IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 21-1898

POLK COUNTY CASE NO. LACL146265

TRACY WHITE
Plaintiff-Appellee

vs.

STATE OF IOWA and IOWA DEPARTMENT OF HUMAN SERVICES

Defendants-Appellants

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

PLAINTIFF-APPELLEE'S AMENDED FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case is appropriate for transfer to the Court of Appeals because it presents application of existing legal principles appropriate for summary disposition.

STATEMENT OF THE CASE

Many sexual harassment cases involve a single harasser and a single target. Just as prevalent, however, are situations in which sexualized behavior and gender hostility permeate the plaintiff's entire work environment. This was one of those cases.

Following an 11-day trial, the jury delivered a verdict which provided for substantial justice. It was upheld by an experienced trial judge. No basis exists on which to disturb the judgment.

STATEMENT OF FACTS

Defendants' description of this case is rife with inaccuracies and many alleged "facts" lack citations to the record. The hostile work environment sexual harassment on which this lawsuit is based *included* Mike McInroy's conduct but was never *limited to* his conduct. *See* SJ Ruling 3-5 (App. Vol. I, 66-68). But starting with the false premise that Tracy's case was solely about McInroy enables Defendants to argue the trial court should not have admitted other sexual harassment that contributed to her hostile work environment.

Defendants take the same approach with respect to the timeline, arguing that certain events were too attenuated from the time period at issue. But the time period at issue is the time during which Tracy experienced a sexually hostile work environment. Neither party asked the Court or the jury to narrow the time frame over which Tracy experienced a hostile work environment. The fact that the hostile environment persisted for so many years supports the jury's determination that it was pervasive.

Tracy White began working for DHS as a case manager in 2000. 5/10 TT 55:2-4, 75:18-19 (App. Vol. I, 160, 175). She had excellent performance evaluations. Exhibit 25A (App. Vol. II, 3-167). Witnesses who worked with Tracy for years described her in glowing terms: caring, compassionate, challenging, and committed to fostering a healthy work environment for employees. *See, e.g.* 5/5-6 TT 78:11-79:2, 114:4-22; 5/7 TT 18:10-16; 5/12 TT 51:14-52:8, 54:18-24, 95:25-96:7 (App. Vol. I, 113-14, 120; 128; 270-71, 272, 293-94). Tracy was 57 years old at the time of trial, married to a retired Lieutenant Colonel for the National Guard. 5/10 TT 51:10-24 (App. Vol. I, 158). She has two adult children and four grandchildren. 5/10 TT 51:25-52:6 (App. Vol. I, 158-59).

By 2010, Tracy had worked her way up to the job of Social Work Administrator ("SWA"), managing the supervisors who manage social workers. 5/10 TT 77:22-78:2 (App. Vol. I, 176-77). Tracy first reported to Des Moines Service Area Manager ("SAM") Pat Penning, as did SWA Mike McInroy. 5/10 TT 80:15-17, 80:24-81:4 (App. Vol. I, 178, 178-79). McInroy had previously been Tracy's boss and he continued to want to manage her even as peers. 5/10 TT 80:15-17; 5/19 TT 10:16-11:9 (App. Vol. I, 178; 346-47).

When Penning retired in February 2015, Defendants promoted McInroy to replace her as the SAM over Penning's objections. 5/10 TT 89:9-13; 5/19 TT

11:13-12:11 (App. Vol. I, 186; 347-48). McInroy's boss was Division Administrator Vern Armstrong. *See* Exhibit 30A (App. Vol. II, 168).

Employees described the work environment under McInroy as dysfunctional, hostile, toxic, chauvinistic, and scary. 5/5-6 TT 74:1-10; 5/12 TT 76:3-9; Exhibit 11, p. 1 (App. Vol. I, 110; 283; App. Vol. III, 26). Female employees were disadvantaged by their sex. 5/5-6 TT 14:15-19, 74:11-17, 103:20-104:5; Ex. 11, p. 4 (App. Vol. I, 93, 110, 118-19; App. Vol. III, 29). McInroy was congenial with male employees, favoring them and valuing their opinions. 5/5-6 TT 15:3-11, 55:11-14, 55:25-56:2; 5/10 TT 91:16-19; Exhibit 11, p. 4 (App. Vol. I, 94, 102, 102-03; 188; App. Vol. III, 29). He was similarly pleasant with female employees who were "compliant" and "agreeable" toward him—who flirted or tried to make him feel important, and "would just do what he wanted and didn't question him." 5/5-6 TT 14:15-19, 55:11-14, 55:25-56:2; 5/10 TT 91:20-92:1, 97:6-3; Exhibit 11, p. 4 (App. Vol. I, 93, 102, 102-03; 188-89, 193; App. Vol. III, 29).

McInroy did not like women who were assertive, stood up for what they thought was right, asked questions, or offered ideas. 5/10 TT 98:4-9 (App. Vol. I, 194). He called these women "assholes." 5/10 TT 97:10-15, 104:3-21; 5/12 TT 37:25-39:6 (App. Vol. I, 193, 198; 266-68). Supervisor Trisha Gowin learned early on that McInroy "did not like smart, strong women." 5/5-6 TT 55:3-10

(App. Vol. I, 102). He also derided female employees for being "too emotional." 5/5-6 TT 16:2-25; Exhibit 11, p. 4 (App. Vol. I, 95; App. Vol. III, 29).

McInroy was verbally abusive. 5/10 TT 131:17-21 (App. Vol. I, 212). He would berate and yell at Tracy to the point of tears, point at her, slam things, refuse to allow her to leave the room, ask her the same question over and over, then interrupt her. *See* 5/10 TT 130:21-131:5, 222:14-225:1 (App. Vol. I, 211-12, 243-46). It seemed to give him pleasure to get Tracy to the point where she was crying and begging. *Id.* at 224:23-225:1 (App. Vol. I, 426-27). McInroy treated Tracy with hostility at least in part because of her gender. 5/11 TT 33:9-12 (App. Vol. I, 262).

McInroy promoted Kristin Walker (now Konchalski) as the other SWA. 5/10 TT 90:25-91:4 (App. Vol. I, 187-88). Walker called McInroy her "work husband." 5/19 TT 18:9-10 (App. Vol. I, 350). She was "almost flirtatious" with McInroy and other male leaders. 5/10 TT 96:14-17; 5/12 TT 60:19-61:8 (App. Vol. I, 192; 276-77). "It was just always clear that [McInroy and Walker] had an extremely strong alignment." 5/19 TT 18:16-17 (App. Vol. I, 350). Walker did not behave assertively with McInroy. 5/12 TT 66:8-24 (App. Vol. I, 279). Many employees testified that McInroy favored Walker over Tracy. 5/10 TT 93:18-94:22; 5/12 TT 58:14-59:8, 60:4-18, 61:15-23 (App. Vol. I, 190-91; 274-75, 276, 277). He was more open to Walker's suggestions. 5/19 TT 17:11-2

(App. Vol. I, 349). It seemed like McInroy and Walker were the ones making decisions and Tracy's ideas were pushed aside. 5/12 TT 56:18-23, 58:14-59:8 (App. Vol. I, 273, 274-75). Tracy was kept out of the loop to the point that subordinates were embarrassed for her. 5/12 TT 68:3-70:9, 125:2-8 (App. Vol. I, 280-82, 295). Walker spent lots of time with McInroy in the office, going to lunch, and interacting in the evenings. 5/19 TT 17:20-24; 5/10 TT 218:9-16 (App. Vol. I, 349; 242). McInroy told Tracy she needed to be more like Walker. 5/10 TT 217:25; 5/14 TT 28:15-22 (App. Vol. I, 241; 327).

Gowin recalled meetings in which McInroy would literally sit with his back to Tracy and refuse to look her way or acknowledge when she spoke. 5/5-6 TT 58:3-13, 92:1-9 (App. Vol. I, 104, 116). McInroy held "Services," (which Walker supervised) to much lower standards than Child Protective Assessments or "CPA" (which Tracy supervised). 5/5-6 TT 72:1-8, 75:8-76:15; TT 5/10 226:21-228:5; 5/12 TT 39:10-40:14, 63:10-13, 84:15-23 (App. Vol. I, 108, 111-12; 247-249; 268-69, 278, 284).

McInroy inundated Tracy with work. At one point, Tracy was responsible for CPA throughout the entire 15-county service area *plus* Services in 14 of those counties. 5/18 TT 208:25-210:11; Exhibit 43; 5/5-6 TT 72:9-73:21 (App. Vol. I, 341-43; App. Vol. II, 184; App. Vol. I, 108-09). This required a lot of travel. 5/14 TT 122:15-21 (App. Vol. I, 332). Walker, however, managed *only* Services

and *only* in Polk County. 5/18 TT 209:21-210:1 (App. Vol. I, 342-43). Tracy had 12 supervisors reporting to her while Walker had only seven. 5/18 TT 208:14-20; Exhibit G, p. 3 (App. Vol. I, 341; App. Vol. V, 11).

Pauline Rutherford was the Personnel Manager for the Des Moines Service Area. 5/5-6 TT 96:8-9 (App. Vol. I, 117). She testified that she wasn't part of McInroy's clique because she was "an older overweight female." 5/13 TT 122:13-19 (App. Vol. I, 325). During a work gathering in 2012, Tracy heard Rutherford joke: What's purple and polka dotted and hangs between Vern Armstrong's legs? The answer was "Mike's tie." 5/10 TT at 83:12-84:5 (App. Vol. I, 180-81).

That same year, supervisors told Tracy that Darin Thompson (Community Liaison until McInroy promoted him to Bureau Chief) could be creepy and flirty. 5/10 TT at 85:18-86:3; 5/18 TT 9:7-17 (App. Vol. I, 182-83; 337). Thompson engaged in inappropriate sexual banter with a young female worker whom he encouraged to call him "Daddy," and once asked if she needed a spanking. *Id.* at 86:3-23 (App. Vol. I, 183). Tracy addressed the situation at Penning's behest. *Id.* at 87:1-89:3 (App. Vol. I, 184-186).

McInroy seemed preoccupied with the appearance of women. 5/10 TT 126:14-17 (App. Vol. I, 209). In around 2015, two women interviewed for a promotion. 5/10 TT 175:24-176:6 (App. Vol. I, 233-34). Although one was

objectively more qualified, McInroy referred to her as "dowdy" and argued the other candidate was "very attractive and had sexy shoes." 5/10 TT 100:10-101:23 (App. Vol. I, 195-96).

In the fall of 2016, Gowin wore a plaid shirt, vest, and Timberland boots to a meeting. 5/5-6 TT 49:12-21 (App. Vol. I, 98). In front of Tracy and others, McInroy told Gowin that she looked like a "sexy lumberjack." 5/5-6 TT 49:22-50:5 (App. Vol. I, 98-99). Gowin felt gross, disrespected, and embarrassed. 5/5-6 TT 50:11-18, 51:3-7 (App. Vol. I, 99, 100).

McIroy derided lesbian Supervisor Beth Avery's physical appearance and talked about how he hated to picture her having sex.[1] 5/10 TT 103:1-104:7 (App. Vol. I, 197-98). McInroy's comments filled Tracy with anger, sadness, and disgust. 5/10 TT 103:22-104:7 (App. Vol. I, 197-98).

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[1] In one of the more bizarre moments of trial, McInroy admitted he could see himself making such comments. 5/14 TT 114:19-116:7 (App. Vol. I, 329-31). After appearing aghast at what had just slipped out of his mouth, McInroy then tried to say that he would initiate a work discussion about envisioning lesbians having sex only to change the subject when staff members were having off-color discussions that were inappropriate for the workplace. *Id.*

In January 2017, McInroy told Tracy he'd had a dream about her in which she was wearing black leather and whipping him. 5/10 TT 105:8-25 (App. Vol. I, 199). Tracy was shocked, embarrassed, humiliated, and disgusted. 5/10 TT 106:1-16 (App. Vol. I, 200).

During 2017, a young, attractive female employee sometimes wore a short, tight dress to work. 5/10 TT 115:8-117:18 (App. Vol. I, 203-05). During leadership meetings, managers laughed as they discussed the need to tell her to stop wearing it. 5/10 TT 115:22-116:7 (App. Vol. I, 203-04). McInroy recounted how he and a male supervisor were walking behind the worker wearing the dress and he couldn't decide if he should pray she dropped her pencil or pray she didn't. 5/10 TT 116:8-117:10 (App. Vol. I, 204-05). Tracy was angry, disgusted, humiliated, and embarrassed for the young woman as well as for herself. 5/10 TT 116:20-117:13 (App. Vol. I, 204-05).

In January 2017, Tracy heard Supervisor Darci Patterson scream angrily at her subordinate Amber Jointer, "*I know you're fucking him!*" TT 5/10 61:5-14, 193:8-9 (App. Vol. I, 165, 237); *see also* Exhibit 1, p. 5; Exhibit 2, p. 2 (App. Vol. III, 8; 10). Patterson's spit landed on Jointer's face. TT 5/10 61:10-14 (App. Vol. I, 165). Jointer was "terrorized and traumatized." *Id.* Tracy was adamant that DHS should investigate Patterson's behavior, but McInroy refused, insisting he had already coached and counseled her. 5/10 TT 61:15-62:3, 62:5-12; 5/14

TT 86:8-10 (App. Vol. I, 165-66, 166; 328). Spoiler alert: he had not. 5/10 TT 63:19-22 (App. Vol. I, 167).

Tracy personally observed Patterson engage in a panoply of inappropriate sexual behavior. 5/10 TT 56:5-25, 198:16-23, 200:11-22 (App. Vol. I, 161, 239, 240). Patterson talked of wanting to bury her face in the breasts of a coworker and "motorboat" her. 5/10 TT 56:14-20, 193:9-11 (App. Vol. I, 161, 237). During a work dinner with Tracy and other supervisors, Patterson yammered on about the waiter's "unnaturally large dick." 5/10 TT 120:9-121:6 (App. Vol. I, 207-08). Tracy directed Patterson to stop. *Id.*

Tracy did not observe Patterson act this way around subordinates. 5/10 TT 57:1-7 (App. Vol. I, 162). However, Patterson's behavior was "common knowledge" throughout the office. 5/10 TT 7:8-11, 73:22-74:6, 192:8-10; 5/12 TT 70:13-25 (App. Vol. I, 152, 173-74, 236; 282). Tracy told Patterson to stop "many times." 5/10 TT 56:21-25 (App. Vol. I, 161).

Defendants mistakenly claim that Tracy was Patterson's supervisor. Def. Brief 19, 31, 34. In fact, for six of the seven years that Patterson supervised Jen Jackson, Patterson reported either to McInroy or Walker. 5/7 TT 121:13-15; 5/10 TT 73:22-25 (App. Vol. I, 147; 173). Tracy did not become Patterson's supervisor until February 2017. Exhibit 2, p. 2; 5/5-6 TT 45:12-17 (App. Vol. III, 10; App. Vol. I, 96). Despite Tracy's increasingly desperate pleas, Armstrong

refused to allow Tracy to discipline Patterson or authorize an investigation of her behavior. See Exhibit 2, pp. 4-9 (App. Vol. III, 12-17).

McInroy was close with Patterson. They joked around a lot. 5/7 TT 128:16-18 (App. Vol. I, 148). Patterson told coworkers, "Mike knows how I am . . . and he doesn't have a problem with it, so I don't have to worry about repercussions or discipline." 5/19 TT 17:20-24 (App. Vol. I, 349). Patterson talked down to Tracy and treated her disrespectfully, openly yelling at Tracy, belittling her, and bragging about making her cry. 5/5-6 TT 45:21-46:3; 5/10 TT 41:25-42:20 (App. Vol. I, 96-97; 154-55). Peers like Gowin were too afraid to confront Patterson about her sexually inappropriate behavior "because she would let you know that her and Mike [McInroy] were very tight and that she would make sure people would be miserable if necessary. And we lived in a culture of fear." 5/5-6 TT 54:11-18 (App. Vol. I, 101).

In April 2017 Tracy began to complain to Defendants about McInroy and the hostile work environment. 5/10 TT 106:22-24 (App. Vol. I, 200). Tracy reported that both she and others were being sexually harassed and discriminated against. 5/10 TT 111:12-19 (App. Vol. I, 201). Tracy told Armstrong about Patterson screaming vulgarities and spitting on Jointer. Exhibit 37, p. 1 (App. Vol. II, 169). Tracy also told Armstrong about McInroy's shocking comment about Tracy wearing black leather and whipping him. 5/10 TT 111:12-14, 112:6-

9 (App. Vol. I, 201, 202). Tracy said it felt like she was trapped in a cycle of domestic abuse. 5/10 TT 131:17-21 (App. Vol. I, 212). Armstrong viewed Tracy as a "complainer" and continued to support McInroy. 5/7 TT 42:25-43:15, 42:20-24, 44:5-9, 54:12-23 (App. Vol. I, 132-33, 132, 134, 136).

Jerry Foxhoven was DHS Director from June 2017 through June 2019. 5/7 TT 10:11-17 (App. Vol. I, 127). He immediately noticed the environment was oppressive and that employees had a constant fear of retaliation. 5/7 TT 24:22-25:24 (App. Vol. I, 129-30).

Tracy repeatedly complained to Foxhoven about the rampant sexual harassment. 5/7 TT 27:10-14; 5/10 TT 119:12-20 (App. Vol. I, 131; 206), which Foxhoven himself described as "pervasive." 5/7 TT 66:1-25 (App. Vol. I, 138). McInroy was certainly part of the problem at DHS, but by no means all of it. 5/7 TT 82:23-83:5 (App. Vol. I, 139-40). Other employees told Foxhoven that McInroy mistreated Tracy. 5/7 TT 45:8-17 (App. Vol. I, 135). "No matter what Tracy did, it was never right." 5/7 TT 45:12-13 (App. Vol. I, 135).

On October 9, 2017, Tracy met with Social Worker Jen Jackson. Exhibit 37; 5/7 TT 118:19-119:2; 5/10 TT 62:13-20 (App. Vol. II, 169-71; App. Vol. I, 144-45; 166). Jackson was extremely upset and cried throughout the meeting. 5/10 TT 41:4-5 (App. Vol. I, 154). Jackson reported that Patterson was creating a hostile work environment for her and others. 5/7 TT 118:19-119:2 (App. Vol.

I, 144-45). Jackson said she had seven years of evidence, including photos, emails, texts, and recordings. 5/10 TT 62:13-20 (App. Vol. I, 166).

Tracy decided not to press Jackson for details right then. Social workers learn early on that repeatedly having to recount trauma can be psychologically harmful. 5/10 TT 40:7-22 (App. Vol. I, 153). Tracy was certain Defendants would investigate Jackson's serious allegations and did not want to force Jackson to relive her anguish unnecessarily. 5/7 TT 135:13-24; 5/10 TT 40:7-41:11; 5/18 TT 190:23-191:11 (App. Vol. I, 149; 153-54; 339-340). Tracy was also petrified because she was "in the middle of [her] own unanswered complaints about sexual harassment." 5/10 TT 234:11-21 (App. Vol. I, 250).

Tracy promised Jackson she would do everything in her power to protect her. 5/7 TT 119:11-18 (App. Vol. I, 145). She immediately reported Jackson's concerns to Rutherford. 5/10 TT 63:15-22 (App. Vol. I, 167). Tracy informed Armstrong that she met with two of Patterson's subordinates and was "incredibly alarmed" by what she labeled a "hostile work environment." Exhibit 1, p. 5 (App. Vol. III, 8). "I am very anxious to handle this situation well and need your support and guidance to do so." *Id.* She asked for a meeting, "preferably yet this week, to discuss how to move forward with Darci Patterson." *Id.*

Tracy reiterated her concerns about McInroy's continued disparate treatment, dishonesty, manipulation, bullying, and excluding her from decision-making. Exhibit 1, pp. 1, 3-5 (App. Vol. III, 4, 6-8). She said she didn't feel safe meeting alone with him. *Id.* at 5 (App. Vol. III, 8).

Tracy emailed Armstrong again on October 13 to report additional acts of insubordination by Patterson. Exhibit 2 (App. Vol. III, 9-19). She advised that Jackson "reported numerous concerns" that have "plagued her sense of safety at work for seven years." *Id.* at 2 (App. Vol. III, 10). Tracy requested permission to "move forward with Darci," starting with a very strong conversation about her unacceptable behavior. *Id.*

Tracy tried again on October 16, reminding Armstrong that Jackson reported a hostile work environment and had seven years of documentation. 5/10 TT 64:9-25 (App. Vol. I, 168). She said, "I really need to figure out a plan for moving forward with Darci sooner than later as two of her staff have come to me with significant anxiety." Exhibit 2, p. 3 (App. Vol. III, 11). Armstrong responded: "The situation with Darci is under review at this time as well, so we will hold off on the proposed meeting with her until we receive further guidance." *Id.* at 5 (App. Vol. III, 13). Armstrong later added, "Please hold off on addressing this incident with Darci while we review how we will be proceeding. We should know relatively soon." *Id.* at 9 (App. Vol. III, 17).

Tracy met with Armstrong and Bureau Chief Chad Dahm on October 18. Exhibit 5, p. 1 (App. Vol. III, 20). Armstrong refused to permit Tracy to "move forward on any concerns regarding Darci Patterson" or even "initiate a conversation with [Patterson] regarding [the] most recent concern because that [wa]s being assessed above [Tracy]. *Id.* When Tracy mentioned McInroy's "black leather" dream, Armstrong said he didn't want to hear it again. 5/10 TT 119:1-9 (App. Vol. I, 206).

On November 2, Tracy again reported disparate treatment, unreasonable expectations, and the toxic environment from McInroy. Exhibit 5 (App. Vol. III, 20-25). Tracy expressed concern about the emotional wellbeing of Patterson's employees and being blocked from trying to guide Patterson onto a better path. *Id.* at 4 (App. Vol. III, 23).

Tracy continued to beg Armstrong to allow her to address Patterson's behavior on December 4 and December 18, 2017. Exhibit 37, p. 2 (App. Vol. II, 170). Armstrong kept putting her off. *Id.*

On February 1, 2018, Tracy was called into a meeting with Armstrong and asked if she would be willing to take a demotion or leave the child welfare practice entirely. 5/10 TT 69:1-11, 129:8-12 (App. Vol. I, 169, 210).

On February 14, Tracy met with Armstrong and McInroy. 5/10 TT 69:12-15 (App. Vol. I, 169). She reminded them that Jackson had seven years of

evidence documenting the hostile environment. 5/10 TT 69:18-19 (App. Vol. I, 169). McInroy admitted that he had never coached and counseled Patterson. 5/10 TT 69:19-70:10 (App. Vol. I, 169-70). They told Tracy she could discuss Patterson's behavior if something new happened, but she was not permitted to address anything from the past. 5/10 TT 70:11-25 (App. Vol. I, 170).

In May 2018, Rutherford told Tracy that Thompson had made more sexually explicit comments at work. 5/10 TT 137:2-24 (App. Vol. I, 213). Thompson spoke of how people sweat during sex and that sweat drips down their back and pools around their anus. *Id.* Thompson said he called that fluid "the nectar of the gods." *Id.*; Exhibit 15, p. 1 (App. Vol. III, 31). Tracy was shocked and disgusted. 5/10 TT 137:25-138:2 (App. Vol. I, 213-14).

In June 2018, a worker complained about a technician calling her his "my eye candy." 5/10 TT 138:9-22 (App. Vol. I, 214). Tracy informed Rutherford who took no action. 5/10 TT 138:22-139:18 (App. Vol. I, 214-15). The technician continued to lurk around the worker's desk and make her uncomfortable. 5/10 TT 139:19-23 (App. Vol. I, 215). The technician was eventually coached and counseled, but not disciplined. 5/10 TT 139:24-140:2 (App. Vol. I, 215-16).

During the same leadership meeting in which the "eye candy" complaint was discussed, Rutherford entertained managers by singing the Lil' John song,

"Get Low," including the lyrics, "From the window, to the wall, 'til the sweat runs down my balls." 5/10 TT 140:3-141:10 (App. Vol. I, 216-17). McInroy was present and did nothing. 5/10 TT 141:18-21 (App. Vol. I, 217).

In the summer of 2018, Patterson decorated the outside of her direct reports' cubicles with their photos on pictures of dogs and called it "Sniffers' Row," a tawdry reference to the front row of a strip club where one can supposedly smell the dancers' vaginas. Exhibit 34; 5/5-6 TT 61:12-62:22, 124:4-7 (App. Vol. III, 103-04; App. Vol. I, 105-06, 125). Tracy made Patterson take down the decorations. 5/10 TT 194:1-9 (App. Vol. I, 238).

On August 29, Tracy emailed Armstrong and Foxhoven, expressing her frustration that "after 16 months of documenting concerns regarding hostile work environment and disparate treatment . . . nothing has moved forward. Exhibit M (App. Vol. V, 21-24). On September 13, Tracy reported additional incidents of sexual harassment. Exhibit 15 (App. Vol. III, 31-34). She followed up on September 19, *again* asking for guidance about moving forward with some plan of action for Patterson since it had now been delayed *nearly an entire year*. Exhibit 33, p. 2 (App. Vol. III, 97).

In November 2018, Supervisor Chris Skuster emailed Foxhoven to report "inappropriate sexual comments" by Darin Thompson.[2] Exhibit 41 (App. Vol. II, 182-83). He expressed concern about the message McInroy sent to staff by recently promoting Thompson. *Id.* Although Foxhoven responded by pledging to "act on these issues" (*Id.*), no one ever got back to Skuster or interviewed him. 5/12 TT 92:23-93:8 (App. Vol. I, 291-92). Skuster testified about overhearing Thompson make a "very sexual-type joke" about dildos. 5/12 TT 88:21-89:10 (App. Vol. I, 287-88). Skuster later heard Thompson make another inappropriate sexual joke, which McInroy laughed at. 5/12 TT 89:23-90:22 (App. Vol. I, 288-89). Other supervisors reported hearing Thompson make similar jokes at work. 5/12 TT 91:7-17 (App. Vol. I, 290).

On December 18, 2018, Tracy met with Dahm to reiterate her deep concern regarding the hostile environment Jackson had reported back in October 2017. Exhibit 37, p. 1 (App. Vol. II, 169). Only then did Defendants finally interview Jackson and begin an investigation into her complaints. *Id.*

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[2] Defendants failed to produce this email in discovery. Plaintiff obtained it mid-trial only because, after reading about the trial in the newspaper, Skuster emailed Plaintiff's counsel that he might have relevant information. *See* 5/11 TT 3:11-9:20; 5/12 85:18-21 (App. Vol. I, 252-58; 466).

Patterson was Jackson's supervisor from 2010 to 2018. 5/5-6 TT 116:4-5 (App. Vol. I, 121). Jackson testified that Patterson talked at work "all the time" about topics such as:

- "Big black dicks" (5/5-6 TT 116:11-25) (App. Vol. I, 121);
- A coworker's "red and curly" pubic hair (5/5-6 TT 116:15-16 (App. Vol. I, 121);
- A coworker masturbating in her car (5/5-6 TT 117:3-13) (App. Vol. I, 122);
- "Just the tip" (referencing the end of a penis) (5/5-6 TT 117:14-17 (App. Vol. I, 122);
- Jackson's large breasts (5/5-6 TT 121:9-11, 121:20-122:7) (App. Vol. I, 123, 123-24);
- Halicia Brown's large breasts (*Id.*);
- Other peoples' breasts (5/7 TT 108:32-109:6) (App. Vol. I, 141-42);
- People's sex lives (*Id.*).

Patterson would "turn everything into a sexual conversation." 5/7 TT 121:11-14 (App. Vol. I, 147). On a work outing at the Iowa Cubs, Patterson pulled up the shirt of a female subordinate. 5/7 TT 119:3-13 (App. Vol. I, 145). During several baseball events, Patterson would talk about the players' butts and "packages" (genitals), and how she wanted to have sex with them. 5/7 TT 119:19-120:8 (App. Vol. I, 145-46).

As a coworker was taking a picture of Patterson and Jackson, Patterson suddenly grabbed Jackson's breast. Exhibit 29, p. 13; 5/7 TT 108:12-22 (App.

Vol. III, 95; App. Vol. I, 141). This wasn't the first time she grabbed her breast. 5/7 TT 108:25-109:2 (App. Vol. I, 141-42).

Patterson texted Gowin photos of a scene she had arranged at work showing a toy witch kneeling in front of a Batman figurine to which a large blue penis had been attached, simulating oral sex. *See* Exhibit 39; 5/12 TT 16:20-17:18 (App. Vol. V, 4-8; App. Vol. I, 264-65). Patterson also texted Gowin and others a photo of a plastic penis next to some lotion she had arranged in a coworker's cubicle. Exhibit 39, pp. 4-5 (App. Vol. V, 7-8). In Patterson's office, she kept dildos, penis-shaped candles ("Make a Wish and Blow!"), sexual lubricant, and a toy elephant with Christmas bulbs glued where his genitals would be. *See* Exhibit 38, pp. 12-14, 29-30 (App. Vol. IV, 15-17, 32-33).

Tracy learned the extent of Darci Patterson's sexual harassment of Jen Jackson and others in December 2018 and January 2019. Exhibit 37, p. 1; 5/10 TT 59:12-20 (App. Vol. II, 169; App. Vol. I, 164). She saw Exhibits 34, 38, 39, 41, and the text messages in Exhibit 29 for the first time at trial. She did not learn about Chris Skuster's information until trial.

Tracy described the effects this ordeal has had on her:

> I was on pins and needles constantly at work and at home. I was anxious. I was sad. I was preoccupied. I was no longer confident. I didn't want to go out and do things. I just worked all the time

> trying to stay caught up so that I wouldn't get in trouble.[3] I wasn't sleeping. I wasn't doing any of the things we enjoyed doing before.

5/10 TT 146:19-25 (App. Vol. I, 218). Tracy broke out in shingles on her face and eye. 5/10 TT 147:1-4; 5/12 TT 214:5-25 (App. Vol. I, 219; 298). As a result, she missed her grandson's first birthday party. *Id.* She was afraid of McInroy every single day. 5/10 TT 147:17-18 (App. Vol. I, 219).

Not only was Tracy powerless to make Defendants remedy the harassment against herself, she could not convince them to do anything to protect others. Tracy still carries the burden and guilt of having let down workers who relied on her. 5/10 TT 147:12-16 (App. Vol. I, 219). "I felt responsible for those people, and they were being talked about and laughed about and made fun of and objectified, and it was just incredibly offensive to me." 5/10 TT 156:25-157:7 (App. Vol. I, 222-23); *see also* 5/11 TT 30:4-31:14 (App. Vol. I, 259-60). Because Tracy is a woman, she felt vulnerable when bad things happened to other women. 5/11 TT 31:23-32:3 (App. Vol. I, 260-61).

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[3] Tracy was working 60 to 70 hours a week. 5/12 TT 216:12-217:9 (App. Vol. I, 300-01).

Foxhoven worried about how the environment affected Tracy. 5/7 TT 54:24-55:6 (App. Vol. I, 136-37). She became more and more tearful over time and it seemed like she was ready to give up. *Id.* Coworkers saw it take a toll on Tracy and noticed her personality change. 5/5-6 TT 79:22-80:5 (App. Vol. I, 114-15).

Tracy's marriage suffered. It interfered with physical intimacy. 5/12 TT 215:24-216:1 (App. Vol. I, 299-300). She lashed out at her husband and cleaned the house obsessively. 5/12 TT 212:2-13:8 (App. Vol. I, 296-97). Tracy had terrible problems sleeping. 5/10 TT 148:15-16 (App. Vol. I, 220).

> Q: When you were lying in bed and couldn't sleep, can you tell the jury what would go through your mind?
>
> A: My fear of Mike, the unpredictability, what was going to happen the next day, this feeling like he was incredibly protected and I had no outlet to talk about what was happening. I would have a physical reaction when it was time to go to work in the morning. Headaches, upset stomach, nausea. When I went in to work, just a heightened sense of alertness all the time. I stayed late. I went early. I traveled to all the outer counties. And then I got accused of not being accessible.
>
> Q: How exhausting was it to have that heightened sense of alertness all the time?
>
> A: I was always exhausted. I could never sleep. I was always overwhelmed. I wouldn't concentrate. . . . I didn't enjoy anything.

5/10 TT 148:17-149:7 (App. Vol. I, 220-21). Tracy was too overwhelmed to go out with her husband, see her grandbabies, or meet friends. 5/10 TT 163:3-12 (App. Vol. I, 227).

Clinical Social Worker Margaret Conrad provided Tracy with counseling. *See* Exhibits 22A; 40 (App. Vol. I, 565-612; 254-63). The focus of the treatment was the "DHS hostile working environment." 5/13 TT 7:9-11, 9:8-13 (App. Vol. I, 304, 305). Conrad gave Tracy the trauma diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood. 5/13 TT 9:16-11:7 (App. Vol. I, 305-07). Conrad testified that Tracy exhibited the following symptoms: feelings of hopelessness and helplessness, difficulty sleeping, anxiousness, heart palpitations, difficulty breathing, panic attacks, fear, and hyperarousal. 5/13 TT 11:1-7, 14:3-23 (App. Vol. I, 307, 308). The cause of Tracy's disorder was the work situation at DHS. 5/13 TT 28:16-21 (App. Vol. I, 318).

The medical record from October 25, 2017, reflects that McInroy continued to abuse Tracy in large meetings. 5/13 TT 18:15-19 (App. Vol. I, 311). They discussed how his need to exert power and control over her was similar to a situation involving domestic abuse. 5/13 TT 18:21-20:2 (App. Vol. I, 311-13).

Conrad sometimes thought it would be best for Tracy to leave DHS, but Tracy was passionate about helping vulnerable Iowans and protecting her employees. 5/13 TT 20:3-16, 21:17-22:8 (App. Vol. I, 313, 314-15). Conrad

noted on July 16, 2018, that Tracy continued to be in constant crisis at work and victimized by the system. 5/13 TT 23:7-11 (App. Vol. I, 316). Even in March 2019, Tracy was still being undermined and disrespected by leadership. 5/13 TT 25:12-24 (App. Vol. I, 317).

Conrad explained to the jury that the job of the brain's amygdala is to scan the environment looking for danger. 5/13 TT 16:3-17 (App. Vol. I, 309). When it senses danger, the body releases cortisol, glucose, and adrenaline to aid in fighting, flight, or freezing. *Id.* The amygdala does not communicate well with the frontal cortex, where we think logically. 5/13 TT 16:18-17:22 (App. Vol. I, 309-10). The result is an involuntary state of hyperarousal that increases one's heart rate and blood pressure, interferes with sleep, and takes a long-term toll on the body. 5/13 TT 17:15-22, 29:4-16 (App. Vol. I, 310, 319).

Although it's impossible to say what the long-term damage from these experiences will be, Conrad testified that Tracy is at risk for future psychological problems. *Id.* at 30:11-18 (App. Vol. I, 320). Tracy may be "triggered" by any number of things that could (logically or illogically) cause her amygdala to warn that she's in imminent danger. *Id.* at 29:15-30:10 (App. Vol. I, 319-20).

McInroy's vehicle is such a trigger. "I'm still terrified. Whenever I see this big red truck he drives, . . . I just get like a flash." 5/10 TT 158:11-13 (App. Vol. I, 224).

Just because things have improved at work does not mean Tracy is healed. 5/10 TT 158:23-25 (App. Vol. I, 224). She feels revictimized every time she thinks about what she endured. 5/10 TT 158:15-16 (App. Vol. I, 224). "It's just like this reel that's always going on in my head about how many times . . . I tried to ask for help and didn't get it. It's constant. It's daily, even now. . . . I'm more scared than ever." 5/10 TT 163:24-164:8 (App. Vol. I, 227-28).

Tracy has been permanently changed. 5/10 TT 161:21-162:24 (App. Vol. I, 225-26). She continues to feel angry, sad, and guilty. 5/10 TT 158:19-22 (App. Vol. I, 224). She is less trusting and hopeful. 5/10 TT 161:21-162:24 (App. Vol. I, 225-26). She lost confidence in a system she strongly believed in. *Id.* She has a "harder edge." *Id.* She gained 50 pounds. *Id.*

It still bothers Tracy that she had to go through all this—that it got to such an extreme before it was fixed. 5/12 TT 220:3-11 (App. Vol. I, 302). Her husband testified, "It's probably going to haunt her for a long time." *Id.*

ARGUMENT

I. HAD THE DEFENDANTS PRESERVED ERROR, THE COURT STILL WOULD HAVE BEEN CORRECT TO OVERRULE OBJECTIONS TO HARASSMENT EVIDENCE REGARDLESS OF WHETHER IT WAS DIRECTED SPECIFICALLY AT PLAINTIFF

A. ERROR PRESERVATION

Defendants failed to preserve error on their claim that the court admitted too much evidence of harassment. They assert the trial court granted "the State a standing objection on the *topics* addressed in its motion in limine," but that is not so. *See* Def. Brief 13 (emphasis added) (citing 5/5-6 TT 8:7-9:18) (App. Vol. I, 91-92).

At the start of trial, Plaintiff's counsel read into the record a stipulation to the entry of various exhibits. 5/5-6 TT 6:10-7:7 (App. Vol. I, 89-90). Defendants agreed, subject to the objections raised in their motion in limine. Defense counsel stated, "Your Honor, we would just like to note our continuing standing objection *to exhibits* that reference materials or facts that came up in our motion in limine . . ." 5/5-6 TT 8:8-10 (App. Vol. I, 91) (emphasis added). The objection was only to exhibits—not "topics." Defendants never objected on relevance or 5.403 grounds to any of the *testimony* they now claim was improvidently admitted. Ironically, Defendants *themselves* elicited much of the testimony they now claim was improperly admitted. *See, e.g.* 5/10 TT 184:4-5 (App. Vol. I, 235) (asking about other homophobic comments McInroy might have made).

Moreover, "standing objection" was not really the right term. It is clear from the context that Defendants were simply stipulating to entry of the particular exhibits being offered at the time, subject to the objections stated in their motion in limine. They preserved error as to those exhibits—but not to

any and all exhibits yet be offered that Defendants might later claim fell within their motion in limine.[4] This was clearly Judge Rosenberg's understanding. He stated, "So [Exhibits] 1 and 2 are stipulated to except for certain portions that the defendant has brought up in her motion in limine." 5/5-6 TT 9:7-9 (App. Vol. I, 92).

Indeed, it is difficult to tell what Defendants think was covered by their motion in limine and what they claim they would have objected to. *See, e.g. State v. Harrington*, 178 N.W.2d 314, 316 (Iowa 1970) (standing objection to "this line of questioning" was insufficient to alert the court that counsel was also objecting to matters covered later in the cross-examination).

Importantly, when given the chance to object to many of the exhibits about which they now complain, Defendants affirmatively declined to do so.

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[4] In the middle of trial, Plaintiff learned Defendants had failed to produce approximately 3,000 documents that had been requested in discovery. *See* 5/10 TT 164:24-168:1; 5/11 TT 3:11-9:16; 5/13 TT 62:21-63:3; 5/19 TT 4:13-23 (App. Vol. I, 228-32; 252-58; 321-22; 345). On the first day of trial, neither party knew about several of the exhibits to which Defendants now say their objection encompassed. They could not have been objecting to exhibits the very existence of which they were unaware. *See* Exs. 29, 34, 38, 39, 41 (App. Vol. III, 83-95, 103-04; App. Vol. IV, 4-36; App. Vol. V, 4-8; App. Vol. II, 182-83).

Exhibit 29 Screenshots from Jen Jackson's phone (App. Vol. III, 83-95).

No objection – 5/7 TT 109-110 (App. Vol. I, 142-43)

Exhibit 34 Photos of "sniffers' row"
No objection – 5/10 TT 43-44 (App. Vol. I, 156-57)

Exhibit 37 Tracy's email to Jerry Foxhoven
No objection – 5/10 TT 58 (App. Vol. I, 163)

Exhibit 38 Darci Patterson office photos
Defendants stipulated to admission – 5/10 TT 5 (App. Vol. I, 151)

Exhibit 41 Email from Chris Skuster
No objection 5/12 TT 86 (App. Vol. I, 286)

Exhibit 101 Tracy's notes from meeting with Jen Jackson
No objection 5/10 TT 58 (App. Vol. I, 163)

Defendants *themselves* offered and used exhibits that would have violated the limine order they sought:

- Exhibit G (mentioning "nectar of the Gods" and "eye candy") 5/5-6 TT 7 (App. Vol. I, 90)
- Exhibit P (mentioning complaint of sexual orientation discrimination) 5/17 TT 78 (App. Vol. I, 334)
- Exhibit Q (hostile work environment from Patterson) 5/17 TT 81 (App. Vol. I, 335)
- Exhibit S ("eye candy") 5/6-7 TT 7 (App. Vol. I, 271)
- Exhibit L-1 ("nectar of the Gods," "til the sweat runs down my balls," McInroy's mistreatment of Jeneary) 5/18 TT 36 (App. Vol. I, 338)
- Exhibit Y1 (Patterson's sexual language and "Sniffers' Row") 5/13 TT 63-65 (App. Vol. I, 322-24)

"'It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.'" *Dolly Investments, LLC v. MMG Sioux City, LLC*, 984 N.W.2d 168, 173 (Iowa 2023) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). We all learned in law school that an appeal cannot be based simply on what one party claims is the wrong end result. Instead, it must be based on a judge's wrong decision.

Making a wrong decision on a motion in limine is not final or appealable.[5] *Quad City Bank & Trust v. Jim Kircher & Assoc., P.C.*, 804 N.W.2d 83, 89 (Iowa 2011). An objection must still be made when the evidence is offered at trial. *Id.*

Rather than objecting in real time, Defendants waited in the wings and allowed what they now claim was inadmissible evidence to supposedly taint the record. But:

> it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable

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[5] A limited exception exists when the judge makes it plain that the ruling is final and will not be revisited. *Id.* There is no indication that such exception applies here, and Defendants do not claim it does.

> outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.

State v. Pickett, 671 N.W.2d 866, 869 (Iowa 2003). Because the lower court did not have the chance to consider the evidentiary objections Defendants now make, any error has been waived.

B. STANDARD OF REVIEW

In the event the Court excuses the failure to preserve error, it should keep in mind that a trial court is vested with "broad discretion" in applying the balancing test of Rule of Evidence 5.403. *Blakely v. Bates*, 394 N.W.2d 320, 324 (Iowa 1986).

C. THIS WAS NOT "ME TOO" EVIDENCE

Defendants make the fundamental error of trying to apply rules about the admissibility of "me too" evidence in disparate treatment cases to this *harassment* case. Def. Brief 26-43. Disparate treatment cases do not consider the "totality of the circumstances;" harassment cases do. "Evidence of a hostile environment must not be compartmentalized, but must instead be based on the totality of the circumstances of the entire hostile work environment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Madison v. IBP, Inc.*, 257 F.3d 780, 793 (8th Cir. 2001), *judgment vacated on other grounds*, 536 U.S. 919 (2002). The *Madison* court rejected a challenge to the trial court's admission of evidence that other women

and African Americans were harassed. *Madison*, 257 F.3d at 793. The "Eighth Circuit Court of Appeals has recognized that harassment directed at others of which the plaintiff is aware can constitute evidence of a hostile environment *as to the plaintiff*." *Stricker v. Cessford Const. Co.*, 179 F. Supp. 2d 987, 1001 (N.D. Iowa 2001) (emphasis added).

"[H]ostile work environment claims are by nature cumulative—proof of such claims often requires evidence of multiple acts of harassment (including evidence of harassment experienced by other employees besides the plaintiff) over a period of time." *Davis v. Packer Eng., Inc.*, 2016 WL 11689521, at *4 (N.D. Ill., Nov. 14, 2016).

"As a matter of settled law and common sense, a hostile environment claim requires consideration of the *environment* in which a plaintiff works." *Ruffino v. State Street Bank & Trust Co.*, 908 F. Supp. 1019, 1038 n.34 (D. Mass. 1995). All sexual harassment and sexist behavior that Tracy witnessed or knew about was part of the hostile environment she experienced.

D. SEXUAL HARASSMENT IS ADMISSIBLE IN SEXUAL HARASSMENT CASES

Defendants attempt to re-cast Plaintiff's claims to limit the time frame and actors involved, evidently preferring Plaintiff would have based her case solely on the way McInroy treated her. But the plaintiff is the master of her own case.

Grimm v. U.S. West Comm'ns, 644 N.W.2d 8, 14 (Iowa 2002). Tracy's sexually hostile work environment claim was not limited to McInroy's behavior, nor was it limited to conduct that was directed specifically at her.

It would defy logic to exclude evidence of conduct that contributed to the plaintiff's hostile work environment. As long as the plaintiff knew about the conduct during her employment and her work environment was affected by it, the plaintiff is entitled to any damages she suffered because of it.

> The mere fact that [the plaintiff] was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim. Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment, the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment.

Schwapp v. Town of Avon, 118 F.3d 106, 111 (6th Cir. 1997) (internal citations omitted).

The trial court in *Jackson v. Quanex Corp.*, 191 F.3d 647, 656 (6th Cir. 1999) adopted the position that:

> every single member of a protected class would have to suffer a series of affronts both explicitly racial and personal in nature before she could claim the existence of a racially hostile work environment. In essence, under this view, each minority employee would have to show that the employer had an intent specifically to harass her, and could not proceed on a theory that the employer had a general intent to harass all employees of the minority group.

Id. The Sixth Circuit found "such a myopic view of harassment unacceptable, particularly in light of the directive in *Harris* that courts are to consider 'all of the circumstances' in determining whether a hostile work environment exists." *Id.; see Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). When the trial court refused to consider harassment that did not occur in the plaintiff's presence or was not directed at him, it "abandoned its responsibility to consider all the circumstances." *Id.* at 659. A plaintiff need not personally see an act of harassment for it to be admissible. *Id.* at 661. "[T]he fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor can impact the work environment." *Id.*

The idea that an employer's conduct toward an entire group is probative was recognized in the seminal case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). There, the plaintiff Latina's claim was that the employer created a hostile work environment for her by discriminating against Hispanic clients. *Id.* at 65-66. "As *Meritor* demonstrates, an employer may create a hostile environment for an employee even where it directs its discriminatory acts or practices at the protected group of which the plaintiff is a member, and not just at the plaintiff herself." *Jackson*, 191 F.3d at 661.

In *Angier v. Henderson*, 2001 WL 1629518, at *4 (D. Minn. Aug. 3, 2001), the defendant argued the harassment was "primarily overheard by Angier rather

than directed at her," so it was not severe or pervasive enough to be actionable. The court disagreed, noting that it must consider the totality of the circumstances, and "offensive comments need not be directed at a plaintiff in order to constitute conduct violating Title VII." *Id.; see also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1117 (9th Cir. 2004) (racial hostility pervading a workplace violates Title VII "even if such hostility was not directly targeted at the plaintiff"); *Huff v. Sheahan*, 493 F.3d 893, 903 (7th Cir. 2007) (sexual harassment is actionable by plaintiff who was not the direct target if she is within the protected class the conduct targets); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) ("We are, after all, concerned with the 'environment' of workplace hostility").

Even when the plaintiff doesn't know about them, acts of harassment are admissible to show the general atmosphere, link individuals to the animus, prove notice to the employer, determine intent, whether the harassment was part of a pattern or practice, and whether Defendants took prompt and appropriate remedial action that was reasonably calculated to end the harassment. In *White v. Honeywell, Inc.*, 141 F.3d 1270 (8th Cir. 1998), the district court refused to admit evidence that when the plaintiff's former supervisor was shown her racial harassment complaint, he responded, "If the dumb n***er doesn't like it she can sign out." *Id.* at 1274. The statement was made five years before the plaintiff filed her lawsuit. *Id.* at 1272, 1274. It was not made to the plaintiff or in her

presence. *Id.* at 1274, 1276. Nevertheless, the jury verdict and judgment in favor of the employer was reversed because the court excluded that evidence. *Id.* at 1277. "This background evidence, if believed by the jury, would have helped White to demonstrate knowledge and an ongoing pattern of racial harassment and discriminatory animus directly linked to the management-level at Honeywell." *Id.* at 1276. Because the statement helped "to define the general work atmosphere, or the totality of the circumstances, it matters little that White did not hear [the supervisor's] statement." *Id.*

The *White* court also rejected the employer's contention that the probative value of the statement was outweighed by unfair prejudice. "In a case where race discrimination is the issue, the introduction of alleged racist remarks is not to be unexpected." *Id.* at 1276. The same is true of sexually offensive conduct in a sexual harassment case. Although damaging, and in that sense prejudicial to Defendants, "it is not *unfairly* prejudicial. It helps to define the essential background against which White's claim arose." *See id.* at 1277.

There are cases which imply that harassment is less serious if it is not directed specifically at the plaintiff, but that is not necessarily true.[6] A Jewish employee is likely to find a workplace adorned with swastikas every bit as hostile even if the symbols were intended to threaten a *different* Jewish person. *Cf. Noel v. Carite of Garden City*, 2020 WL 5891591 (E.D. Mich. Oct. 5, 2020). By the same token, "the line that runs between 'you are a bitch' and 'all women are bitches' . . . is quite a fine one." *Yuknis v. First Student, Inc.*, 481 F.3d 552, 554 (7th Cir. 2007). Darts still sting even if they "were aimed elsewhere and hit [Tracy] by accident." *Id.*

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RECOGNIZING EVIDENTIARY SUPPORT FOR THE VALUE THE JURY PLACED ON PLAINTIFF'S FUTURE EMOTIONAL DISTRESS

[T]he fact that a damage award is large does not in itself . . . indicate that the jury was motivated by improper considerations in arriving at the award." 58 AM. JUR. 2D *New Trial* § 313, at 313 (2002). "In considering the contention the

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[6] Studies have shown that indirect exposure to sexual harassment can affect victims as profoundly as targeted harassment. Afroditi Pina & Theresa A. Gannon, *An Overview of the Literature on Antecedents, Perceptions and Behavioural Consequences of Sexual Harassment*, 18 J. of Sexual Aggression 209, 221 (July 2012).

verdict is so excessive as to . . . show it is the result of passion and prejudice we must take the evidence in the aspect most favorable to plaintiff which it will reasonably bear." *Townsend v. Mid-Am. Pipeline Co.*, 168 N.W.2d 30, 33 (Iowa 1969).

A new trial can be granted only if the trial court abused its discretion in rejecting Defendants' claim that their substantial rights were affected by excessive damages "appearing to have been influenced by passion or prejudice." IOWA R. CIV. P. 1.1004(4). Here, there is nothing to suggest an abuse of discretion. The court followed the law that verdicts are not to be tampered with absent the most unusual circumstances. "[T]he amount of an award is primarily a jury question, and courts should not interfere with an award when it is within a reasonable range of evidence." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009); *see also Riniker v. Wilson*, 623 N.W.2d 220, 230 (Iowa Ct. App. 2000) ("The amount of damages awarded is peculiarly a jury, not a court, function."). "The preeminent role that the jury plays in our civil justice system calls for judicial restraint in exercising the power to reduce a jury's damage award." *Cuevas v. Wentworth Group*, 144 A.3d 890, 893 (N.J. 2016).

"In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict." *Clarey v. K-Prods., Inc.*, 514 N.W.2d 900, 903 (Iowa 1994). The court must uphold

damages "so long as the record discloses a reasonable basis from which the award can be inferred or approximated." *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982). "If the verdict has support in the evidence the [other factors, including prejudice,] will hardly arise." *Miller v. Young*, 168 N.W.2d 45, 53 (Iowa 1969).

The jury decided Tracy's future pain was worth $530,000. To evaluate whether the trial court abused its discretion in holding the valuation was based on evidence rather than passion or prejudice, the Court must consider the underlying facts of the case along with the substantial evidence of Tracy's pain.

A. THE GRAVITY OF PLAINTIFF'S EMOTIONAL DISTRESS IS CONSISTENT WITH WHAT SHE WENT THROUGH

Emotional distress is proven by showing the nature and circumstances of the wrong and its effect on the plaintiff. *Carey v. Phiphus*, 435 U.S. 247, 264-65 (1978). The jury heard substantial evidence that Tracy's emotional stress was directly related to the nature of the wrongs.

The atmosphere at DHS was rife with extremely offensive sexual comments and behavior from supervisors and managers. Tracy endured years of McInroy's personal hostility and abuse which the jury was within its rights to find was related to her gender. McInroy's mean and dismissive treatment of Tracy was openly displayed. The biased treatment bled over into her work

assignments and culminated with Tracy being responsible for roughly double the work of her colleague. The jury was able to picture the utter despair Tracy felt—trapped in a world in which no one would acknowledge the fundamental unfairness she faced. Her pleas to help Jen Jackson fell on deaf ears. Her subordinates suffered from McInroy's animosity toward her, causing Tracy even more stress and guilt. McInroy derived pleasure from seeing her cry and beg.

The Supreme Court has emphasized "that the objective severity of harassment should be judged from the perspective of a reasonable person *in the plaintiff's position,* considering 'all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (emphasis added) (quoting *Harris*, 510 U.S. at 23).

The fact that McInroy was a perpetrator/enabler of harassment is important. The impact of harassment is heightened when a supervisor perpetrates it. *Steck v. Francis*, 365 F. Supp. 2d 951, 973 (N.D. Iowa 2005). "Harassment by a supervisor appears to carry the weight and imprimatur of the employer's authority and seems to authorize or condone like conduct by subordinates, thereby fostering a perception that the environment as a whole is hostile." *Id.*; *see also Ellis v. Houston*, 742 F.3d 307, 320 (8th Cir. 2014).

Tracy's emotional distress can be understood only in the context of the civil rights violations from which it arose. Civil rights violations cause a special kind of anguish:

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

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

B. THE VERDICT FOR FUTURE COMPENSATORY DAMAGES REFLECTS THE SERIOUSNESS OF THE EMOTIONAL HARM INFLICTED

The jury heard exhaustive evidence about Tracy's injuries from her coworkers, the people closest to her, her treating therapist, and herself. She endured a variety of physical and emotional symptoms because of her work environment.

Clinical Social Worker Margaret Conrad diagnosed Tracy with adjustment disorder caused by the hostile work environment at DHS. She testified that Tracy was constantly on edge—that her amygdala kept her constantly vigilant for danger because her work environment was not safe. Conrad explained to the jury that Tracy would likely continue to experience these symptoms into the future. Defendants did not call an expert to call any of Conrad's conclusions into question.

Although Tracy's work environment is better now, she is far from healed after surviving years of misconduct. She feels revictimized each time she thinks about what she endured. She continues to feel angry, sad, and guilty. She is less trusting, hopeful, and confident. She was betrayed by leaders of an organization, a State, and a community to which she had devoted 21 years.

"Although essentially subjective, genuine [emotional distress] injury . . . may be evidenced by one's conduct and observed by others." *Carey*, 435 U.S. at 264 n.20. Employees like Trisha Gowin testified that it seemed like someone was putting out Tracy's fire, her sparkly personality; that you could tell Tracy was being dimmed. TT 5/5-6 70:4-16 (App. Vol. I, 107). Tracy testified that she felt increasingly helpless and hopeless that DHS would do the right thing. The jury saw Tracy in tears throughout most of the trial.

The record provides substantial evidence for the jury to find that Tracy's "work environment was so polluted by sexual harassment that it affected her psychological and emotional well-being." *See Lynch v. City of Des Moines*, 454 N.W.2d 827, 835 (Iowa 1990).

> Sexual harassment has a cumulative, eroding effect on the victim's well-being. When women feel a need to maintain vigilance against the next incident of harassment, the stress is increased tremendously. When women feel that their individual complaints will not change the work environment materially, the ensuing sense of despair further compounds the stress.

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1507 (M.D. Fla. 1991).

This type of pain and trauma leaves permanent scars. It was obvious throughout the trial that Tracy continues to struggle to reconcile the platitudes Defendants voiced with the reality of how they ignored and facilitated sexual mistreatment of employees. All the witnesses who knew Tracy well—including current employees of DHS—testified that although Tracy seemed better than she was during the height of the sexual harassment, she was still suffering the aftereffects of the experience. Conrad testified at length about how trauma changes the brain and why Tracy's symptoms could last far into the future. The jury clearly agreed.

No amount of money can make up for enduring the degrading treatment—both the sexually hostile work environment and Defendants' refusal

to do anything about it. Determining the value of a human being's emotional distress is not a scientific determination of the objectively correct amount; it is a matter of weighing moral values and determining the consensus of the community. The job of the jury is to determine and apply the conscience of the community on a matter for which there is no exact "right" answer. *Cf. Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003). Jurors based their damage award on substantial evidence of exactly how Tracy was harmed by Defendants. They awarded the specific amounts of $260,000 in past emotional distress and $530,000 in future emotional distress, showing they gave careful consideration to their decision. That decision deserves respect.

"The verdict was within the evidence. The jury has spoken. The parties had a fair trial. The court may not arbitrarily substitute its opinion for the conclusion of the jury." *Lantz v. Cook*, 127 N.W.2d 675, 677 (Iowa 1964).

C. COMPARISONS TO OTHER VERDICTS

This Court has "pointed out many times that comparison of verdicts in different cases is not helpful in determining the propriety of an award in a given case—each must be determined upon the evidence therein. *Wagaman v. Ryan*, 142 N.W.2d 413, 420 (Iowa 1966). After all, even if it was possible to find a factually identical case, we still would not know which jury had pinpointed the "right" amount of damages. *Cuevas*, 144 A.3d at 905.

The facts of each unique case must drive any evaluation of jury awards. While exact comparisons to other cases are impossible, multi-million-dollar results are not terribly unusual in civil rights cases. The most egregious cases are more likely to settle before trial—let alone before an appellate decision is reported. Nevertheless, there are cases in the public record that the Court may consider:

- A Sioux City jury awarded $735,000 in emotional distress damages to a victim of sexual harassment in *Baker v. John Morrell & Co.*, 249 F. Supp. 2d 1138 (N.D. Iowa 2003).

- A jury found an Ames woman sustained over $2.5 million in emotional distress damages for sexual harassment, discrimination, and retaliation. *McElroy v. State*, CL 74459 (Polk County 2003).

- A central Iowa jury ordered a Des Moines woman compensated $640,000 for her emotional distress after she was sexually harassed and retaliated against. *Fulkerson v. Borgen Systems- Ultra Cool Corp.*, 4-02-CV-20507 (S.D. Iowa 2004).

- An Iowan who had been discriminated against and harassed was awarded $731,000 for his emotional pain in *Eliserio v. United Steelworkers of America, Local 310*, 4:02-cv- 70159 (S.D. Iowa 2005).

- The jury awarded a coach $197,000 for emotional distress after she was fired in retaliation for complaining about discrimination and unequal pay. *Crowe v. State of Iowa*, LACV097328 (Polk County 2008).

- A jury found a teacher needed $352,000 to compensate him for emotional distress after being fired illegally. *Girsch v. Cedar Valley*, CV102-656 (Black Hawk County 2010).

- A trucking company paid $500,001 to a woman who was sexually harassed and retaliated against. *Peddicord v. Housby Mack, Inc.*, CL111366 (Polk County 2010).

- A Polk County jury awarded $65,000 in emotional distress damages to an employee who had been retaliated against for complaining about sexual harassment. *Hodges v. Central Iowa Hosp. Corp.*, LACL 114549 (2011).

- A southern Iowa jury awarded $500,000 for the pain of an employee who had experienced sex discrimination and retaliation. *Erwine v. UGL Servs.*, LALA003532 (Monroe County 2011).

- A jury in Sioux City awarded $240,000 in emotional distress damages to a victim of sexual harassment and retaliation. *Gilster v. Primebank*, 10-4084-MWE (N.D. Iowa 2012).

- An 81-year-old doctor received a jury verdict of $200,000 for past and future emotional distress. He had worked for the State for eight days and suffered age discrimination. *Hurkin v. Woodward Resource Ctr.*, LACL 120384 (Polk County 2012).

- A jury awarded $50,000 in emotional distress damages to a 53-year-old woman who was fired after complaining that she was passed over for a promotion because of her race. *Polk v. State of Iowa*, LACL 128844 (Polk County 2013).

- Madison County paid $685,000 to an employee who was retaliated against after she complained about sexual harassment. *Frank v. Madison County*, LACV033099 (Madison County 2013).

- A paralegal who had been sexually harassed was awarded $80,000 for emotional distress in *Farmer v. Floyd County*, LACV029793 (Bremer County 2013).

- A jury awarded $1.3 million in emotional distress damages to a worker who had been sexually harassed, retaliated against, and constructively discharged. *Haskenhoff v. Homeland Energy Solutions, Inc.,* LACV003218 (Chickasaw County 2014).

- A central Iowa jury decided a woman who was sexually harassed endured past emotional distress valued at $1 million and would suffer future emotional distress of $800,000. *Renneger v. Manley Toy*, (S.D. Iowa 2015).

- The Iowa Court of Appeals upheld a verdict of $435,000 in emotional distress damages to a 64-year-old man for disability discrimination and failure to accommodate. *Vetter v. State*, 2017 WL 2181191, at *12-15 (Iowa Ct. App. May 17, 2017).

- A jury awarded emotional distress damages of $500,000 and $600,000, respectively, to two women who had been harassed and retaliated against. One plaintiff was employed for a total of seven weeks and the other worked alongside her harasser for only five weeks. *Oyler & Schemmel v. Laxmee, Inc. & Vijay Patel*, LACV058056 (Dubuque County 2015).
- A jury awarded $100,000 in emotional distress damages to a woman who was retaliated against and fired after complaining about disability discrimination. *Moenck v. Hy-Vee, Inc.*, LACV081214 (Linn County 2016).

- In a February 2019 retaliation case, the jury decided a male firefighter had suffered emotional distress worth $1,096,972. *Hurd v. City of Lincoln*, 4:16-cv-03029 (D. Neb. 2019).

- A local police department paid $1.9 million to settle a case of gender discrimination, harassment, and retaliation against a female sergeant in *Zaglauer v. City of West Des Moines*, LACL 132694 (Polk County 2016).

- A jury awarded $4.28 million in past and future emotional distress damages for age discrimination, disability discrimination and

retaliation. *Hawkins v. Grinnell Regional Med'l Ctr.*, LALA002281 (Poweshiek County 2017).

- A school district paid a woman $1 million to settle her retaliation lawsuit. *Patters v. Waukee Cmty. Sch. Dist.*, LACV 040919 (Dallas County 2019).

- The City of Urbandale compensated a male police sergeant $1,175,000 for his claims of disability discrimination and retaliation. *Jorgensen v. City of Urbandale*, LACL143474 (Polk County 2020).

- The City of Dubuque settled sexual harassment and retaliation claims from a female police captain for $1,750,000. *Simon v. City of Dubuque*, LACV109271 (Dubuque County 2021).

- In May 2021, a jury awarded $30,000 in emotional distress for disability discrimination and failure to accommodate. *Roberts v. City of Des Moines*, LACL144995 (Polk County 2021).

- In November 2021, a jury awarded $1,155,350 in past and future emotional distress damages to a female employee who was paid less than her male counterpart and retaliated against for complaining. *Selden v. DMACC*, LACL147358 (Polk County 2021).

- In February 2022, a jury awarded $575,000 in past and future emotional distress to a female firefighter who suffered sex discrimination and harassment. *Boss v. City of Dubuque.*, LACV111210 (Dubuque County 2022).

- In October 2022, an Omaha jury awarded $1.28 million in emotional distress damages to a woman who suffered sex discrimination. *Shaner v. HDR Engineering, Inc.*, CI 19-735 (Douglas County 2022).

In the past few years, the State itself has settled discrimination and sexual harassment cases for far more than the jury verdict in this case:

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

- The jury in *Anderson v. State,* No. LACL131321 (Polk County 2017) valued a woman's past emotional distress suffered on account of sexual harassment and retaliation to be worth $1.4 million and her future emotional distress to be worth $795,000. The case was later settled for $1.75 million.

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

- In February 2019, the State of Iowa entered a pre-suit settlement of two sexual harassment cases for $2.35 million and $1.8 million, respectively. *Mahaffey v. State* (2019).

- Defendants imply that Jen Jackson simply gave up on her claims and dismissed her lawsuit. Def. Brief 31 n.8. The truth is that they paid her a settlement of $962,500.[7]

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[7] https://www.desmoinesregister.com/story/news/2022/01/11/iowa-dhs-department-human-services-sexual-harassment-lawsuit-settlement/9172871002/

These are civil rights cases in which Midwesterners on actual juries evaluated compensatory damages. These are cases in which employers assessed the settlement value of workers' emotional distress. The value the jury placed on Tracy's distress certainly falls within these ranges.

Defendants discuss *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751 (Iowa 2009), in which the court upheld a decision to grant a new trial on the $100,000 emotional distress verdict. The court determined the verdict exceeded its evidentiary basis because Jasper had the job only a few months; her emotional distress was not prolonged; the evidence was unspecific; and there was no medical testimony. *Id.* at 773. "[A]wards are noticeably less in cases involving a single incident of wrongful discharge that gives rise to the common consequences of any involuntary loss of employment." *Id.* at 772. "[T]he upper range of emotional-distress damages increases as the nature of the wrongful conduct involved becomes more egregious, and the emotional distress suffered becomes more severe and persistent." *Id.* at 773. The length of the plaintiff's employment is also important. *Id.* Tracy worked for Defendants for 21 years. The evidence about her distress was quite detailed and supported by a medical professional. It was also significant that Tracy continues to suffer even though the harassment had ceased, leading to the logical conclusion that her distress will continue into the future.

This evidence in this case was more like that in *Smith v. Iowa State University of Science & Technology*, 851 N.W.2d 1 (Iowa 2014), where the court noted "emotional-distress damages tend to range higher in employment cases … involving egregious, sometimes prolonged, conduct.'" *Id.* at 32. Smith was subjected to "wrongful conduct for an extended period of time in a job he had held for nearly a decade;" and he sought treatment with a psychologist, who diagnosed him with extreme stress and anxiety that significantly impacted his life. *Id.* at 33.

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

Id. (internal citation omitted). The facts about Smith's emotional distress were quite similar to Tracy's in that she worked for Defendants for decades, received medical treatment and diagnosis, wrote lengthy grievances, and testified in great detail about the emotional toll the harassment exacted from her. That was enough in *Smith* to establish the "extreme or severe emotional distress" necessary to prove intentional infliction and support a verdict over $600,000. *Id.* at 30.

In the end, comparison of verdicts is of limited help. "Our legal system has not attempted to set schedules of presumptive awards for various types of

injuries, and a court cannot and should not do that under the guise of determining 'comparability.'" *Zurba v. United States*, 247 F. Supp. 2d 951, 962 (N.D. Ill. 2001). It is important that "the trial court, with benefit of seeing and hearing witnesses, observing the jury and having before it all incidents of the trial, did not see fit to interfere [with the jury's verdict]." *Smith*, 851 N.W.2d at 32. The trial court was required to judge this verdict on its own merits—on the evidence presented in the courtroom—and not by comparing it to fact patterns in other cases where it did not see the witnesses or hear the evidence. There is no indication the trial court abused its considerable discretion.

Even as this Court reads the facts of this case, it must keep in mind that Tracy did not experience these incidents as lifeless words on a page, nor is that the way the jury learned what happened. The Court is necessarily missing out on key aspects of the evidentiary presentation that cannot be captured in words:

> Summaries cannot compare to what a jury hears from a witness on the stand; to the timbre of a voice that recalls the emotional cuts and slashes felt from . . . discrimination; to in-depth descriptions of daily workplace humiliations that mentally beat down an employee; and to first-hand accounts of mental anguish—anguish that leads to depression and frays personal relationships.

Cuevas, 144 A.3d at 905.

Relying on all the evidence cited above, a properly instructed, rational group of eight ordinary Iowans determined it will take $530,000 to fully

compensate Tracy White for her future emotional harm. The experienced trial judge, who observed the jury for 11 days, detected no passion or prejudice. The fact that this verdict may be higher than some previous ones upheld by this Court may reflect the limited number of cases the Court hears.[8] It may mean that Tracy was hurt more than those other plaintiffs. It may also mean that the consensus of the community as to the monetary worth of human anguish is changing. It may be that we better understand mental health issues like depression and anxiety than we did 20 or 30 years ago. It may be that society values civil rights more preciously than it used to.

Because there is substantial evidence to support the jury's decision, the Court must respect and uphold it.

III. THE JURY REASONABLY FOUND THE HARASSMENT WAS SEVERE OR PERVASIVE

Whether harassment is severe or pervasive enough to create an abusive work environment is "quintessentially a question of fact." *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1098 (10th Cir. 1999); *Mosby-Grant v. City of Hagerstown*,

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[8] Adjusting for inflation also significantly increases the value of older verdicts. This can be done easily at https://www.dollartimes.com/inflation/

630 F.3d 326, 335 (4th Cir. 2010); *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 310 (6th Cir. 2016); *Munoz v. Adventure Lands of Am., Inc.*, 2021 WL 377441, at *4 (Iowa Ct. App. Feb. 3, 2021), *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 232 (Minn. 2020).

Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury. *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998). It is for the jury to determine when behavior crosses the line between merely unpleasant conduct and actionable harassment. *Sandoval v. Am. Build. Maint. Indus., Inc.*, 578 F.3d 787, 802-03 (8th Cir. 2009); *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997); *Baker*, 249 F. Supp. 2d at 1160.

A. THE JURY IS ENTITLED (AND REQUIRED) TO USE PRESENT-DAY BEHAVIORAL STANDARDS

Many of the cases on which Defendants rely to support their argument that the harassment was not severe or pervasive were decided many years ago. *See* Def. Brief 51-54. While there are many factual distinctions between those cases and this one, the Court must also recognize that times have changed. Views on the type conduct that constitutes actionable workplace sexual harassment have evolved and continue to evolve. What we expected women to put up with in the *Mad Men* era was vastly different from where we drew the line in the 1990s

and from where we draw the line today. What was once deemed acceptable workplace conduct is no longer tolerable. "[E]volving standards of decency . . . mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

The conduct recounted and minimized in the opinions relied upon by Defendants would be considered a great deal more horrifying by reasonable people now. "Today, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside." *Kenneh*, 944 N.W.2d at 231. It is long past time to reevaluate the arbitrary standards judges set in outdated cases. The Supreme Court has warned that "appalling conduct" described in prior cases should not be taken to "mark the boundary of what is actionable" in subsequent cases. *Harris*, 510 U.S. at 22 at 371.

The "Me-Too" and "#timesup" movements reflect the general public's outrage that our civil justice system has failed to enforce our civil rights laws' guarantee of equal employment opportunity. "It goes without saying that changes in public opinion do not automatically change the validity of legal precedent." Joan C. Williams, *et al.*, *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 145. But the standard is what objectively reasonable people would find to be hostile or abusive at work. *Farmland Foods v. Dubuque Human Rights Comm.*, 672 N.W.2d 733, 746 (Iowa 2003). "Reasonableness standards are meant to build flexibility and continuous

updating into the law, not to entrench norms from another time." *Williams* at 154. Too many judges making decisions in sexual harassment cases "have failed to update their understandings of reasonableness and instead rely on cases reflecting standards . . . from the last century." *Id.*

The concept of "reasonableness" plays a central role in harassment cases. *Id.* at 145-46. Judges dismiss cases on summary judgment based on their feel for how "reasonable jurors" would evaluate the situation. Societal standards of decency governing workplace conduct have undeniably risen over the last ten to 30 years. Reasonable people now expect both their employers and the law to protect them from conduct their mothers had to endure as a matter of course.

B. THE FACTS DEFENDANTS ARGUE ARE SET FORTH IN THE LIGHT MOST FAVORABLE TO THEMSELVES

"When considering a motion for judgment notwithstanding the verdict, the district court must view the evidence in the light most favorable to the party against whom the motion is directed." *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 617 (Iowa 1990); *see also Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010). The motion should be denied when there is any substantial evidence to support the jury's verdict. *Id.* "Every legitimate inference" deduced from the evidence is to be given the party against whom the motion is directed. *In re Will of Pritchard*, 443 N.W.2d 95, 97 (Iowa Ct. App. 1989).

A court may "not set aside a verdict simply because it might have reached another conclusion." *Ort v. Kli*, 496 N.W.2d 265, 269 (Iowa Ct. App. 1992). Rather, the question is whether, "giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties." *Cowan v. Flannery*, 461 N.W.2d 155, 158 (Iowa 1990).

Defendants argue a version of the facts dramatically different from those the jury found to be true. When the facts are viewed in the light most favorable to the verdict, a reasonable jury could have found the harassment was severe and/or pervasive.[9]

C. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S DETERMINATION THAT THE HARASSMENT WAS SEVERE OR PERVASIVE

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[9] Defendants mistakenly tell the Court that Plaintiff was required to prove the harassment was both severe ***and*** pervasive. Def. Brief 48. On the contrary, the standard has always been "severe ***or*** pervasive." *See, e.g. Bowen*, 311 F.3d at 884; *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 747 (Iowa 2006); *Farmland Foods*, 672 N.W.2d at 743; *McElroy v. State*, 637 N.W.2d 488, 499-500 (Iowa 2001). "[T]he more severe the conduct, the less pervasive it needs to be; the more pervasive, the less severe." *Fye v. Okla. Corp. Comm'n*, 175 Fed. Appx. 207, 210 (10th Cir. 2006).

Whether an environment is objectively "hostile" or "abusive" requires consideration of the "totality of the circumstance." *Harris*, 510 U.S. at 21-22; *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1378 (8th Cir. 1996); *Farmland Foods,* 672 N.W.2d at 744-45. The totality of the circumstances includes all sexist, sexual, anti-woman activity in the workplace, as well as general hostility that the jury can find is related to gender. *See Robinson*, 760 F. Supp. at 1522.

A proper evaluation "considers all the circumstances, including: (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." *Farmland Foods*, 672 N.W.2d at 744-45 (citing *Harris*, 510 U.S. at 23). Additional factors include whether "the harassment caused economic injury, affected the employee's psychological well-being, detracted from job performance, discouraged [the] employee from remaining on the job, or kept the employee from advancing in his or her career." *Quick,* 90 F.3d at 1378 (citing *Harris*, 510 U.S. at 23). Nearly all these factors support the jury's determination that the workplace was sufficiently hostile or abusive to violate Tracy's right to equal employment opportunity.

"[I]ncidents of sexual harassment directed at employees other than the plaintiff can be used as proof of a hostile work environment claim because one

of the critical inquiries is the 'general work atmosphere' as well as specific hostility to the plaintiff." *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 103 (2d Cir. 2010).

In *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 335 (6th Cir. 2008), the defendant argued that the plaintiff had to have personally observed an incident in order for it to count toward her hostile environment claim. The court disagreed, finding the great weight of authority held the opposite, including:

- *Moore v. KUKA Welding Sys.*, 171 F.3d 1073, 1077-79 (6th Cir. 1999);
- *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 110-12 (3d Cir. 1999);
- *Rodgers v. W.S. Life Ins. Co.*, 12 F.3d 668, 673-75 (7th Cir. 1993).

More weight should be given to harassment by someone the plaintiff knows has committed offensive acts in the past. *Hawkins*, 517 F.3d at 335. "This is because a serial harasser left free to harass again leaves the impression that acts of harassment are tolerated at the workplace and supports a plaintiff's claim that the workplace is both objectively and subjectively hostile." *Id.* One thing the Defendants have never understood is that their failure to protect Tracy's coworkers—even after she begged—caused Tracy enormous distress. Under the circumstances of this case and given Tracy's fierce commitment to her colleagues, the continued harassment of others was as rough for her to bear as the acts directed at her personally.

Defendants invite the Court to exclude from consideration the abuse Tracy suffered at the hands of McInroy, disregarding the bedrock principle that mean and unfair treatment constitutes sexual harassment when it stems from anti-female animus. *See, e.g., Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564-65 (6th Cir. 1999).

It is true that McInroy did not seem to discriminate against Kristin Walker, the other Social Work Supervisor. He also favored other female DHS employees who pandered to him, flirted with him, and never questioned him. As the jury apparently found, however, these examples *support*, rather than undermine, the allegation that McInroy treated women differently. Female workers should be able to prove themselves at work without the added job duty of making the boss feel good about his manliness. If the only way for women to succeed is with their feminine wiles, then women are denied the same employment opportunities as men.

A reasonable jury could (and did) find that McInroy's favorable treatment of "agreeable" women in the workplace, like Walker, illustrated his sex-based biases. Some men are perfectly appropriate around women who do not challenge them, and yet act abusively toward women who threaten them.

There was plenty of evidence for the jury to have found McInroy's behavior was related to Tracy's gender. Chris Skuster, Lindee Jeanery, Trisha

Gowin, and others provided strong testimony about the derision and disrespect with which Tracy was treated. The witnesses *themselves* linked that treatment to Tracy's sex and her refusal to stroke McInroy's ego. In addition, the jury heard evidence that McInroy made overtly sexist and sexual remarks. Comments carrying clear sexual overtones "permit an inference that . . . animus motivated not only [the harasser's] overtly discriminatory conduct but all of [his] offensive conduct." *Bowen v. Missouri Dep't of Soc. Servs.*, 311 F.3d 878, 884 (8th Cir. 2002).

In *O'Shea*, 185 F.3d at 1099, the harasser recounted a dream about a naked woman jumping on a trampoline. Unlike Mike McInroy's description of his dream about Tracy, the dream was not about the plaintiff and his description had not been communicated directly to the plaintiff. *Id.* Nevertheless, the court found the harasser's description of the dream (along with a reference to his wife compared to a Playboy model) would justify a jury finding that the non-sexual poor treatment of the plaintiff was based on gender. *Id.* McInroy's "black leather" dream similarly supports the jury's determination that the reason he treated Tracy with such venom was related to her gender.

Particularly considering McInroy's years of abuse, there can be no doubt that the harassment was sufficiently severe or pervasive to change Tracy's terms and conditions of employment. Gowin testified that the entire work environment in the Des Moines Service Area was infected by sexual harassment.

5/5-6 TT 79:8-12 (App. Vol. I, 114). The former DHS Director described the sexual harassment as "pervasive." 5/7 TT 66:1-25 (App. Vol. I, 138).

The jury listened to 11 days of evidence and decided it was severe or pervasive. It is for the community to judge what are the ordinary tribulations of the workplace and what crosses the line into abusive behavior that no Iowa worker should be forced to endure in exchange for the privilege of earning a living. No judge is more qualified to answer that question than the eight citizens who brought their diverse experiences and collective wisdom to the Polk County Courthouse. *See Webner v. Titan Dist., Inc.*, 101 F. Supp. 2d 1215, 1226 (N.D. Iowa 2000).

IV. THE STATEMENTS OF LAW IN JURY INSTRUCTION 16 ARE CORRECT

A. DEFENDANTS PRESERVED ERROR ONLY WITH RESPECT TO THE LAST SENTENCE

Defendants objected to only the last sentence of Instruction 16, thus waiving any argument that only incidents involving McInroy or directed specifically toward Tracy should have been considered. 5/19 TT 25:20-26:3 (App. Vol. I, 351-52). The same is true with respect to their claim that the Instruction conflated evidence that Defendants knew about sexual harassment generally as opposed to harassment directed toward Tracy. Def. Brief 43. This argument was never made below.

B. STANDARD OF REVIEW

The standard of review is for correction of errors at law. *State v. Harrison*, 914 N.W.2d 178, 188 (Iowa 2018). The trial court must give a requested instruction as long as it is correct, applies to the case, and is not expressed elsewhere. *State v. Kraai*, 969 N.W.2d 487, 492 (Iowa 2022).

C. INSTRUCTION 16 WAS CORRECT

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 reasonable calculated to end the harassment.

(emphasis added). Defendants objected only to the last sentence of the instruction, claiming that "conduct of which Tracy White was unaware" was irrelevant. 5/19 TT 25:20-26:3 (App. Vol. I, 351-52).

The jury was carefully instructed that the only purposes for which it could consider incidents Tracy didn't know about were: (1) Defendants' intent; (2) whether they were part of a pattern or practice; (3) whether Defendants had

notice; or (4) whether Defendants took prompt and remedial action that was reasonable calculated to end the harassment. These are all relevant considerations.

Contrary to Defendants' argument on pages 48 and 49 of their Brief,[10] "intent to create a hostile work environment is not an element of a hostile environment claim." *Boyer-Liberto v. Fontainbleu Corp.*, 786 F.3d 264, 282 (4th Cir. 2015); *State v. Watkins*, 914 N.W.2d 827, 842 (Iowa 2018). Even harassers with benign intent can create a hostile work environment. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1228 (10th Cir. 2015). *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d Cir. 2004) is a case in which most of the offensive material did not specifically target the plaintiff. *Id.* at 222. "[H]er coworkers would likely have traded sexual insults

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[10] Quoting from the decision in *Farmland Foods*, 672 N.W.2d at 745, Defendants insist that "discriminatory intimidation, ridicule, and insult must be motivated by a worker's membership in a protected group." Def. Brief 49-50. While there has to be a nexus tying the behavior to a protected characteristic, that nexus can arise from the harasser's purpose or from the effect of his actions. *Meritor*, 477 U.S. at 65; *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 632 (Iowa 1990). Civil rights laws are intended "to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor*, 477 U.S. at 64. "The critical issue […] is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 510 U.S. at 25; *see also Cote v. Derby Ins. Agency, Inc.*, 2017 WL 3283862 at *8 (Iowa Ct. App. Aug. 2, 2017), *aff'd*, 908 N.W.2d 861 (Iowa 2018).

every morning and defaced terminal boxes with sexual graffiti regardless of Petrosino's presence." *Id.* Nonetheless, the effect of the conduct was that Petrosino was subjected to a work environment that was hostile toward her as a woman in ways that her male coworkers did not have to face. *Id.*

Nevertheless, intent is relevant to show that harassment had the "purpose or effect" of unreasonably interfering with the plaintiff's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor,* 477 U.S. at 65; *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 632 (Iowa 1990).

Acts of harassment unknown to the plaintiff are still relevant to motive. *See White*, 141 F.3d at 1275-76 (racist epithet that plaintiff did not hear was background evidence to help establish knowledge, an ongoing pattern of racial animus, and employer's failure to act); *Madison*, 257 F.3d at 794 (employer's failure to discipline harassers or protect others' civil rights was relevant, not prejudicial, and not confusing, especially since the instructions advised that plaintiff could recover only damages she herself suffered).

Actual notice to employers is established by proof that management knew about acts of harassment, and constructive notice is established when the harassment was so widespread or overt that management reasonably should have known about it. *Sandoval*, 578 F.3d at 802-03. In *Sandoval*, the district court's

refusal to consider harassment against others was roundly criticized by the Eighth Circuit.

> A plaintiff, however, is not limited to offering such evidence only to prove the subjective component of a sexual harassment claim. Irrespective of whether a plaintiff was aware of the other incidents, the evidence is highly probative of the type of workplace environment she was subjected to, and whether a reasonable employer should have discovered the sexual harassment.
>
> When judging the severity and pervasiveness of workplace sexual harassment, this court has long held harassment directed towards other female employees is relevant and must be considered. *See Hall v. Gus Constr. Co.,* 842 F.2d 1010, 1014–15 (8th Cir. 1988) ("We also reject appellants' contention that the district court erroneously considered all of the women's claims together in determining that the harassment was sufficiently pervasive and severe...."). In *Williams v. ConAgra Poultry Co.,* 378 F.3d 790, 793–94 (8th Cir. 2004), the court discussed the distinction between evidence offered to prove the substance of a plaintiff's hostile work environment claim versus evidence offered to prove the severity and pervasiveness of harassment in the workplace. In *Williams,* the plaintiff (Williams) offered the testimony of several co-workers detailing a host of racially motivated harassment that occurred during his employment at Conagra's plant. *Id.* at 793. Conagra objected because Williams conceded he was unaware of the incidents, and according to Conagra, the evidence could not be used to prove Williams found the workplace subjectively hostile. *Id.* at 794. <u>This court, recognizing the evidence was irrelevant to Williams's subjective perceptions of his workplace, nonetheless found the evidence highly relevant to prove, among other things, the type of workplace environment to which Williams was subjected</u>. *Id.*

Id. (emphasis added).

Instruction 16 closely aligns to one previously approved by the Eighth Circuit:

> In determining whether discriminatory or harassing conduct was sufficiently severe or pervasive enough to create a hostile work environment for Madison, you may consider conduct towards her co-workers, so long as she was aware of that conduct and her own well-being was affected by that conduct. You may consider harassment that Madison was unaware of, in determining intent, and whether the harassment was a part of the pattern and practice of harassment against her.

Madison, 257 F.3d at 794 n.10.

The statements of law expressed in the last sentence of Instruction 16 were correct, and any error would be harmless. Indeed, Defendants would have been prejudiced if the last sentence had been *omitted*, thereby running the risk that the jury might award damages for incidents of harassment about which Tracy did not even know.

CONCLUSION

Plaintiff respectfully requests that the Court affirm the judgment and remand the case for entry of an order regarding additional attorney fees.

REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellee requests to be heard.

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

Certified by: */s/ Paige Fiedler*

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