing in the new section 216.6A, or the enhanced remedy provision in section 216.15(9), states that the 300-day limitations period does not apply to such claims. "Changes made by revision of a statute will not be construed as altering the law unless the legislature's intent to accomplish a change in its meaning is clear and unmistakable." *State v. Pearson*, 327 N.W.2d 735, 738 (Iowa 1982). Thus, if the legislature intended to exclude section 216.6A from the 300-day limitations period, it would have expressly said so.

Moreover, the language of section 216.6A contemplates the application of the 300-day limitation period. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the U.S. Supreme Court was presented with the issue of when the statute of limitations period begins to run for a pay discrimination claim. 550 U.S. 618, 623 (2007). In a controversial decision, the Supreme Court held that pay

discrimination occurs, and the applicable 180-day limitations period begins to run, not when each separate paycheck or payment is issued, but rather at the time the discriminatory pay decision was made—thereby severely restricting the time period for filing pay discrimination claims. *Id.* at 628-29. In response, Congress passed the Lily Ledbetter Fair Pay Act, which, among other things, specifically prescribes when a discriminatory pay decision occurs for purposes of triggering the statute of limitations:

> [A]n 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.

Pub. L. No. 111-2, 123 Stat. 5 (2009); 42 U.S.C. § 2000e-5(e)(3)(A). By providing multiple options for events that can constitute an occurrence of a discriminatory pay practice, including "each time wages, benefits or other compensation is paid," the Act circumvents the Supreme Court's decision in *Ledbetter*, while still maintaining the application of the 180-day or 300-day filing period. *See id.*

When the Iowa legislature amended the ICRA and added section 216.6A, it used the exact same language as the Fair Pay Act in delineating when an unfair or discriminatory pay practice occurs. *Compare* Iowa Code §

216.6A(2)(b) *with* 42 U.S.C. § 2000e-5(e)(3)(A). By using the same language as the Fair Pay Act, the Iowa legislature clearly intended to avoid the application of the controversial outcome of the *Ledbetter* decision. However, the risk of a *Ledbetter* interpretation of section 216.6A only exists if there is an applicable limitations period. *See Ledbetter*, 550 U.S. at 623-624. If the 300-day period provided by section 216.15(13) was not intended to apply to claims under section 216.6A, then there would be no risk of a *Ledbetter* interpretation limiting the period upon which to bring a claim and no reason to mirror the language of the Fair Pay Act. Rather, the Iowa legislature clearly intended the 300-day limitations period to apply to claims brought pursuant to section 216.6A and drafted the section with that limitations period in mind.

Because the ICRA's 300-day limitations period applies to section 216.6A, a plaintiff's lost-income recovery for claims brought under that section "is the pay that should have been received within the 300-day limitations period set forth in Iowa Code 216.15(13)." *Dindinger*, 860 N.W.2d at 575-76. In *Dindinger*, this Court was presented with the question of what period of time a plaintiff could recover in the context of an intentional pay discrimination claim brought pursuant to Iowa Code section 216.6. *Id.* at 567. Applying the 300-day limitations period, this Court determined that "each paycheck is a discriminatory practice and a new 300-day limitations

period applies to each check." *Id.* at 568. Therefore, this Court held "a plaintiff's lost income is based upon the 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.

This Court's holding in *Dindinger* applies equally to claims brought under Iowa Code section 216.6A. Each paycheck is treated as a discrete discriminatory practice. *See id.* at 568. In fact, section 216.6A specifically provides that each discriminatory paycheck constitutes a separate violation of section 216.6A. Iowa Code § 216.6A(2)(b) ("an unfair or discriminatory practice occurs . . . when an individual is affected by application of a pay decision or other practice, including each time wages, benefits or other compensation is paid . . ."). As such, each paycheck is separately actionable, and is evaluated individually for limitations purposes. *Dindinger*, 860 N.W.2d at 572. Because the 300-day limitations period provided by section 216.15(13) is applicable to claims brought pursuant to section 216.6A, a plaintiff's lost income recovery under such claim is based upon and limited to the pay that should have been received within that 300-day period. *See id.* at 575–76; Iowa Code § 216.15(13).

While the parties in *Dindinger* did not provide briefing or argument in relation to whether this Court's holding as to claims brought under 216.6 was

also applicable to claims under 216.6A, in its decision, this Court in a footnote stated:

> In 2009, the legislature provided a different statute of limitations for claims under Iowa Code section 216.6A, allowing the employee to recover "for a period of time for which the complainant has been discriminated against." 2009 Iowa Acts. Ch. 96, § 3 (codified at Iowa Code § 216.15(9)(a)(9)(a)). This language appears to allow the employee to recover for the entire period of discrimination, so long as some equal pay violation occurred within 300 days of the employee's administrative complaint.

Id. at 572, n. 7. It is unclear whether the "entire period of discrimination" referenced by the Court means the period starting from the first discriminatory practice within the 300-day period or whether it includes reaching back in time prior to the start of the 300-day complaint-filing period. Section 216.6A provides that the unfair or discriminatory practice "include[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). This appears to indicate that the Court's language in this footnote was explaining the remedy, which starts with the "unfair or discriminatory practice" (the first paycheck within the 300-day filing period) and continues into the future. *See id.* In the event that this Court meant otherwise, instead interpreting the language of section 216.15(9)(a)(9)(a) to mean that a plaintiff can seek wages

beyond the 300-day limitations period, the Court should reconsider such conclusion.

Interpreting section 216.6A to allow recovery dating back past the 300-day complaint-filing period—potentially 20 to 30 to 40 years for long-term employees—would directly contradict the structure of section 216.6A. The legislature made 216.6A a strict liability statute, removing any requirement that a plaintiff show an employer acted with intent and thereby making it easier for a plaintiff to bring a pay discrimination claim. *Dindinger*, 860 N.W.2d at 656. At the same time, the legislature imposed an "enhanced remedy" of two or three times the wage differential. Iowa Code § 216.15(9)(a)(9)(a)–(b). It is unlikely that the legislature intended to subject employers to strict liability with the potential of two to three times "enhanced" damages[1] *and* impose an additional, third penalty by making those enhanced damages recoverable for the entire "period of discrimination" without any regard to the timely filing of a claim. This would be a strange and sudden deviation from the rest of the ICRA.

Moreover, such an allowance would entice plaintiffs who are aware of potential wage discrimination to sit on their hands and wait, increasing the

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[1] For all other ICRA employment-practice claims, the remedy is limited to "actual damages." Iowa Code § 216.15(9)(a)(8).

time period by which they can receive *two to three times* the amount of backpay wage differential. Such an interpretation would be extremely prejudicial to employers. *See Cada*, 920 F.2d at 453 ("[D]elay in bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements."). It would also undermine the very purpose for the Iowa legislature's implementation of the 300-day limitations period: to encourage the prompt processing of all charges of discrimination which balances both the interests of the employee and the employer. It is unlikely this was the legislature's intent in passing the 2009 amendment.

Rather, the sensible and logical interpretation of the amendment is that the legislature intended to provide a remedy of two or three times the backpay wage differential for the period beginning 300 days before the complainant files his or her administrative complaint and continuing for any subsequent period of discrimination. This approach is "consistent with the language of the ICRA, which requires the complaint to be filed 'within three hundred days after the alleged discriminatory or unfair practice occurred,'" and aligns with the conclusion of this Court in *Dindinger* that "[s]eparate discriminatory paychecks should be evaluated separately for limitations purposes." *Dindinger*, 860 N.W.2d at 572, 575. It also serves to maintain the reasonable policy reasons for the legislature's enactment of the 300-day limitations

period in the first place. *See Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) ("Relief back to the beginning of the limitations period strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past.").

For these reasons, whether a plaintiff's wage discrimination claim is brought under 216.6 or 216.6A, the claim is subject to the same 300-day limitations period set forth in section 216.15(13) and his or her lost-income recovery is limited to the pay that should have been received within that 300-day period. Because the 300-day limitations period for Plaintiff's lost income recovery under 216.6A began October 12, 2018,[2] any claim for damages on her wage-discrimination claim before that date is barred. Accordingly, judgment should be reversed as to all damages for wages prior to October 12, 2018.

IV. EXCESSIVE EMOTIONAL DISTRESS DAMAGE AWARDS LIKE THE ONE ENTERED IN THIS CASE NEED TO BE REINED IN BY THE COURT

Historically, the law viewed claims for emotional distress with great skepticism. Courts in the late nineteenth and early twentieth centuries categorically denied recovery for purely emotional harm. Nancy Levit,

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[2] October 12, 2018 represents 300 days prior to when Selden filed her administrative charge with the ICRC on August 8, 2019. App. I at 800 (187:6-8).

Etheral Torts, 61 Geo. Wash. L. Rev. 136, 142 (1992). "The fear of imaginary injuries and fictitious suits, the belief in self-responsibility for mental well-being, the difficulty of monetarily valuing emotional harms, the lack of tools and standards for measurement of emotional ills, and the nascent state of the behavioral sciences all combined to preclude recovery for emotional suffering." *Id.* In the 1920s and 1930s, courts began to modify the absolute prohibition against such recovery by allowing "parasitic damages" for mental suffering that accompanied a physical injury. *Id.* "Since then, the availability of such damages has expanded greatly," but the "inchoate, subjective nature of such claims has created significant problems of measurement and proof." Eugene Konorovich, *The Mitigation of Emotional Distress Damages*, 68 U. Chi. L. Rev. 491, 493 (2001). Thus, at each expansion of liability, "courts have attempted to limit recovery to categories of cases where the emotional distress seems most likely to be genuine and substantial, such as where the distress flows from a physical injury to a plaintiff." *Id.*

Under current Iowa law, plaintiffs bringing claims under the ICRA may recover damages for emotional distress "without a showing of physical injury, severe distress, or outrageous conduct." *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 537 (Iowa 1996). Unlike Title VII, the Iowa Civil Rights Act contains no limits on the amount of such damages. *Compare* Iowa

Code § 216.15(9)(a)(8) *with* 42 U.S.C. § 1981a(b)(3). This Court has stated that damages for emotional distress are "highly subjective" and "not easily calculated in economic terms," and has cautioned against judicial interference with such awards. *Smith v. Iowa State University of Science and Technology*, 851 N.W.2d 1, 31 (Iowa 2014). This system creates a significant moral hazard. For juries, the difficulty in monetizing emotional distress in the absence of quantitative standards is "exacerbated by a sort of sympathetic moral hazard that juries face when making awards on an ad hoc basis and spending money that is not their own." Randall R. Bovbjerg James, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 Nw. U. L. Rev. 908, 936 (1989). For plaintiffs, the system creates an incentive to exaggerate and aggravate, rather than mitigate, their emotional distress:

> Emotional distress liability will create moral hazard because the 'insured' victim can exercise some degree of control over the ex post size of the injury—a defining condition of moral hazard. Given that there is no ceiling on common law tort recovery, emotional distress victims would have an incentive to exacerbate the extent of their damages in order to recover more than their actual losses—the ex post species of moral hazard.

Konorovich, 68 U. Chi. L. Rev. at 502–03.

Meanwhile, punitive damages are not available under the ICRA. *Ackelson v. Manley Toy Direct, LLC*, 832 N.W.2d 678, 689 (Iowa 2013). This creates a danger that juries will use their "unbounded discretion to punish

unpopular defendants by coloring compensatory damages with punitive considerations." Timothy R. Freeman, *Compensatory or Punitive Damages? Tarr v. Ciasulli Blurs the Distinction*, 36 Seton Hall L. Rev. 1285, 1298 (2006). This Court recognized this danger in *City of Hampton*, where it reduced an emotional distress award from $50,000 to $20,000 because the ICRA "does not allow for punitive damages" and there was a "relatively small amount of evidence supporting the award" and a "total lack of any medical or psychiatric evidence." 554 N.W.2d at 537. Unfortunately, the Court has also used language in other cases suggesting that emotional distress damages may be awarded based on the severity of the defendant's conduct. *See Jasper v. H. Nizam*, 764 N.W.2d 751, 773 (Iowa 2009) ("These cases reveal that the upper range of emotional-distress damages increases *as the nature of the wrongful conduct becomes more egregious*…." (emphasis added)). "[A]llowing the jury to determine compensatory damages for emotional distress based on their assessment of the defendant's conduct could open the door to unjustified awards based more on jury passion than reason." Freeman, 36 Seton Hall L. Rev. at 1299.

The Court has previously attempted to impose boundaries on emotional distress damages by establishing "broad ranges" of appropriate awards. *Jasper*, 764 N.W.2d at 772. In *Jasper*, the Court explained that cases

involving a single incident of wrongful termination resulting in "anger, confusion, loss of esteem, financial worry, and the effect on marital relationships" could justify awards in the $40,000 to $50,000 range, while cases involving egregious or prolonged conduct or more "severe and persistent" emotional distress could justify awards in the "upper range" of $165,000 to $200,000. *Id.* at 772–73. However, the Court left the door open to higher awards by suggesting that more egregious cases "may support awards of $200,000 *and beyond*…." *Id.* at 773 (emphasis added). The Court walked through that door only five years later in *Smith*, upholding a $500,000 emotional distress award largely based upon the Court's reluctance to interfere with jury verdicts. 851 N.W.2d at 33.

Since that time, emotional distress awards in employment cases in Iowa have exploded, with juries regularly awarding six- and seven-figure emotional distress damages based on little more than the plaintiff's own testimony about his or her subjective state. *See, e.g., Anderson v. State*, Case No. LACL131321 (Polk Co. July 18, 2017) ($2,195,000 in emotional distress damages); *Hawkins v. Grinnell Regional Medical Center*, Case No. LALA002281 (Poweshiek Co. July 24, 2017) ($4,280,000 in emotional distress damages); *Meyer v. State*, Case No. LACL133931 (Polk Co. May 5, 2017) ($1,056,000 in emotional distress damages); *Haskenhoff v. Homeland*

Energy Solutions LLC, Case No. LACV003218 (Chickasaw Co. Aug. 15, 2019) ($1,050,000 in emotional distress damages); *Godfrey v. State*, Case No. LACV121599 (Jasper Co. July 16, 2019) ($1,500,000 in emotional distress damages); *White v. State*, Case No. LACL146265 (Polk Co. May 20, 2021 ($790,000 in emotional distress damages); *Rumsey v. Woodgrain Millwork Inc.*, LACL138889 (Polk Co. Sept. 3, 2019 ($450,000 in emotional distress damages).

Such awards have "turned the civil justice system into a slot machine, paying off in jackpots for those who hit the right, randomly selected combination." Freeman, 36 Seton Hall L. Rev. at 1301. Post-verdict review by district and appellate courts often does little to keep these awards in check because "trial judge, like juries, lack objective standards for deciding … what award levels to deem adequate and not excessive," and appellate courts are "required to defer to damage findings below" and likewise "lack objective standards for altering awards." James, 83 Nw. U. L. Rev. at 915-16. Thus, "[m]ost post-verdict changes in jury awards occur by virtue of settlement…." *Id.*

It is time for this Court to rein in these out-of-control emotional distress awards. This case is a perfect example. The jury awarded over $1.1 million in emotional distress damages to Plaintiff, including $720,975 on the equal pay

claim[3] and $434,375 on the retaliation claim, with scant evidence of actual injury. Plaintiff received no medical treatment, did not see a psychiatrist, and took no medication. App. I at 814 (201:5–23). The sole evidence presented on emotional distress was the testimony of Plaintiff and her husband and daughter. With respect to the equal pay claim, they testified that after Plaintiff found out she was being paid less than Tjaden, Plaintiff was generally not as happy as she used to be, not as enthusiastic at work, not as outgoing, lost her spark and confidence, was frustrated, had less energy, and was more easily agitated.[4] App. I at 778 (165:20–25); 969 (145:4–11); 970 (146:7–12); 975 (151:3–11); 976 (152:2–25); 977 (153:17); 984 (160:7–24)). With respect to the retaliation claim, Plaintiff testified that it was humiliating and made her cry when her co-workers asked her why she did not apply for the supervisor position and she had to tell them she did apply but did not get an interview. App. I at 778 (165:5–15).

Such testimony does not support anything more than a nominal award. "Hurt feelings, anger and frustration are part of life," and "[u]nless the cause

[3] The district court ultimately set aside the emotional distress award with respect to the equal pay claim on the basis that such damages are not available for claims brought pursuant to Iowa Code § 216.6A. App. I at 1831.

[4] Meanwhile, Plaintiff's husband testified that his unemployment which lasted an entire year caused no stress whatsoever to their family. App. I at 980 (156:4–18).

of action manifests some specific discernable injury to the claimant's emotional state," emotional distress damages are not recoverable. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 940 (5th Cir. 1996). "An award of damages for emotional distress must be supported by competent evidence of 'genuine injury.'" *Bailey v. Runyon*, 220 F.3d 879, 880–81 (8th Cir. 2000). Factors that bear on whether a "genuine injury" has been proved include whether (1) the plaintiff suffered a physical injury as a consequence of the emotional distress, (2) the plaintiff received medical attention, (3) the plaintiff received psychological or psychiatric treatment, (4) the plaintiff suffered a loss of income as a result of the emotional distress, and (5) there is other evidence corroborating the plaintiff's subjective testimony. *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1254 (4th Cir. 1996). While expert testimony is not always required, courts "have noted the probative value of expert psychological proof regarding causation of the claimant's depression and emotional distress." *Bailey*, 220 F.3d at 881. Corroboration by plaintiff's doctors "aid[s] triers of fact in determining the propriety of awarding compensatory damages for emotional distress, as well as appellate courts in reviewing sufficiency challenges to such awards." *Price*, 93 F.3d at 1254.

Testimony alone may sometimes be sufficient to prove a compensable injury in the proper case, however, courts must "scrupulously analyze an

award compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony." *Id.* at 1251. To be sufficient, the "testimony must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a [civil rights] violation occurred support an award of compensatory damages." *Id.* at 1255. "Conclusory statements give the finder of fact no adequate basis from which to gauge the nature and circumstances of the wrong and its effect on the plaintiff." *Bailey*, 220 F.3d at 881. Thus, testimony that a plaintiff feels humiliated, depressed, despondent, upset, betrayed, degraded, embarrassed, or stressed is too vague and conclusory to support damages for mental harm. *Price*, 93 F.3d at 1255; *see also Brady v. Fort Bend County*, 145 F.3d 691, 719 (5th Cir. 1998). Similarly, testimony that the plaintiff suffered nervousness, sleeplessness, or marital stress which fails to elaborate with any detail and fails to explain "the nature or extent or severity of the alleged harm" does not support an award of compensatory damages. *Brady*, 145 F.3d at 719. Instead, such testimony supports only nominal damages. *Bailey*, 220 F.3d at 881.

In the present case, none of the factors which support a finding of "genuine injury" are present in this case. The testimony was vague,

conclusory, and lacking in detail. There was no corroborating expert testimony, no physical injury, no medical or psychological treatment, and no loss of income due to the alleged emotional distress. The emotional distress damages were clearly excessive and went far beyond compensation. While counsel for Plaintiff gave lip service to the jury about not using damages to punish DMACC, counsel went on to argue for an award based on exactly that. App. I at 1447 (171:17–18). Counsel told the jury that DMACC's treatment of Plaintiff at trial was cruel and disrespectful; that DMACC had "repeatedly accused Sandy of violating federal law and made veiled threats at future discipline for coming here"; that DMACC has "gotten away with whatever it could"; that the jury needed to "put a stop to it" not only for Plaintiff but also "the other three women devalued for 23 years and for her four daughters, [and] for young women she hopes won't have to go through something that should have been over"; that DMACC would "continue to get away with whatever it can until [the jury does] something about it"; and that the jury needed to "hold[] DMACC accountable…." App. I at 1447-1450 (171:17–174:25).

Such "send a message"-type arguments are inappropriate because they "divert[] the jury's attention to decide the case based on the facts and the law instead of emotion, personal interest or bias." *Caudle v. D.C.*, 707 F.3d 354, 361 (D.C. Cir. 2013). "It is axiomatic that 'send a message' arguments, which

urge the jury to base its findings on compensatory damages on alleged facts outside of the record and for the purposes of punishment, are improper." *McCabe v Mais*, 580 F. Supp. 2d 815, 835 (N.D. Iowa 2008) *aff'd in part, rev'd in part sub nom., McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010). Such arguments are "no different than a prosecutor urging the jury at the end of a criminal case 'to be the conscience of the community,' an improper argument that, in a close case, may warrant a new trial." *Gilster v. Primebank*, 747 F.3d 1007, 1011 (8th Cir. 2014).

It is apparent that the jury bought in to Plaintiff's counsel's closing argument and used the emotional distress award as a means of punishing DMACC rather than as compensation for genuine injury. The emotional distress award should be set aside by this Court as clearly excessive. In doing so, the Court should also take this opportunity to affirm the need for plaintiffs to establish "genuine injury" to recover for emotional harm, to prescribe the required level of proof to establish "genuine injury," and to establish appropriate ranges for emotional distress awards to assist district courts in evaluating post-trial motions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.906(4) and 6.903(1)(g)(1) because it contains 6,694 words, excluding the parts of the brief exempted by the rule.

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 27, 2023, the foregoing Final Brief was electronically filed with the Iowa Supreme Court by using the EDMS system. I further certify that all parties or their counsel of record are registered as EDMS filers and will be served by the EDMS system.

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