IN THE SUPREME COURT OF IOWA

No. 21-1898

TRACY WHITE,

Appellee,

vs.

STATE OF IOWA and IOWA DEPARTMENT OF HUMAN SERVICES,

Appellants,

Appeal from the Iowa District Court for Polk County
Hon. Scott Rosenberg, District Judge

APPELLANTS' AMENDED FINAL BRIEF

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court under Rule 6.1101(2)(*c*). This case presents an opportunity to resolve an important question on the scope of permissible evidence in hostile work environment claims under the Iowa Civil Rights Act. Specifically, under what circumstances can evidence of harassment of *other* employees be used to prove that the *plaintiff's* work environment was impermissibly hostile? The Iowa Court of Appeals has discussed this issue in an unpublished opinion, *see Salami v. Von Maur, Inc.*, No. 12-0639, 2013 WL 3864537 (Iowa Ct. App. July 24, 2013), and other courts to consider this issue have held "an employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile." *Adams v. Austal, U.S.A.*, 754 F.3d 1240, 1245 (11th Cir. 2014).

Here, after the jury heard evidence of alleged harassment against non-Plaintiff employees, including allegations not involving Plaintiff and of which the Plaintiff had no knowledge, the jury returned a substantial emotional damages award unsupported by the Plaintiff's evidence. This Court should retain this case and provide guidance to litigants on the appropriate scope and use of evidence of discrimination against non-plaintiffs.

STATEMENT OF THE CASE

Tracy White is a Social Work Administrator for the Iowa Department of Health and Human Services ("HHS"). White claims that her then-supervisor Michael McInroy created a hostile work environment due to her gender at HHS between January 2017 and McInroy's termination in February 2019. Her claim proceeded to trial, and she sought to hold the State liable through a direct negligence theory.

The trial should have been about White's allegations and claims. Instead, the district court—over the State's objections—improperly admitted substantial prejudicial evidence that was not probative of White's claim. Throughout the eleven-day trial, White's hostile work environment claim included testimony regarding allegations of race and sexual orientation discrimination against non-parties (even though White is a straight, white woman), as well as other misconduct distinct from her claim.

The court allowed the jury to hear evidence about conduct that White was unaware of during the period she claims she experienced a hostile work environment. It also improperly admitted evidence of events that occurred years before the period at issue in the lawsuit, as well as comments made outside the workplace.

White alleged she complained for years about workplace conduct she felt was inappropriate and that HHS failed to address her

concerns. Yet White is a supervisor and failed to timely notify HHS of sexually explicit comments and gender-based conduct. HHS could not remedy conduct to be consistent with its policies if it was not aware of violations. When White finally notified HHS, it acted to investigate and stop the inappropriate behavior, including terminating two HHS employees.

Despite this evidence, the prejudicial evidence impassioned the jury, which returned an unjust and punitive award of future emotional distress damages. The jury awarded White $260,000 in past emotional distress damages and $530,000 for future emotional distress damages. The jury thus awarded $790,000 in emotional distress damages for White—who never lost her job, whose alleged harasser was terminated, and who testified that she is now in a healthy, positive work environment.

The district judge denied the State's post-trial motions for judgment notwithstanding the verdict, new trial, and remittitur. The State now appeals, as (1) the district court's evidentiary errors and jury instructions leaves the integrity of the verdict in doubt, (2) the impassioned jury rendered a flagrantly excessive damages award, and (3) White failed to prove the necessary elements of her claim at trial.

STATEMENT OF THE FACTS

I. The parties.

Defendant-Appellant the Iowa Department of Health and Human Services is a division of the State of Iowa.[1] It was established to improve the well-being and productivity of the people of the State of Iowa. *See* Iowa Code § 217.1. HHS is charged with addressing social problems through social programs. *Id.*

Appellee Tracy White is currently employed by HHS as a Social Work Administrator and held that same position during the period at issue in this lawsuit. White began her employment with HHS in September 2000, when she was hired as a Social Worker Case Manager. [5/10/2021 Tr. 55:2-10]. White climbed the ranks at HHS and over the years was promoted to Social Work Supervisor, and ultimately, Social Work Administrator (also a supervisor position). [5/10/2021 Tr. 76:5-77:25]. White is currently employed with HHS as a Social Work Administrator. [5/10/2021 Tr. 78:1-5].

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[1] The Iowa Department of Health and Human Services was formerly two separate agencies: the Iowa Department of Health and Human Services and the Iowa Department of Public Health. *See* 2022 Iowa Acts. Ch. 1131 § 51. Those agencies' consolidation has begun and is expected to be complete by July 1, 2023. *See* Iowa Dept. of Health & Human Servs., *Iowa Health and Human Services Alignment*, https://hhsalignment.iowa.gov.

II. District court denies HHS's motion in limine and clears the path for extraneous evidence at trial.

In November 2019, White sued the State of Iowa and HHS (collectively, "the State"), alleging that HHS maintained a hostile work environment and that White had been discriminated against based on her gender. *See* Petition, filed November 11, 2019, App. Vol. I, 4-16. During summary judgment proceedings, the parties disputed which of White's complaints were relevant to her hostile environment claim. *See* HHS MSJ; White MSJ Resistance. The district court denied the State's motion in its entirety. Order, filed April 29, 2021.

The State filed a lengthy motion in limine, which urged the court to exclude evidence that was unfairly prejudicial and not probative of White's claim that she faced a hostile work environment based on her sex or gender between January 2017 and February 2019. Def. MIL (April 19, 2021), App. Vol. I, 17-44. The State warned that the broad scope of the evidence White intended to introduce at trial would confuse the issues and the jury, create mini-trials, and generally inflame the jury to passion or prejudice. *Id.* The court orally denied the State's motion in limine in its entirety, and at trial granted the State a standing objection on the topics addressed in its motion in limine. [5/5/21 Tr. 8:7–9:18].

III. The jury trial devolved into mini-trials and inflammatory rhetoric unrelated to White's gender-based claim.

At trial, White presented a slew of evidence relating to inappropriate conduct that allegedly occurred within HHS over the course of eight to ten years: some that she directly observed, some that she heard about secondhand, some that happened outside of work hours, some that happened in other offices, and much of which was not at all related to sexual harassment, gender discrimination, or her work environment at HHS. White testified throughout the trial that over the years she had reported this offensive conduct to her supervisors. The State disputed White's claim and presented evidence that she, in fact, failed to report and therefore deprived HHS of the ability to properly address the conduct.

White's presentation of nearly a decade's worth of conduct began with an anecdote about a conversation that happened in 2011 or 2012—five or six years before White alleges she was discriminated against. [5/6/21 Tr. 42:12-19; 87:23-88:4; 5/10/21 Tr. 83:12-84:14; 5/12/21 Tr. 25:5-13]. Witnesses testified about a sexual joke that then-HHS Business Manager Pauline Rutherford allegedly told at a happy hour with colleagues. [5/6/21 Tr. 42:12-19; 87:23-88:4; 5/10/21 Tr. 83:12-84:14; 5/12/21 Tr. 25:5-13]. No one reported the joke. [5/6/2021 Tr. 87:23-88:12].

Some of the purportedly offensive behavior appeared to be more immature than related to sex- or gender-discrimination. For example, witnesses testified that a bureau chief made "poop jokes" during leadership meetings. [5/13/21 Tr. 82:18-20; 5/18/21 Tr. 162:1-5; 163:7-23]. White found these jokes offensive, while others testified that they were merely sophomoric. [5/10/21 Tr. 170:3-171:4; 167:14-168:4]. Although one witness testified that he had overheard that bureau chief make offensive sex jokes on other occasions, White only became aware of those jokes during testimony at trial. [5/12/21 Tr. 88:7-90:22]. And the witness admitted that he did not report being offended by these jokes until years after he overheard them. [5/12/21 Tr. 88:7-90:22].

White complained that in February 2016, McInroy commented to her that a female job applicant was "dowdy" and that White likely preferred an applicant with "sexy shoes" because she is a "shoe person". [5/10/21 Tr. 100:10-101:8; 5/14/21 Tr. 35:13-36:7]. White found this comment offensive but did not report it for years. [5/10/21 Tr. 100:16-101:15; 175:24-177:5].

The jury heard conflicting testimony that during the fall of 2016, McInroy commented that a supervisor who was wearing a flannel shirt looked like a "sexy lumberjack." [5/6/21 Tr. 49:12-50:25; 5/10/21 Tr. 101:16-102:14; 1818:4-19; 5/11/21 Tr. 39:25-40:11; 5/12/21 Tr. 25:22-27:7; 32:20-25; 42:3-20; 44:15-22; 198:13-18;

5/13/21 Tr. 80:20-81:12; 110:4-24; 5/14/21 Tr. 36:11-37:16; 5/17/21 Tr. 38:8-39:5]. White found this comment offensive but did not report it at the time. [5/10/21 Tr. 101:16-102:14; 181:4-182:2]. Other witnesses also failed to report. [5/12/21 42:3-30].

Lindee Jeneery, a former HHS employee who transferred to another agency in 2016, testified about her perception that McInroy was a male chauvinist—a claim that she never made to any HHS official before submitting her exit interview. [5/6/21 Tr. 14:15-17:25].

The jury heard that sometime in January 2017, Jennifer Ware told McInroy and White that she "had a nightmare last night that [White] fired" her. [5/10/21 Tr. 105:20-23]. White testified that McInroy said, "oh, was she wearing black leather and whipping you in your nightmare too?" [5/10/21 Tr. 105:20-25][2].White eventually reported this comment to Division Administrator LaVerne Armstrong and admitted that McInroy never again directed another inappropriate sexual comment at her. [5/10/21 Tr. 118:12-120:8; 233:7-9].

Various witnesses testified that sometime before April 2017, McInroy called a group of supervisors "assholes." [5/14/21 Tr. 57:25-58:21].

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[2] McInroy denies having made this comment. [5/14/21 Tr. 53:8-16].

During the spring or summer of 2017, McInroy allegedly commented on a "young, attractive female social worker" who wore a "tight, short, red dress" to work at a leadership team meeting. [5/10/21 Tr. 115:11-116:19; 5/14/21 Tr. 58:22-59:23]. No other individuals who attended leadership meetings recall hearing McInroy make inappropriate sexual comments about that worker or anyone else. [5/13/21 82:5-17; 85:3-11; (Konchalski); 129:3-130:10 (Rutherford); 5/18/21 Tr. 134:2-135:12; 148:2-149:6 (Dahm)].

Witnesses testified about a different co-worker's rendition of a line of lyrics from the song "Get Low" by the Lil' Jon & the East Side Boyz at a business meeting. [5/10/21 Tr. 140:19-141:10; 5/11/21 Tr. 103:15-104:1; 5/14/21 Tr. 70:2-22]. White found that singing offensive, while others either did not recall the incident or did not find the song offensive. [5/10/21 140:19-141:21 (White); 5/13/21 Tr. 83:23-85:2 (Konchalski); 5/18/21 149:24-152:11 (Dahm)].

The jury heard testimony that White was offended when that coworker recounted her own conversation with an HHS bureau chief, in which he made a comment about drinking the "nectar of the gods" sometime in 2018. [5/10/21 Tr. 137:15-138:2; 186:6-18]. White's coworker was not offended by the conversation and did not report it, but HHS ultimately investigated after White reported the comment. [5/13/21 Tr. 138:12-142:4].

Witnesses testified about a female Child Protective Worker ("CPW") who received an email from an IT Technician in June 2018, in which he called the CPW his "eye candy." [5/6/21 Tr. 68:2-15; 99:23-100:12; 5/10/21 Tr. 138:9-21; 5/12/21 Tr. 34:21-35:8; 45:8-19; 5/13/21 Tr. 134:14-22; 5/14/21 Tr. 68:14-17; 5/18/21 Tr. 149:7-23]. White did not receive the email and was never referred to as "eye candy," but was concerned that the relevant supervisor had moved too slowly in investigating the CPW's complaint. [5/10/21 Tr. 138:9-140:2, 188:16-191:24; Tr. 5/13/21 134:14-138:11 (Rutherford time-line of the complaint)].

White also testified about her work relationship with McInroy, her difficulties working with him, and her belief that he treated her and other "strong women" less favorably than he treated "compliant women". [*See* 5/10/21 51:6-235:6; 5/11/21 10:18-43:11].

White is a straight, white woman, and her sexual harassment claim against the State did not involve allegations that she was harassed on the basis of race or sexual orientation. Yet the court permitted testimony on alleged discrimination against members of those protected classes. For instance, White emphasized that she believed McInroy was racist in his treatment of Black employees. [*See, e.g.*, 5/10/21 Tr. 81:5-83:11; 111:3-19; 152:3-18 (insinuating that McInroy supported and permitted discrimination against "gay people, black people, young people")]; 206:23-208:7).

On top of allegations that McInroy is racist, White also testified about her speculation that McInroy is homophobic. [5/10/21 Tr. 125:20-22]. Her testimony included speculation that a lesbian HHS employee had been terminated because of her sexual orientation. [5/10/21 Tr. 102:15-104:7, 107:8-22, 113:4-12, 184:4-185:6].

And testimony recounting the most egregious behavior revolved not around White and McInroy, but around harassment that Social Worker Jennifer Jackson allegedly suffered at the hands of her supervisor, Darci Patterson. [5/6/21 Tr. 116:4-127:14; 5/7/21 Tr. 107:17-138:11]. White admitted that she was never harassed by Ms. Patterson and that, despite *being Ms. Patterson's supervisor*, she was unaware of much of Ms. Patterson's behavior, particularly about the sexual harassment of Jackson and others, until the end of 2018. [5/10/21 Tr. 150:17-151:5]. Other witnesses admitted that they observed but never reported Patterson's conduct. [5/6/21 Tr. 52:19-54:25].

Yet Jackson and White were permitted to offer emotionally charged testimony about Jackson's experiences with Patterson. [5/6/21 Tr. 116:4-127:14; 5/7/21 Tr. 107:17-138:11]. Of course, as soon as Jackson reported the harassment to supervisors *other than* White, the Iowa Department of Administrative Services ("DAS") promptly conducted a thorough investigation and both Patterson and McInroy were fired. [5/10/21 Tr. 151:6-15].

IV. The inflammatory and confusing trial results in a half-million-dollar future emotional distress award unsupported by substantial evidence.

At the end of trial—following many confusing mini-trials on the authenticity of inflammatory allegations unknown to or not experienced by White, as well as charges of racism and homophobia—the jury awarded White $260,000 in past emotional distress damages and $530,000 in future emotional distress damages. The half-million-dollar award for future emotional distress was not supported by substantial evidence at trial and the district court should have granted the State's post-trial motions on that basis.

During trial, White testified about the impact that working under McInroy between 2017 and 2019 had on her life.[3] [5/10/21 Tr. 51:6-235:6; *see* 146:16-149:9 (White discussion of symptoms of her past emotional distress); 157:19-164:8;[4] 5/11/21 Tr. 10:17-43:15]. She explained that the job itself caused her a great deal of stress.

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[3] White admits that she first complained to HHS about her work environment in April 2017 and that her work environment improved considerably when Jana Rhoads was hired as Service Area Manager. [5/10/21 Tr. 151:22-23; 151:6-152:2 (Rhoads was hired about a year after McInroy was terminated in February 2019)].

[4] *See* Tracy White testimony about her emotional reaction to specific incidents at [5/10/21 Tr. 74:23-75:8; 103:11-104:7; 105:8-106:21; 111:3-8; 114:2-17; 114:18-115:5; 115:11-117:18; 119:21-120:8; 123:20-126:25; 130:4-136:13; 136:20-137:1; 137:2-138:8; 138:9-141:21; 142:6-19; 146:9-15; 158:3-8].

[5/10/21 Tr. 79:11-75:8-80:14]. White also testified that she is "in therapy" to deal with the everyday stress that comes with being a social worker and described the loving support she regularly receives from friends and family. [5/10/21 Tr. 79:11-75:8-80:14].

White also provided limited testimony about how she could still be impacted by the harassment in the future. In doing so, she described her work environment under her new supervisor, Jana Rhoads. White testified that HHS, without McInroy, was "better." [5/10/21 Tr. 151:22-23]. She described her relationship with her new boss as "healthy" and having a "sense of partnership" and a "sense of team." [5/10/21 Tr. 152:3-153:3].[5] White stated that Rhoads is "clear", "direct", "kind", and that the new leadership team agreed that "[t]here is not going to be dirty, vulgar sex language, discrimination against gay people, black people, young people, cute people[.]" [5/10/21 Tr. 152:3-153:3]. She told the jury "[t]he environment is so different. It's -- I can't even describe it." [5/10/21 Tr. 152:3-153:3].

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[5] This testimony was supported by White's friend and colleague, Trisha Gowin, who testified that the work environment under Rhoads is "more positive" and fostered "a team approach." [5/6/21 Tr. 81:4-16]. Jennifer Ware also testified that the work environment was much improved under Rhoads and stated that there was a "level of cohesiveness" instilled "right away" and that "there doesn't seem to be the conflict." [5/12/21 Tr. 40:21-41:7].

White testified that though things are better at work, she has not completely healed from her experiences under McInroy. She testified that she feels "revictimized" when she thinks about that time because she "tried so hard on behalf of the Jen Jacksons and all of the people that were subjected to these horrific comments." [5/10/21 Tr. 158:9-18]. She also sometimes feels angry, sad, and guilty. [5/10/21 Tr. 158:9-22]. White stated that her experiences with DHS "changed her" because she is no longer "as trusting" or "as hopeful" and that she now has a "harder edge" that isn't natural for her. [5/10/21 Tr. 161:21-162:14]. She stated that she felt daily stress preparing for the trial and that she was "scared" to continue working at HHS because of her participation in the trial. [5/10/21 Tr. 163:18-164:8].

White then discussed her struggles with her mental health. [5/10/21 Tr. 162:15-162:24]. She explained she had to care for her mental health through therapy and reliance on very supportive friends and family. [5/10/21 Tr. 159:16-160:20]. She also continued to do things that bring her joy. [5/10/21 Tr. 159:16-160:20]. Notably, after starting work under Rhoads,[6] White attended therapy just

[6] According to Tracy White, Jana Rhoads began her employment as SAM sometime in February 2020. [5/10/21 151:12-152:2]. White testified that she had struggled to continue with activities she enjoyed "up until Jana" assumed the role, or sometime during

three times. Trial Exhibit 22A. White attended therapy once in 2020 and twice—in the months before trial—in 2021. *Id.* Notes from White's 2020 and 2021 sessions with her therapist state that White "is doing well" and "loves her new boss and she is very supportive." [Trial Exhibit 22A, at 41-48]. White stated that she would continue to go to therapy as-needed for a "tune up." [5/10/21 Tr. 160:11-20].

Others also testified about White's future emotional distress. White's therapist, Margaret Conrad, testified about her experience working with White in therapy between 2017 and 2021. [5/13/21 Tr. 3:16-50:13]. Conrad testified that "last time I saw her she was doing much better." [5/13/21 Tr. 27:23-28:15]. Conrad did not testify that White would remain impacted by the distress she experienced under McInroy. Instead, in response to counsel's prompt, Conrad testified only there could be "potential" for future psychological issues but that the future effects on White's mental health are unknown. [5/13/2021 Tr. 30:11-18].

White's husband, Jim White, testified about his observations of his wife's struggles under McInroy's leadership. [5/12/21 206:9-221:2]. He did not, however, provide the jury with any information from which it could glean that White would continue to suffer

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summer of 2020. [5/10/21 Tr. 162:25-12]. She acknowledged that the COVID-19 pandemic also impacted her ability to socialize. [5/10/21 Tr. 162:25-12].

$530,000 worth of emotional distress. In fact, he testified that there was a "night-and-day difference" in White after she was assigned a new manager and that "everything was great." [5/12/21 219:1-9]. He testified that their marriage was a "lot better" than it was while White was working for McInroy and that the two had been able to return to their social life. [5/12/21 219:18-220:2]. The only evidence that Mr. White provided which could support a claim for future emotional distress was his statement that White had struggled during preparation for trial and during trial, and that "[i]t's probably going to haunt her for a long time." [5/12/21 220:3-11].

After trial and the substantial damages award, HHS moved for judgment notwithstanding the verdict, moved for a new trial and, alternatively, moved for remittitur, challenging the sufficiency of the evidence and the excessive damages award. The district court denied the motions, finding sufficient evidence to support the outcome and awards. Ruling (Nov. 28, 2021), App. Vol. I, 78-87.

HHS timely appealed from the adverse rulings.

ARGUMENT

I. The district court admitted prejudicial evidence that confused and inflamed the jury, depriving the defendants of a fair trial.

A. Error preservation and standard of review.

The State preserved error on the district court's evidentiary rulings by moving in limine to exclude the evidence and by obtaining a standing objection to the disputed evidence throughout trial. Iowa R. Evid. 5.103(a); *State v. Thoren*, 970 N.W.2d 611, 621 (Iowa 2022).

Discovery rulings are reviewed for abuse of discretion. *Id.* at 620. "A district court abuses its discretion when it bases its decisions on grounds or reasons clearly untenable or to an extent that is clearly unreasonable . . . [or] if it bases its conclusions on an erroneous application of the law." *Id.* (quoting *Stender v. Blessum*, 897 N.W.2d 491, 501 (Iowa 2017)) (alterations in original).

If a verdict results from passion and prejudice, a new trial is required. *Goettelman v. Stoen*, 182 N.W.2d 415, 421 (Iowa 1970). When irrelevant evidence is admitted, and a jury returns an excessive and disproportionate damages award, a verdict can stem from passion and prejudice. *Id.*

B. Competent evidence for workplace discrimination claims and the limits of "me too" testimony.

White brought one claim against the State: that she was harassed based on her gender in violation of the Iowa Civil Rights Act (ICRA). To succeed, she had to prove (1) she was a member of a protected class, (2) she faced unwelcome harassment, (3) the harassment was based on her protected class, and (4) the harassment affected a privilege, term, or condition of her employment. *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 571 (Iowa 2017).

Although the evidence supporting harassment claims will often be case- and context-specific, "an employee alleging a hostile work environment cannot complain about conduct of which [s]he was oblivious for the purpose of proving that [her] work environment was objectively hostile." *Adams v. Austal, USA, LLC*, 754 F.3d 1240, 1245 (11th Cir. 2014). That is the central principle at issue here, as most of White's evidence at trial related to discrimination experienced by others. Indeed, the bulk of White's case consisted of "me too" evidence.[7]

[7] "Me too evidence" is separate from, and received its moniker long before, the modern "Me Too Movement." *See, e.g.*, *Reed v. Nat'l Linen Serv.*, No. 97-5545, 1999 WL 407463, at *7 (6th Cir. 1999) ("Trial courts regularly prohibit 'me too' evidence from or about other employees who claim discriminatory treatment because it is highly prejudicial, but only slightly relevant.").

"Me too" evidence—evidence of discrimination against people other than the plaintiff—is sometimes admissible "depending 'on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.'" *Salami v. Von Maur, Inc.*, No. 12-0639, 2013 WL 3864537, at *8 (Iowa Ct. App. July 24, 2013) (quoting *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008)).

To determine whether evidence of discrimination against persons other than the plaintiff are relevant, courts generally consider (1) "whether such past discriminatory behavior by the employer is close in time to the events at issue in the case," (2) "whether the same decisionmakers were involved," (3) "whether the witness and the plaintiff were treated in a similar manner," and (4) "whether the witness and the plaintiff were otherwise similarly situated." *Id.* (quoting *Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008)).

In weighing these factors, courts must be vigilant in allowing me-too evidence, as it presents a significant risk of confusing the jury and prejudicing the defendant. *DeAngelis v. City of Bridgeport*, No. 3:14-cv-01618, 2018 WL 429156, at *1 (D. Conn. Jan. 15, 2018). "A case brought in the name of a single plaintiff for discrimination may end up devolving into a prolonged trial about an employer's alleged discrimination against many other employees who are not parties to the case." *Id.*

For every non-plaintiff who takes the stand to accuse the defendant employer of discriminating against them personally, the employer must engage in "time-consuming mini trials to adjudicate the truth or falsity of the complaints." *Hill v. Goodfellow Top Grade*, No. 18-cv-01474, 2019 WL 4194277, at *2 (N.D. Cal. Sept. 4, 2019). *See also Jones v. St. Jude Med. S.C., Inc.*, 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011), *aff'd*, 504 F. App'x 473 (6th Cir. 2012) ("'Me too' evidence is typically inadmissible . . . because it prejudices the defendant by embellishing the plaintiff's own evidence of alleged discrimination and typically confusing the issue of whether the plaintiff, and not others, was discriminated against.").

To prevent a case from devolving into improper and convoluted mini-trials, me-too evidence is typically limited to "previous cases in which discrimination was found or admitted," rather than mere complaints of discrimination. *Garang v. Smithfield Farmland Corp.*, 439 F. Supp. 3d 1073, 1095 (N.D. Iowa 2020); *see also E.E.O.C. v. CRST Van Expedited, Inc.*, No. C07-0095, 2009 WL 1033161, at *3 (N.D. Iowa Apr. 16, 2009) (distinguishing between founded evidence of other harassment and mere complaints by other employees of harassment).

And even then, after the mini-trials filled with allegations and heightened rhetoric, the jury is left with minimally probative propensity evidence—even if it finds the employer discriminated

against the witness, it does not follow that the employer must have discriminated against the plaintiff, too. *Cf. Iowa Sup. Ct. Att'y Disc. Bd. v. Moothart*, 860 N.W.2d 598, 607 (Iowa 2015) ("[W]e recognize the general proposition embraced by [Rule 5.404], namely, that absent some relevance other than propensity, evidence related to sexual harassment of one person should be given no weight in determining the merits of a different sexual harassment claim involving another person."); *Johnson v. Interstate Brands Corp.*, 351 F. App'x 36, 41 (6th Cir. 2009) ("[T]rial courts regularly prohibit 'me too' evidence from or about other employees who claim discriminatory treatment because it is highly prejudicial and only slightly relevant.").

"Congress did not enact Title VII to be 'a general civility code for the American workplace.'" *DeAngelis*, 2018 WL 429156, at *2 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). Courts must be mindful that "a plaintiff—by seeking to inject a trial with evidence of wrongful acts against others—may effectively seek to put an employer or supervisors on trial for presiding over a generally toxic or dysfunctional workplace," rather than focusing on actionable discriminatory conduct against the plaintiff. *Id.*

Beyond confusing the jury on whose allegations of discrimination they are resolving, "the potential for unfair prejudice from 'me

too' evidence is another" concern. *Id.* Me-too evidence invites the risk that "a jury may draw an impermissible 'character' inference against an employer because of evidence about the employer's alleged mistreatment of others." *Id.* "[C]ourts are reluctant to consider 'prior bad acts' in [the employment discrimination] context where those acts do not relate directly to the plaintiffs." *Denney v. City of Albany,* 247 F.3d 1172, 1189 (11th Cir. 2001). When the plaintiff's allegations are dissimilar to the me-too witness' allegations, such distinctions "weigh heavily against attaching a great deal of probative value" to the prior bad acts. *Id.*

In sum, there is no blanket rule prohibiting or allowing me-too evidence in workplace discrimination claims. But when assessing admissibility, the limited probative value of me-too evidence must be weighed against the significant risk of confusion and prejudice caused by admitting conduct not experienced, or perhaps even known by, the plaintiff. And courts must be especially careful to forestall plaintiffs using me-too evidence as a backdoor to introduce unrelated, provocative, and inflammatory allegations to incite the jury to respond to conduct outside the scope of the suit.

C. Admitting testimony relating to racism, homophobia, and misconduct that White neither observed nor experienced tainted the verdict.

Applying these principles and the me-too-evidence factors, the district court erred in allowing substantial irrelevant evidence that would confuse and inflame any reasonable jury.

1. *Allegations against Darci Patterson.* Witness Jennifer Jackson is not a plaintiff in this suit.[8] Her workplace interactions with McInroy were "close to none." [5/6/21 Tr. 115:1-5]. She couldn't describe "any relationship [McInroy] had with anyone." [5/7/21 128:16-20]. The person who she claims harassed her—Darci Patterson—was not White's supervisor. In fact, White supervised Ms. Patterson. [5/5/21 Tr. 45:15-17].

White testified that she had no knowledge of Jackson's allegations against Ms. Patterson during the time White claimed to have been harassed:

> Q: Of the witnesses we've heard testify so far, is there any incident you didn't know about until this trial?
>
> A: Many. Many incidents that I did not know about.
>
> Q: Like what?

[8] Jackson brought her own lawsuit against the State, which was voluntarily dismissed with prejudice in 2022 before an adjudication on the merits. *See generally Jackson v. Iowa Dep't of Hum. Servs*, LACL147192 (Polk).

> A: *Everything Jen Jackson had to say*. I did not know about the dildos. I did not know about talking about dicks at work. I didn't know about talking about big black dicks at work. I didn't know she was celebrating birthdays with birthday cakes with penis candles. I didn't know about the groping. . . .

[5/10/21 Tr. 150:17–151:2] (emphasis added).

Still, despite no nexus to White's workplace experience with McInroy, the jury heard detailed and graphic testimony about Ms. Patterson making sexual "jokes" in the workplace—many jokes White never heard. [*Id.* Tr. 116:6–117:15]. The jury heard testimony that Ms. Patterson lifted another woman's shirt up at an I-Cubs game—White did not attend that game. [*Id.* Tr. 119:6-13]. The jury heard that Ms. Patterson groped Jackson's breasts from behind at a bar after work—White was not at that bar. [5/7/21 Tr. 108:5-22]. The jury was read sexually inappropriate texts sent by Ms. Patterson in group chat—White was not included in that group chat. [5/7/21 Tr. 110:24–112:25]. And the jury heard that Ms. Patterson sent her employees to an "adult store" to buy "sex toys" for employee birthdays—White did not know of or participate in those purchases. [5/7/21 Tr. 115:5-11].[9]

This evidence is irrelevant to White's claim, highly prejudicial, and beyond the scope of acceptable me-too evidence. First, and

[9] The jury also repeatedly heard testimony about nondiscriminatory issues, including how "territorial," "angry," and demanding Ms. Patterson was to work with. [5/6/21 Tr. 125:17–127:14].

most significantly, Jackson's testimony did not involve the same alleged harasser as White, and thus is not probative of McInroy's motive or intent to discriminate. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1286 (11th Cir. 2008) (allowing me-too evidence because the coworkers "were discriminated against by the same supervisor," so their experiences "were probative of [the supervisor's] intent to discriminate"). That Ms. Patterson often discussed sex at work with her coworkers does not affect whether White endured inappropriate comments by her supervisor, McInroy. Nor did it place the State on notice of any misconduct against White. Because the allegations involved different actors, that factor heavily weighs against allowing the me-too evidence. *Salami*, 2013 WL 3864537, at *8.

Second, Jackson's and White's allegations are materially dissimilar. White never alleges she was improperly touched, while Jackson detailed multiple instances of improper physical touching. Jackson also recounted many instances where she was personally subjected to improper sexual comments. White, conversely, testified that during the period at issue in the suit, McInroy made only one sexual comment to her—the "black leather" comment. Thus, the witness and the plaintiff were not treated in a similar manner, and instead Jackson's testimony introduced allegations far more severe than anything White herself observed or experienced.

Third, Jackson and White are not similarly situated. Jackson had "close to" no interaction with McInroy, and thus had no information to help the jury discern McInroy's intent or motives. White, in turn, *supervised* Ms. Patterson—and thus was not under Ms. Patterson's power like Jackson.

And fourth, Jackson's testimony was the type of evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, [and] triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case." *State v. Rodriguez*, 636 N.W.2d 234, 240 (Iowa 2001). Allowing evidence of alleged misconduct far more severe than anything White herself observed or experienced—allegations including removing women's shirts, groping women's breasts, and explicit references to sex toys and body parts—is unduly prejudicial and serves only to incite the jury to punish HHS for conduct outside the scope of the case.

Even when the offering party presents a strong case without the improper evidence, introducing inappropriate content that is "antithetical to the sensibilities of decent people" casts "'grave doubt' that anyone could scrub all traces clean from one's mind regardless of the quantum of evidence presented." *United States v. Hazelwood*, 979 F.3d 398, 415 (6th Cir. 2020). The graphic and sexual evidence unknown to White, yet heavily emphasized in closing

arguments by her counsel, *see* 5/19/21 Tr. 57:21–62:1, casts such doubt on the verdict that a new trial is required. *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 48 (Tex. 2008) ("[O]ne method of measuring the prejudicial impact of evidence is to consider 'the efforts made by counsel to emphasize the erroneous evidence.'" (quoting *Nissan Motor Co. Ltd. v. Armstrong,* 145 S.W.3d 131, 144 (Tex. 2004))).

2. "*Daddy*" *comments*. In 2013 or 2014—years before White's period of harassment was alleged to begin—two employees reported to White that a female HHS employee had been calling her male coworker "Daddy." [5/10/21 Tr. 85:18–88:6]. White never heard the "Daddy" comments, nor was White asked to call anyone "Daddy." The employee at trial denied calling anyone "Daddy," [5/18/21 Tr. 121:10-16], and White testified that the female employee did not believe the "Daddy" comments were inappropriate. [5/10/21 Tr. 87:1-22]. Upon receiving the report, White spoke with the male employee and told him the language was inappropriate. [*Id.* at 88:18-25].

This evidence is irrelevant, prejudicial, and should have been excluded. First, the comments were remote in time to White's alleged harassment. Second, entirely different actors were involved. McInroy never asked anyone, let alone White, to call him "Daddy," and thus the evidence does not tend to make it more likely that

McInroy harassed White. Third, White and the female employee were not treated in a similar manner. White was never asked to call a male employee an inappropriate name, so it didn't serve to put the State on notice that *White* was being harassed. Finally, White and the employee were not similarly situated. White had enough seniority that she felt comfortable speaking with both employees about the situation. By all accounts, the situation had resolved itself and did not recur.

Despite White never hearing the comments, and the employee not subjectively believing they were inappropriate (and in fact denying they occurred), White's counsel listed this incident as supporting the severity and pervasiveness of *White's* harassment during closing arguments. [5/19/21 Tr. 104:24-106:7]. Because none of the me-too factors are satisfied, the evidence does not make it more likely that White herself was harassed, and the evidence's sexually suggestive nature poses a significant risk of inflaming the jury, failure to exclude the evidence casts doubt on the verdict.

3. *"Nectar of the gods" comment*. In 2018, a female employee told White that a male HHS employee once spoke with her and, during the conversation, described that "when you have sex and you sweat and sweat runs down your back and pools in your anus, that is called nectar of the gods, and that's something you really want to

get into." [5/10/21 Tr. 137:17-24]. White was not present for the conversation. The male employee never made a similar comment to White. Again, the prejudicial value of this evidence far outweighs the minimal probative value, and its admission colors the jury's verdict.

First, it is unclear when this comment occurred. White was told of it in May 2018, but she did not know when it happened. [5/10/21 Tr. 185:7-11]. The jury therefore could not assess when this comment was made in relation to White's own identified improper comment. Second, completely different actors were involved. McInroy did not make this statement, and thus it cannot be used to show McInroy's intent or motives, nor could it put the State on notice that White was being harassed. *Id.* Third, White was not treated similarly—she was not subjected to similar sexually descriptive language by her supervisors. *Id.*

And fourth, White and the woman are not similarly situated. Notably, the woman did not report the comment, which she did not find offensive, and was upset at White for reporting it. [5/10/21 Tr. 185:17-20]. White emphasized that she and the woman had disparate views on what was appropriate in the workplace, as White also believed the woman acted inappropriately on a "yearly" basis. [*Id.* 188:4-9].

This evidence serves only as shock value—a sexually graphic conversation between two adults, which White did not observe or overhear, does not make it more likely that White was harassed by McInroy. Yet in closing arguments, White's counsel emphasized the "nectar of the gods" incident when arguing that *White*'s work environment was hostile. [5/19/21 Tr. 57:21–59:11; 117:17-20]. With no probative value for White's claim, and given the sexually explicit nature of the evidence, failure to exclude the evidence undermines the integrity of the verdict.

4. *"Eye Candy" comment*. In 2018, an IT Technician emailed a female HHS worker, telling her he would "miss his eye candy." [5/10/21 Tr. 138:18-21]. The female employee reported the comment to her supervisor, who reported it to White. [*Id.* 138:12-15]. White did not receive the email, and no one ever told White that she was their "eye candy." HHS promptly investigated the email after it was reported. [*Id.* 139:15-18].

Despite White never being called anyone's eye candy, White receiving the report and moving it up the chain, and HHS acting on the report, White's counsel told the jury that the "eye candy" comment "contributes to Tracy's hostile work environment." [5/19/21 Tr. 117:17-20]. But the evidence falls outside the bounds of me-too evidence.

As with much of the evidence at trial, it involves completely different actors. That an IT Technician sent an inappropriate email to a worker does not make it more likely that White was harassed by McInroy, nor could the email put the State on notice that White was being harassed. And White's status as a supervisor allowed her to swiftly report the misconduct up the chain, which separates her from the employee who lacked such authority. By allowing this testimony, the court allowed the jury to conflate the female employee's mistreatment with White's disparate allegations, which could confuse a reasonable jury as to whose harassment was before them. Because the improper me-too evidence was not probative of White's claim, and the district court erred in allowing the evidence.

5. *Allegations of homophobia and racism*. Finally, White brought a gender-based discrimination claim against the State under the ICRA. Although the ICRA also includes sexual orientation and race as separate protected classes, White's suit did not allege such discrimination. Even so, White testified to events implying McInroy was homophobic and racist. That irrelevant evidence was improper, prejudicial, and tainted the verdict.

White testified to hearing McInroy make a comment that he did not want to "picture" a female employee and her wife "together." [5/10/21 Tr. 103:1-21; 182:3–183:14]. She testified that the employee felt McInroy treated lesbians negatively. [*Id.* Tr. 113:4-12].

White also testified at several points that she felt "black workers [had] to jump through hoops" under McInroy. [5/10/21 Tr. 111:17-18; 231:24-25]. She specifically testified to one black woman, a child protection worker, who "had to jump through hoops that other applicants had not had to jump through" under McInroy. [5/10/21 Tr. 60:14-21].

She also testified that, once McInroy was gone, there wasn't any more "discrimination against gay people, black people, young people, [or] cute people." [5/10/21 Tr. 152:14-15].

"[I]t is not acceptable advocacy to attempt to inflame the jury with irrelevant evidence or reference to such 'hot-button' matters as . . . race [or] ethnicity." *Coastal Oil*, 268 S.W.3d at 48. *See also Perez v. State,* 689 So. 2d 306, 307 (Fla. Ct. App. 1997) (noting it is "highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues"); *Jones v. Cargill, Inc.,* 490 F. Supp. 2d 989, 993 (N.D. Iowa 2007) (excluding in a race discrimination case plaintiff's statement that "[a]ll Canadians should be taken out and shot", finding that it was wholly irrelevant to the issues at trial and the jury might punish plaintiff for his animosity towards Canadians).

Just as "evidence related to sexual harassment of one person should be given no weight in determining the merits of a different

sexual harassment claim involving another person," evidence related to race or sexual orientation discrimination—without some relevance other than propensity—should be given no weight in determining the merits of a gender discrimination claim. *Moothart*, 860 N.W.2d at 607. Though some ICRA suits can involve the intersection of race, gender, and sexual orientation, White's suit is not such an instance—she is not a member of a protected race or sexual orientation class. Thus, White's testimony related to her belief that McInroy is homophobic and racist does not further any element of her gender discrimination claim and serves only to impassion the jury. Given the prejudicial nature of those claims and the lack of probity, that evidence should have been excluded.

Ultimately, this was not a trial in which one or two pieces of irrelevant evidence were improperly admitted. While me-too evidence can, when used appropriately, be probative of an alleged harasser's intent and motives, White's use of the evidence far exceeded the doctrine's limited purpose. Instead, White asked the jury to find that, if misconduct at HHS was occasionally inflicted on anyone, by anyone, at any time, at HHS, then it shows White experienced a hostile work environment. [5/19/21 Tr. 117:17-20 ("[T]hings like the eye candy complaint or the nectar of the gods. The jury instructions tell you that this evidence contributes to Tracy's hostile work environment.")]. That is not the law.

The district court erred when allowing substantial irrelevant and inflammatory evidence into trial, which undermines the integrity of the verdict. Accordingly, the district court erred in denying the State's motion for a new trial and should be reversed.

D. Jury Instruction 16 improperly instructed the jury on the use of me-too evidence.

Beyond the district court erroneously admitting the evidence, the jury was also improperly instructed on how to use the me-too evidence when weighing White's harassment claim. Jury Instruction 16 stated:

> In determining whether discriminatory or harassing conduct was sufficiently severe or pervasive enough to create a hostile environment, you may consider sexually harassing conduct that was directed toward others in the workplace, so long as Plaintiff Tracy White was aware of that conduct. Plaintiff is entitled to recover damages for conduct that she was aware of that caused her emotional distress. **You may consider harassment which Tracy White was unaware of in determining intent, whether the harassment was part of a pattern or practice, whether Defendants had notice of the conduct, and whether Defendants took prompt and remedial action that was reasonably calculated to end the harassment.**

Final Jury Instruction 16 (emphasis added). But conduct that White was unaware of could not have created a hostile environment and is irrelevant to the claim.

The instruction did not limit the use of evidence to only instances involving McInroy, and thus allowed the jury to infer that *any* harassment at HHS was probative of harassment against White. Additionally, White did not bring a "pattern or practice" discrimination claim. To the extent that the jury needed to consider evidence of a pattern or practice of harassment, that harassment needed to have been directed *at White*. *See* Eighth Circuit Model Jury Instruction 8.41, Committee Comments (citing *Moylan v. Maries County*, 792 F.2d 746, 749–50 (8th Cir. 1986) (noting the "plaintiff must show a practice or pattern of harassment *against her or him*") (emphasis added))).

The Instruction also conflates evidence that HHS knew of *any* sexual harassment within its department and evidence that HHS knew *White* was being harassed. To be liable under a direct negligence theory, White needed to prove the State knew *she* was experiencing harassment and failed to take prompt and remedial action to stop her harassment. *Haskenhoff*, 897 N.W.2d at 573–74.

Admission of the irrelevant evidence, in combination with this Instruction, served only to confuse the issues, conflict with the marshalling instruction, and unfairly prejudice Defendants.

II. The future emotional damages award is excessive and unsupported by the evidence.

Relatedly—and predictably, given the inflammatory evidence admitted—the jury returned a verdict for future emotional distress damages that bore little relationship to White's presented evidence of future harm.

The State preserved this issue for appeal by timely moving for a new trial or remittitur after trial. This Court reviews rulings on motions for new trials for abuse of discretion. *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761 (Iowa 2009).

A new trial or remittitur is required when a jury award is "flagrantly excessive," "a result of passion, prejudice, or other ulterior motive," or "lacking in evidentiary support." *Hoffman v. Clark*, 975 N.W.2d 656, 666 (Iowa 2022) (quoting *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990)). True, damages are generally left to the jury. *Id.* But "an award for emotional-distress damages is not without boundaries." *Jasper*, 764 N.W.2d at 772. And courts will step in when the award is so disproportionate to the evidence that it casts legitimate doubt on the integrity of the verdict. *Rees*, 461 N.W.2d at 839–40.

Here, the future damages award is not supported by White's evidence and "goes beyond the limits of fair compensation." *Id.* at 839 (quoting *Sallis v. Lamansky*, 420 N.W.2d 795, 800–01 (Iowa

1988)). The jury valued White's emotional distress during the alleged harassment at $260,000. Yet it awarded more than double that amount—$530,000—for future emotional distress. Even taking all inferences in favor of White, that award for future harm cannot reasonably be found in the evidence presented.

White testified that her new working environment is "kind," and that her new boss provides "a sense of partnership" and a "sense of team." [5/10/21 Tr. 152:3–153:3]. She told the jury "[t]he environment is so different. It's -- I can't even describe it." [5/10/21 Tr. 152:3-153:3]. She indeed stated that her HHS experience made her less "trusting," and she now has a "harder edge." [5/10/21 Tr. 161:21-162:14]. But she stopped attending regular therapy and only sees her therapist when she needs a "tune up," which includes getting assistance with the everyday stresses of being a social worker. [5/10/21 Tr. 79:11-75:8-80:14]. She does not require any ongoing medication or medical costs. [5/10/21 Tr. 161:4-13]. Her therapist testified that there was a "potential" for future psychological issues, but did not say what they were or how long the unidentified potential issue would last. [5/13/2021 Tr. 30:11-18]. White's husband observed a "night-and-day difference" in White under her new manager, testifying that their marriage and social lives have improved.

[5/12/21 219:1–220:2]. In short, the testimony showed the harm experienced presently—if any—is significantly less than the harm experienced previously.

When a damages award far exceeds a range supported by the evidence, the award is impermissibly punitive. *City of Hampton v. Iowa Civ. Rts. Comm'n*, 554 N.W.2d 532, 537 (Iowa 1996). And when an emotional-distress award is "based on [a] relatively small amount of evidence supporting" it and a "total lack of any medical or psychiatric evidence to support it," this Court will reduce the amount to conform to the evidence presented. *Id.* at 537 (reducing $50,000 award to $20,000 when the award was not based on any medical evidence but plaintiff's own testimony about her stress, anger, and inability to sleep).

Jasper v. H. Nizam, Inc. is instructive. There, a plaintiff was terminated, briefly denied access to her children, and was confronted by the police. 764 N.W.2d at 759, 772–73. During and afterward, she "cried a lot" and was "a wreck." *Id.* at 759. In the following weeks, she couldn't sleep, stressed about money, did not want to get out of bed, and experienced anxiety attacks so severe she went to the emergency room. *Id.* She required medication and was depressed. *Id.* Her marriage suffered, she gained weight, and she lost the confidence she had previously. *Id.* at 760. Despite those major changes, a $100,000 award was deemed excessive—the record only

supported a maximum of $50,000. *Id.* Similarly here, White testified she was anxious, had trouble sleeping, lost confidence, gained weight, and was depressed. And unlike in *Jasper*, White did not lose her job.

Jasper also discussed *Shepard v. Wapello County, Iowa*, which surveyed various emotional distress awards for discrimination and harassment plaintiffs. *Id.* at 772 (citing 303 F. Supp. 2d 1004 (S.D. Iowa 2003)). After surveying cases involving significant mistreatment—including cases involving unwanted touching and stress-induced "ulcer-like symptoms"—the court found "[t]wo points emerge from this body of case law." *Shepard*, 303 F. Supp. 2d at 1023–24. First, "a $250,000 award for emotional distress damages from an unlawful termination of employment is very large, sustainable only upon a showing of a severe degree of emotional distress." *Id.* at 1024. And second, "an award of [this] magnitude is supported by evidence that the emotional injury was unusually severe because of the egregious or continuing nature of the injurious conduct, the particular circumstances of the plaintiff, or both." *Id.*

White's emotional distress award—$790,000 in total and $530,000 for future damages—places her near the upper limits of prior cases. But unlike those cases, White introduced no evidence of "unusually severe" emotional injury. *See, e.g.*, *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 947 (N.D. Iowa 2003) (sustaining

$735,000 in total emotional distress damages—including $260,000 in future emotional distress—for a plaintiff whose emotional injuries were so severe she attempted suicide and required significant mental health treatment well into the future).

Although the Court is "hesitant to disturb a jury award," there is still "some reasonable limit on the awards that [the Court] will uphold." *Rees*, 461 N.W.2d at 840. When an award is so disproportionate to the generalized evidence of harm proffered, as well as issued against the backdrop of inflammatory and prejudicial testimony, it may not be upheld. Accordingly, the district court erred in denying a new trial or remittitur.

III. The district court erred in not directing a verdict for the State because White failed to prove sufficiently severe and pervasive misconduct.

Finally, and alternatively, rather than remand for a new trial, this Court may also reverse the district court's denial of the State's motion for judgment notwithstanding the verdict, as White failed to prove her harassment claim against the State.

The State preserved this issue by moving for a directed verdict during trial, as well as moving for judgment notwithstanding the verdict after trial. This Court reviewed district court's rulings denying directed verdicts for correction of errors at law. *Godfrey v. State*, 962 N.W.2d 84, 99 (Iowa 2021).

Courts have adopted a "demanding" standard to sustain a hostile work environment claim. *Arraleh v. Cnty. of Ramsey*, 461 F.3d 967, 979 (8th Cir. 2006).[10] "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Id.* "'[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee' does not affect the terms, conditions, or privileges of employment to a significant degree." *Simon Seeding & Sod, Inc. v. Dubuque Human Rts. Comm'n*, 895 N.W.2d 446, 470 (Iowa 2017) (quoting *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 633 (Iowa 1990)).

"Harassment affects a term, condition, or privilege of employment 'when the workplace is permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Haskenhoff, LLC*, 897 N.W.2d at 571 (quoting *Farmland Foods, Inc. v. Dubuque Human Rts. Comm'n*, 672 N.W.2d 733, 744 n.2 (Iowa 2003)) (cleaned up). Importantly, any alleged "intimidation, ridicule, and insult must be *motivated by* a

[10] "The [Iowa Civil Rights Act] was modeled after Title VII of the United States Civil Rights Act. Iowa courts therefore traditionally turn to federal law for guidance in evaluating the ICRA." *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999).

worker's membership in a protected group." *Farmland Foods, Inc.*, 672 N.W.2d at 745 (emphasis added).

As well, it is not enough that an employee "subjectively perceived the conduct as abusive"—the court must also find that "a reasonable person would also find the conduct to be abusive or hostile." *Id.* at 744. The court's objective inquiry entails considering "(1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct was physically threatening or humiliating or whether it was merely offensive, and (4) whether the conduct unreasonably interfered with the employee's job performance." *Id.* at 744–75.

Here, considering the conduct directed at or experienced by White in the workplace, her harassment claim includes the following instances over the course of several years: (1) McInroy once stated, "was [White] wearing black leather and whipping you in your nightmare, too?";[11] (2) McInroy once made a comment about another employee wearing a dress, stating he couldn't decide "if he should pray she dropped her pencil or pray she didn't";[12] (3) McInroy once called another employee "a sexy lumberjack,"[13] (4) McInroy once referred to a female applicant as "dowdy";[14] and (5) McInroy

[11] 5/10/21 Tr. 105:20-25.
[12] 5/10/21 Tr. 116:16-19.
[13] 5/10/21 Tr. 101:16-21.
[14] 5/10/21 Tr. 100:16-19.

regularly treated White worse than another woman, Kristen Walker, because White is a strong, opinionated woman.[15]

That evidence falls far below the demanding standard of severe and pervasive harassment, and courts have regularly entered judgment for employers in cases involving far more egregious conduct than White adduced at trial. For example, in *Shaver v. Independent Stave Co.*, an employee with a metal implant in his head was called "platehead" by his co-workers. 350 F.3d 716, 721 (8th Cir. 2003). He was *constantly* called "platehead" for *two years*, and employees continued even after he asked them to stop calling him that name. *Id.* He was also repeatedly called stupid, and one co-worker said the employee "pissed his pants when the microwave was on." *Id.* The court held that the conduct did not amount to actionable harassment and summary judgment was affirmed. *Id.*; *see also Ryan v. Cap. Contractors, Inc.*, 679 F.3d 772, 775–79 (8th Cir. 2012) (finding employee failed as a matter of law to prove the elements necessary to establish a hostile work environment claim despite the fact plaintiff, who was "moderately mentally retarded" and spoke with a stutter, was habitually called "fucking dummy," "fucking retard," "stupid," "idiot," and "numb nuts," and was asked

[15] 5/10/21 91:9–96:17; 205:6-9.

by a coworker if his mother dropped him on his head when he was little).

In *Scusa v. Nestle U.S.A. Co.*, a female employee made nine separate complaints about sexual harassment, including complaints that her colleagues stalked her, humiliated her, ostracized her, vandalized her car, physically threatened her, and cursed at her. 181 F.3d 958, 964 (8th Cir. 1999). Although the court found that the employee "undoubtedly experienced unpleasant conduct and rude comments," it determined the allegations did not rise to the level of being so severe and pervasive as to alter the conditions of her employment and create a hostile work environment. *Id.* at 967.

In *E.E.O.C. v. CRST Van Expedited, Inc.*, female trucking employees brought a sexual harassment claim, alleging their male colleagues bragged about their sexual exploits to them, made sexually vulgar comments to them, and occasionally "proposition[ed them] for sex." 679 F.3d 657, 687 (8th Cir. 2012). Despite the women alleging *multiple instances* of being *directly propositioned for sex* in the workplace, the court explained that "'[m]ore than a few isolated incidents are required to support a hostile work-environment claim." *Id.* (quoting *Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1127 (8th Cir. 2000)).

At trial, White did not offer evidence showing she experienced anything close to the mistreatment experienced by the plaintiffs in *Shaver*, *Ryan*, *Scusa*, and *CRST*—who themselves failed to meet the demanding standard for harassment—and thus her harassment claim fails as a matter of law.

White identified a single sexually inappropriate comment directed at her by McInroy—the "black leather" comment. But isolated comments over time do not amount to an objectively hostile work environment. *See, e.g.*, *Paskert v. Kemna-Asa Auto Plaza, Inc.*, No. C17-4009, 2018 WL 5839092, at *14 (N.D. Iowa Nov. 7, 2018) (finding an instance of unwelcome physical contact, one or two statements that the manager could "have" the plaintiff if they weren't married, multiple comments regretting hiring women, and referring to female customers as "bitches" and "cunts" did not amount to a hostile work environment under the ICRA); *Bainbridge v. Loffredo Gardens, Inc.*, 378 F.3d 756, 759–60 (8th Cir. 2004) (finding racial remarks made once a month for two years did not render the workplace objectively hostile); *Nitsche v. CEO of Osage Valley Elec. Co-op.*, 446 F.3d 841, 845–46 (8th Cir. 2006) ("[Plaintiff] must clear a high threshold to demonstrate actionable harm, for 'complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing' obtain no remedy."); *Duncan v. Gen. Motors*

Corp., 300 F.3d 928, 934–95 (8th Cir. 2002) (granting employer's summary judgment motion where the hostile environment claim was based on: a proposition for a relationship; improper touching of the plaintiff's hand more than once; a request the plaintiff sketch a sexually objectionable planter; the posting of a "Man Hater's Club" poster; and a request the plaintiff "type the He–Men Women Haters beliefs," and the harasser also had in his office a child's pacifier in the shape of a penis and a computer screen saver with a picture of a naked woman, because although the plaintiff "was upset and embarrassed by the posting of the derogatory poster and was disturbed by Booth's advances and his boorish behavior . . . she has failed to show that these occurrences in the aggregate were so severe and extreme that a reasonable person would find that the terms or conditions of [her] employment had been altered.").

Again, "an employee alleging a hostile work environment cannot complain about conduct of which [s]he was oblivious for the purpose of proving that [her] work environment was objectively hostile." *Adams*, 754 F.3d at 1245. Removing all the evidence of conduct only *other* employees experienced, White is left with isolated comments spread over several years, only one of which was directed at her. Because that is insufficient as a matter of law to prevail on a sexual harassment claim under the ICRA, the district court erred

in denying the State's motion and this Court should reverse and enter judgment for the State.

CONCLUSION

For any of the reasons above, the judgment against the State cannot stand. Judgment for the State should be entered, this matter should be remanded for trial, or this Court should order a remittitur to conform the damages to the evidence presented.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 9,916 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on June 27, 2023, this Amended Final Brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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