IN THE SUPREME COURT OF IOWA

NO. 20-0135

RONALD RUMSEY
Plaintiff-Appellee / Cross-Appellant

v.

WOODGRAIN MILLWORK, INC., d/b/a WINDSOR WINDOWS AND DOORS, LIZ MALLANEY, and CLAY COPPOCK
Defendants-Appellants / Cross-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE COLEMAN MCALLISTER

APPELLANTS'/CROSS-APPELLEES' BRIEF
ORAL ARGUMENT REQUESTED

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ROUTING STATEMENT

Plaintiff-Appellee/Cross-Appellant Ronald Rumsey, a plant worker for Defendant-Appellant/Cross-Appellee Windsor Windows and Doors ("Windsor"), injured his back, wrist, and shoulder in the workplace. Windsor provided a series of light-duty assignments to permit Rumsey to work with his significant lifting, bending, and twisting medical restrictions. Appellant Clay Coppock, Windsor's production manager, and Appellant Liz Mallaney, Windsor's Human Resources Manager, observed what they believed to be terminable misconduct by Rumsey during a disagreement about a return to work restriction. They recommended to the HR director that Windsor terminate Rumsey, and the director agreed. Rumsey later sued not only Windsor for disability discrimination and retaliatory termination under the Iowa Civil Rights Act ("ICRA"), but also Coppock and Mallaney individually.

At trial, the district court refused to give the jury an instruction on individual liability and refused to submit a separate special verdict question to the jury on whether Coppock and Mallaney were individually liable. The jury returned a single verdict against all three Defendants for $508,000. The district court refused to set aside the verdict as to Coppock and Mallaney.

The Iowa Supreme Court first held that individuals may be held liable under the ICRA in *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999). Since that decision,

the Court has given very little guidance on the standard for individual liability under the ICRA. This case presents a substantial question of enunciating or changing legal principles. *See* Iowa R. App. P. 6.1101(2)(f). Guidance from the Iowa Supreme Court is needed for the district courts and counsel handling employment discrimination and retaliation cases. Further, whether the issue of individual liability may be submitted to a jury without a line on the verdict form requiring the jury to consider whether an individual should be held liable is both a case of first impression and presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(c) and (d).

STATEMENT OF THE CASE

Nature of the Case

On January 21, 2015, Rumsey suffered injuries to his back, shoulder, and wrist while working on the plant line of Windsor, which manufactures windows and doors in West Des Moines. After Rumsey's doctors issued 10-pound lifting (and other) restrictions for Rumsey, Windsor provided light-duty assignments for him while he was healing from his injuries. On November 24, 2015, Rumsey filed a workers' compensation claim against Windsor. On December 15, 2015, Rumsey and Mallaney, Windsor's human resources manager, had a dispute over a medical restriction from one of Rumsey's doctors. Coppock, Windsor's production manager, witnessed the heated dispute. Mallaney and Coppock recommended to Windsor's human resources director, Pete Crivaro, that Windsor terminate Rumsey based on his conduct, despite the fact that he was still on workers' compensation light-duty assignment. Crivaro agreed, and Windsor terminated Rumsey on December 15.

Rumsey proceeded with his workers' compensation claim. On February 7, 2017, Rumsey and Windsor's workers' compensation carrier settled the workers' compensation claim for a lump sum total of $100,000, which covered all of his claims, including those for lost wages after his termination. On September 7, 2017, Rumsey proceeded with a separate lawsuit in district court alleging he was

"disabled" within the meaning of the ICRA, and raising claims of disability discrimination and retaliation. Rumsey did not plead a claim of workers' compensation retaliation.

Disposition of the Case in the District Court

On September 7, 2017, Rumsey filed his petition against Defendants. (App. 9-14). On May 30, 2019, Defendants filed a motion for summary judgment. (App. 24-40). On August 6, 2017, the district court entered a ruling granting Defendants' motion as to any claims by Rumsey arising prior to December 10, 2015 because Rumsey failed to preserve these claims by the 300-day timing of the filing of his ICRC complaint; and denying Defendants' motion as to Rumsey's other claims.

From August 26-30, 2019, a jury trial was held. The district court refused to admit as evidence Rumsey's receipt of the $100,000 workers' compensation settlement. The district court also refused to instruct the jury on individual liability or include Coppock and Mallaney as separate Defendants on the verdict form. On September 3, the jury returned a verdict in favor of Rumsey and against all "Defendants." (App. 877-884). The jury awarded: $58,000 in back pay, $300,000 in past emotional distress, and $150,000 in future emotional distress.

On September 18, 2019, Defendants filed a motion for judgment notwithstanding the verdict, new trial, or in the alternative remittitur of damages. (App. 888-923). On December 24, 2019, the district court denied the motion in its

entirety. The district court refused to offset the back pay award with the $100,000 paid to Rumsey for his workers' compensation claim. The district court granted Rumsey's application for attorney's fees and costs in the amount of $148,810.22 and denied Rumsey's request for front pay and other equitable relief. (App. 1004-1019; 990-1003). Windsor, Coppock, and Mallaney appeal.

STATEMENT OF THE FACTS

A. The Parties.

Defendant Appellant/Cross-Appellee Windsor operates a plant that manufactures windows and doors in West Des Moines. Defendant Appellant/Cross-Appellee Clay Coppock was the production manager at Windsor in December 2015. Defendant Appellant/Cross-Appellee Liz Mallaney was and still is Windsor's human resources manager. Plaintiff Appellee/Cross-Appellant Ronald Rumsey has been deaf since childhood.

B. Rumsey's Employment with Windsor

In 2007, Windsor hired Rumsey as an hourly employee in the Shipping Department. (App. 159:9-13; 722-3; 748). At the beginning of 2015, Rumsey held the position of Material Handler II. (App. 280:6-10; 722-723). The job description for Material Handler II includes the "physical requirements" of: "Frequent standing, walking, climbing, kneeling, and bending," "occasional turning and twisting," and "Frequent lifting, carrying, pushing and pulling required

(50 lbs. or more)." (App. 722-723). All production positions in the plant have the same 50-pound requirements. (App. 325:18-24). Rumsey testified that his job sometimes required lifting 125 or 150 pounds. (App. 586:25-587:3).

C. Rumsey's Workplace Injury, Medical Restrictions, and Light-Duty Assignments.

On January 21, 2015, Rumsey injured his back, shoulder, and wrist at work.[1] On January 21, Dr. Daniel Miller restricted Rumsey from lifting more than 10 pounds, pushing or pulling more than 25 pounds, and repetitive bending and twisting. (App. 724-726). Dr. Miller also restricted Rumsey from performing overhead work and instructed him to stand and walk only as tolerated. *Id.* Dr. Miller released Rumsey to return to work only on modified duty. *Id.*

Among Mallaney's job duties is: coordinating the return to work of injured employees, working with employees' medical providers on the various medical restrictions of injured employees, working with Windsor's workers' compensation insurer on its handling of claims and payments of medical and lost wage benefits, and locating light-duty work for injured employees that did not run afoul of their medical restrictions. (App. 270:17-24). Although Rumsey's doctors issued very

[1] Rumsey testified to the circumstances of the injury at trial. (App. 505:21-506:20; 730-732).

limiting medical restrictions, Mallaney was able to assign Rumsey a series of light-duty assignments. (App. 186:9-11; 282:5-7).

In the parlance of workers' compensation claims, Rumsey's back reached maximum medical improvement ("MMI") in July 2015. (App. 729; 757). Rumsey continued to receive medical care for his shoulder. (App. 299:16-18; 301:12-14; 733). Rumsey hired a lawyer and on November 24, 2015, filed a workers' compensation claim against Windsor. (App. 730-732). Windsor tendered the claim to Gallagher Bassett, its workers' compensation insurance carrier. Catherine Sams was the representative at Gallagher Bassett who handled Rumsey's injury. (App. 180:2-4).

D. Windsor Terminates Rumsey While on Workers' Compensation Light-Duty.

In December 2015, Mallaney assigned light-duty work to Rumsey at the "bead taping" station, which is a part of a "fabricators" regular duty position, but does not involve the heavy lifting associated with that position. (App. 186:16-22; 301:25-302:22). On December 10, Rumsey requested a sit-down restriction from one of his doctors, Dr. Todd Harbach, and Dr. Harbach issued the requested restriction. (App. 519:13-520:2; 733-4; 735). When Mallaney reviewed the new restriction, she contacted Sams for clarification as Dr. Harbach was treating Rumsey's shoulder—not his back. (App. 180:2-4; 519:8-11). Sams contacted Dr. Harbach's office, and Dr. Harbach decided to remove the sit-down restriction.

(App. 736). On December 11, 2015, Dr. Harbach issued an amended release to return to work, removing the sit-down restriction, but did not notify Rumsey. (App. 740; 741). On December 14, Mallaney sent a text to Rumsey that he was to return to work the next day and listed his modified restrictions. (App. 742).

On December 15, Rumsey reported to the bead taping station for light duty, but he refused to sign his restriction form because it did not include a "sit down" restriction. (App. 526:3-11; 199:4-8). Coppock was called to the station and testified that Rumsey was belligerent, shouted in Coppock's face, appeared threatening, and used foul language including "fuck" directed at Coppock. (App. 431:3-435:4). Coppock escorted Rumsey to Mallaney's office, where both testified that Rumsey continued to use the word "fuck" directed at them and was enraged about the status of his medical restrictions having been changed. (App. 370:17-371:25). For his part, Rumsey admitted there was a disagreement about his restrictions, but he testified he never used foul language, including the work "fuck."[2] (App. 529:18-19).

Mallaney asked Rumsey to stay so they could discuss the situation with Crivaro. (App. 618:9-23). During the meeting, Rumsey requested an interpreter.

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[2] The jury's ultimate verdict implies that Rumsey's alleged disabilities played a part in the decision to terminate him and the "Defendants" as a group would not have made the same decision to terminate based on Rumsey's misconduct.

(App. 535:24-536:10). Rumsey stated that his back hurt and left the meeting to speak with his lawyer. (App. 531:12-18). Later that morning, Mallaney and Coppock recommended to Crivaro that Windsor terminate Rumsey based on his outburst in the workplace and Crivaro agreed. (App. 456:9-17). Windsor terminated Rumsey that day.

E. Rumsey's Workers' Compensation Claim Settlement

In early 2016, Rumsey reached MMI on his shoulder, and Rumsey's medical restrictions became permanent. (App. 757). Rumsey pursued his workers' compensation claim, seeking in part, temporary total and partial disability benefits for periods of time he could not work in his regular capacity due to his injuries. (App. 750-753). On February 2, 2017, Rumsey and Gallagher Bassett settled his workers' compensation claim for a lump sum payment of $100,000. (App. 745-747). This settlement did not include medical benefits, which were separately paid by the carrier. (App. 749).

F. Motion in Limine: Workers' Compensation Settlement

Prior to trial, Rumsey moved in limine to exclude the workers' compensation settlement from evidence. (App. 41-45). Defendants resisted the motion. (App. 96-112). The district court ruled that the fact the settlement had occurred would come into evidence, but not the total amount of the settlement. (App. 126-138).

G. Jury Trial

A large portion of the trial resembled a workers' compensation proceeding before the Industrial Commissioner. Rumsey described his workplace injury, his multiple trips to doctors, his difficult road to recovery, his considerable pain, and the fact that his back will never be the same. (App. 506:18-25; 512:22-25). Rumsey's counsel pushed the theory at trial that Windsor could have accommodated Rumsey by creating a full time light-duty position for him. Rumsey's counsel questioned Mallaney on whether Windsor could assign Rumsey to the bead taping light-duty position as his permanent position:

> Q. And Woodgrain Millwork moved Ron into a job called a fabricator; correct?
> A. Yes.
> Q. And "fabricator," kind of a general term. It's kind of a title for a whole bunch of different jobs; right?
> A. Yes.
> Q. And Ron's job involved putting little strips of bead or foam along these thin light boards; right?
> A. Right. That was a small part of a job that an employee would do, yes, yes. It's called beading, I think. I think so.
> Q. Beading. And this job that Ron was doing, putting the strips of bead, he performed full-time; right?
> A. With light-duty. Yes
> …
> Q. And his job involved taking those boards and running them through that machine which put the foam, or the bead, on the boards; correct?
> A. Uh-huh. Yes.
> Q. As you testified, that was full-time work; right?
> A. Light-duty work for him, yes.

Q. At this point, as we've already discussed, Ron had the -- had permanent restrictions from Dr. Miller about lifting; right?
A. I don't know if they were permanent – permanent at the time, yes.
Q. Right. Now, Ron was certainly qualified to do the job as fabricator that he was performing; right?
A. That one spot there, yes.
Q. He certainly had the skill, experience, and the know-how to do the beading position; right?
A. Yes.
Q. In fact, we talked earlier, he did a lot of jobs at Woodgrain, so he was a well-rounded employee; right?
A. Correct.
Q. And had he not been fired, he could have continued on in that position; right?
A. Like I said, that was a small part of another job.
Q. Ma'am, my -- I appreciate --
A. Yes.

(App. 186:16-187:5; 188:16-189:16).

For his own part, Rumsey admitted he never requested any particular position as an accommodation as he was continuing to heal from his injuries:

Q. Mr. Rumsey, did you ever actually request to work the bead taper line on a full-time basis?
A. Did I ask to work on the beader full time?
Q. Yes.
A. Whatever job was available. And beader was where they put me.
Q. You actually made a request to somebody at the company that because of your injuries, just give me that job for the rest of the time?
A. I'm -- I -- I can't request until my injury's done with. My injury wasn't done with. I was still seeing the doctor. I might be able to do something else other than beading, so -- but beading is one of the permanent, full-time jobs

there, so I could request that, but I didn't request it at the time.
Q. Right. Because at the time you were still healing from your workplace injuries and on light duty correct?
A. Yes.
Q. So you never --
A. Which I'm still healing.
Q. You never requested at Windsor for them to create a full-time position that would allow you to sit?
A. Did I ask Windsor to make a new full-time job for me so I can sit down? No.

(App. 647:12-648:11).

H. Evidence of Emotional Distress

Over Defendants' objection, Rumsey was permitted to testify about childhood trauma he experienced because he is deaf:

Q. When you went to public school, did kids pick on you because of your deafness?
A. Oh, yeah. They picked on all of us.
Q. What do you remember them doing? What do you remember them doing?
MR. ARMENTROUT: Objection. Relevance.
THE COURT: Counsel, tell me why it's relevant.
MR. ALBRECHT: Emotional damages, Your Honor. Defense counsel questioned their witnesses at length about their personal history.
THE COURT: I'll give you some leeway. You may continue.
Q. (BY MR. ALBRECHT:) What do you remember the kids at school doing, Ron?
A. Yes. Well, in the public school, they would, you know, ding dong, do whatever, I mean, just reading their lips they would, you know, ding dong, adding deaf into it and making fun of us, yelling and then looking away and giggling, laughing. And they would - and stuff, and they wake up in the the back row. And we'd turn

around, and everybody would - when I was in the classroom, they would throw stuff at us because we had to sit in the front row, so they would throw stuff at us from be laughing and -- but you didn't know who did it. So they just picked on us.

Q. Did that have an impact on you in your life?

A. Oh, yeah. It was hard for all of us.

(App. 481:4-482:4).

During Rumsey's direct examination, he testified as to financial stress prior to his termination:

Q. How did you feel now that you had finally gotten this restriction?

A. I felt relief.

Q. Why did you feel relief?

A. I'd been missing a lot of work. My income wasn't all that great. And with my wife's lung disease, she missed work. And we had a house payment and bills and stuff, and Christmas was coming up. And so we just had a lot of bills.

(App. 520:20-521:3). Based on this testimony, Defendants' counsel argued Rumsey opened the door and requested that the court permit introduction of the $100,000 settlement. The district court refused to permit this evidence. (App. 543:12-546:22).

With regard to evidence of emotional distress caused by the December 15, 2015 termination, Rumsey testified:

Q. How did it impact you when they fired you?

A. It -- I was surprised when I got the text from my lawyer that I was terminated instead of it being a text to come back, we have an interpreter. Because I thought that we

were going to get the situation taken care of and I would be back to work, but I was terminated. It was two weeks before Christmas. I had no money. I didn't know what I was going to do for the grandkids for Christmas and -- it was just a big impact.

Q. Ron, did you go to any specific mental health provider about how you felt?

A. No.

Q. Why not?

A. I'm not -- I'm not -- I don't like to share – I don't -- I feel -- I've picked myself up before when I've fallen, so, I mean, I -- I don't -- I feel that I could --I picked myself up again. It was just going to take time. But I'm kind of glad that I picked it up before my marriage fell apart.

(App. 565:1-566:5). Rumsey's spouse, Gabby, testified:

Q. How did Ron react when he found out that Woodgrain Millwork had fired him?

A. He was devastated. He withdrew. He would hide out in the garage. Things got tense between him and I. He was angry at the situation, but, you know, when you have a mate, sometimes you tend to, you know, be harder on them or say things to them because you're under a lot of stress. But it was tense. It put a big wedge in between us.

Q. In 2015, what was Christmas like?

A. That he got -- he got fired, like, 10, 12 days, I can't remember exactly how many days, before Christmas. And we have all these -- at that time only the four grandsons, and I had to put stuff on layaway just to get them Christmas presents that year. And it got down to the wire where I didn't think I was going to afford it, so I went in to try to pick out of that bag what I could afford, and I came to find out that a layaway angel paid for the rest. So I just hopped and skipped out of there. You couldn't -- you couldn't contain my smile. I was thrilled.

Q. How did Ron change after Woodgrain Millwork fired him?

> A. He lost his direction for a little bit. He – he was just reduced to doing jobs that maybe we don't all respect as much, teenager jobs. And it was -- it's hard to see. It was hard to watch. He went from such a proud man and he got deflated.

(App. 656:2-657:7).

I. Jury Instruction Conference and Objections

Coppock and Mallaney proposed an instruction on individual liability, which read:

> **FINAL INSTRUCTION NO. 23.**
>
> **Individual Liability**
>
> Plaintiff has also brought claims against Defendants Liz Mallaney and Clay Coppock seeking to hold them personally liable for each of the claims brought against Defendant Windsor under the Iowa Civil Rights Act. In order to establish individual liability, Plaintiff must show that Mallaney and Coppock had decision-making authority to terminate Plaintiff. Plaintiff must also prove the same elements of each of his claims against Windsor against Mallaney and Coppock. (These elements are defined above in Instruction Nos 13-24).
>
> **Authority**
>
> *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999)
> *Whitney v. Franklin Gen. Hosp.*, 2015 WL 1809586 (N.D. Iowa Apr. 21, 2015)

(App. 82). Coppock and Mallaney also proposed a verdict form that included them as individual defendants:

IV. Individual Liability

A. Clay Coppock

15. Did Clay Coppock have the authority to terminate Plaintiff?

_____Yes _____No

16. Would Mr. Coppock have made the same decision to terminate Plaintiff regardless of Plaintiff's shoulder, back, and hearing impairments and Plaintiff's requests for sit down work and an interpreter on December 15, 2015?

_____Yes _____No

B. Liz Mallaney

17. Did Liz Mallaney have the authority to terminate Plaintiff?

_____Yes _____No

18. Would Mrs. Mallaney have made the same decision to terminate Plaintiff regardless of Plaintiff's shoulder, back, and hearing impairments and Plaintiff's requests for sit down work and an interpreter on December 15, 2015?

_____Yes _____No

(App. 95).

In the district court's final instructions, the district court did not include an instruction on individual liability. Further, the district court did not include the individual defendants on the verdict form, instead grouping them all together:

> Question 1: Did Plaintiff Ronald Rumsey prove his claim of Disability Discrimination against Defendants as set forth in Instruction 17?
> (Please mark an "X" in the appropriate spaces.)
> YES _____ No _____
>
> Question 2: Did Plaintiff Ronald Rumsey prove his claim of Failure to Accommodate against Defendants as set forth in Instruction 19?
> (Please mark an "X" in the appropriate spaces.)
> YES _____ No _____

> Question 3: Did Plaintiff Ronald Rumsey prove his claim of Disability Retalition against Defendants as set forth in Instruction 21?
> (Please mark an "X" in the appropriate spaces.)
> YES _____ No _____

(App. 877-878).

Defendants objected:

> We believe that there should be an instruction regarding the individual defendants, and we also believe that there should be a verdict question regarding individual defendants, and neither is included in these instructions, and so we object to the fact that there is no instruction regarding individual defendants and there is no verdict form question regarding the individual defendants. And just to be abundantly clear, the defendants include any of the arguments and objections made on the redline document provided to the Court this morning to be the final that were not expressly stated on the record to the Court today.

(App. 702:11-703:14). The district court did not separately instruct the jury as to Coppock and Mallaney and did not provide a line on the verdict form for either.

J. Rumsey's Counsel's Closing Argument and Jury Question

In his closing argument, Rumsey's counsel focused on Mallaney's questioning of Dr. Harbach's December 10 medical restrictions. Rumsey's counsel painted the story of a conspiracy between Mallaney and Windsor's workers' compensation carrier to deprive him of medical care: "They got a medical doctor to rescind a restriction that he knew was in the best interest of his patient,

and they did it behind the patient's back." (App. 705:23-706:8). Rumsey's counsel accused Mallaney of "sneak[ing] around to get a restriction removed." (App. 708:17-19). Rumsey's counsel emphasized:

> I mean, think of what they did in direct response to Ron getting a medical restriction. Direct response. Minutes later. They want you to think it's common to call doctors' offices but they admitted this is the first time they did it for Ron in 11 months. . . .
> . . .
> That's not clarification. That's interference with Ron's medical care.

(App. 710:9-14; 712:8-9).

On September 3, during deliberations, the jury sent a question to the district court: "Are [we] supposed to figure out Back pay with or without injury?" (App. 874). The district court referred the jury back to the instructions. (App. 875). Later that day, the jury returned with a verdict in favor of Rumsey. (App. 877-882).

ARGUMENT

I. THE DISTRICT COURT COMMITTED LEGAL ERROR IN REFUSING TO SUBMIT A JURY INSTRUCTION ON INDIVIDUAL LIABILITY AND REFUSING TO INCLUDE QUESTIONS ON THE VERDICT FORM REQUIRING THE JURY TO CONSIDER WHETHER TO FIND COPPOCK AND MALLANEY INDIVIDUALLY LIABLE, SEPARATE FROM WINDSOR.

Error preservation. Defendants objected to the district court's failure to give the jury Defendants' proposed Instruction 23 on individual liability, and

objected to the district court's failure to include questions in the verdict form relating to the separate findings required for Coppock and Mallaney. (App. 822; 702:11-703:20). The district court overruled the objections. Iowa R. Civ. P. 1.924; *Shams v. Hassan*, 905 N.W.2d 158, 166-69 (Iowa 2017).

Standard of review. A district court's refusal to give a requested jury instruction is reviewed for errors at law. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016). "Under Iowa law, a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions." *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). Parties to lawsuits are entitled to have their legal theories and defenses submitted to a jury "if they are supported by the pleadings and substantial evidence in the record." *Id.* (quotation omitted). Reversal is warranted where failure to give a jury instruction results in prejudice. *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009). Prejudice results where the district court's failure to give requested instructions "materially misstates the law." *Id.*

A. What is the Standard for Individual Liability Under the Iowa Civil Rights Act?

Unfortunately, for a person sued in his or her individual capacity under the ICRA, there is no clear answer to this question. There is no Iowa appellate court

decision on the standard or test. There is no model jury instruction or special verdict form.

The Iowa Supreme Court first recognized in 1999 that a supervisory employee can be subject to individual liability under the ICRA. *Vivian*, 601 N.W.2d at 878. The Court analyzed the word "person" in the Act and the definition of "employer." The Court did not enunciate under what circumstances a supervisor would be subject to individual liability in *Vivian*. Nor has the Court established the standard in subsequent decisions.[3]

Several federal courts applying Iowa law to ICRA claims tried in federal courts have attempted to establish a standard for individual liability. One point of consensus among these courts is that an individual must possess the decision-making authority over the employment actions affecting the employee in order for such liability to be found. *See Erickson-Puttmann v. Gill*, 212 F. Supp. 2d 960, 976 (N.D. Iowa 2002) ("The court, therefore, concludes that individual liability under the ICRA will not lie against a non-supervisory official who exercises no decision making authority over the employment actions [a]ffecting a plaintiff."); *Johnson v. BE & K Constr. Co., LLC*, 593 F. Supp. 2d 1044, 1049–50 (S.D. Iowa

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[3] In *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997), the Court concluded that although a doctor not employed by the subject employer could be held individually liable under the ICRA, the doctor's recommendation that a pregnant job applicant not be hired is not a discriminatory action under the ICRA.

2009) ("Thus, when an actual person is acting in such a way that he or she is 'in a position to control the company's hiring decisions,' that person may be subject to individual liability as essentially an equivalent to an 'employer.'"); *Nelson v. Wittern Group, Inc.*, 140 F. Supp. 2d 1001, 1010 (S.D. Iowa 2001) ("Before an individual may be found liable under Iowa civil rights law, he or she must be found to have 'control [of] the company's hiring decisions.'" (quoting *Vivian,* 601 N.W.2d at 876)).

In *Erickson-Puttmann*, the plaintiff's claim against the individual defendant under the ICRA was dismissed on summary judgment because the court found the defendant did not have decision-making authority over the plaintiff. 212 F. Supp. 2d at 976. The plaintiff, a social services coordinator for Woodbury County, reported directly to the Woodbury County Board of Supervisors. *Id*. at 964. Although the individual defendant was in a supervisory position as the Woodbury County Auditor/Recorder, he "had no authority over [the plaintiff] in connection with her employment." *Id* The Court found that absent some significant control over employment decisions affecting the plaintiff, liability under the ICRA would not lie. *Id*. at 975–76. Here, if the Supreme Court adopts this standard, the judgments against Coppock and Mallaney should be reversed as a matter of law as there is nothing in the record that shows either had the authority to terminate

Rumsey. *See Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010).

At the district court, during post-trial motions, Rumsey took the position that the legal standard for individual liability is that Mallaney and Coppock were merely "'involved in the disciplinary actions' taken against the [P]laintiff." (App. 946). Ignoring the issue that no instruction on individual liability was given, Rumsey argued that there was substantial evidence at trial that both Mallaney and Coppock were "involved" in the recommendation and decision to fire Rumsey. *Id*.

B. Coppock and Mallaney Were Unfairly Prejudiced Because There Was No Instruction on Individual Liability and No Special Questions Included on the Verdict Form.

The problem is that no instruction with regard to individual liability was given to the jury at all. Thus, whether Coppock and Mallaney or Rumsey was correct on the law below, the district court was still required to instruct the jury on the law on individual liability before the jury could apply the law to the facts in the case and find individual liability. Clearly, both Mallaney and Coppock were unfairly prejudiced because no instruction was given with regard to the law on individual liability. *See Lovic v. Wil-Rich*, 588 N.W.2d 688, 695 (Iowa 1999) ("A trial court has a duty to give the jury a clear understanding of what they need to decide.").

Further, both Coppock and Mallaney were entitled to a separate special interrogatory on the verdict form as to whether their individual decision to recommend a termination was based on discriminatory motive and, importantly, whether each separately would have made the same decision absent the protected criterion. The jury had no opportunity to apply the required law to each individual defendant because no such line for each was included on the verdict form. Coppock and Mallaney were lumped together with the Defendant employer, Windsor, with a single line that simply said "Defendants."

The jury findings necessary to hold an individual liable under the ICRA are analogous to the findings necessary to hold government officers liable in their individual capacities in §1983 actions. In order for an officer to be liable in his or her individual capacity, the plaintiff must prove the officer personally participated in the deprivation of the plaintiff's constitutional rights. *See Williams v. Soto*, No. CV 15-05691-AB (KK), 2015 WL5233995, *3 (C.D. Cal. Sept. 8, 2015). A finding of government liability does not de facto result in individual officer liability. Federal courts have found jury instructions invalid when they allow juries to find individual liability without finding the "individual participat[ed] in the unlawful conduct." *See Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996); *see also Wilson v. Cross*, 845 F.2d 163, 165 (8th Cir. 1988) (affirming a jury

instruction that limited a finding of individual capacity liability to individuals who had actually participated in the unconstitutional action).

In *Fox v. District of Columbia*, the plaintiff alleged unconstitutional termination under §1983. 990 F. Supp. 13, 15 (D.C. 1997). The plaintiff sued Sylvia Kinard in her official capacity and also claimed to sue her in her individual capacity. *Id*. at 22. However, rather than supplying a jury form that listed out each individual defendant, the parties used a form that only required the jury to determine the liability of the "Defendants" collectively. *Id*. The jury returned a verdict finding the Defendants liable. *Id*. at 15–16. On appeal, the court found that Kinard could not be held liable in her individual capacity by the verdict, as it failed to require a separate finding of liability for Kinard. *Id*. at 23.

The verdict form used in *Fox* is much like the verdict form used in this case. Although the Defendants requested special interrogatories which would separate liability of Coppock and Mallaney from the liability of Windsor, the Court denied that request. As a result, liability of all of the Defendants was improperly combined together.

It is entirely possible, if properly instructed, that the jury may have found one or both of the individual Defendants not liable because one or both had not acted with discriminatory intent, or one or both may have made the same decision absent discriminatory intent. For example, the evidence presented at trial showed

that Coppock was at the wrong place at the wrong time. Coppock had nothing to do with Rumsey's request for a sit-down restriction from Dr. Harbach or the insurance carrier's contact with his doctor to clarify this restriction. Coppock was simply called over to the production floor on the morning of December 15 to deal with Rumsey, who was refusing to sign his restriction sheet that morning. (App. 427:2-8). Coppock observed disruptive behavior by Rumsey and escorted Rumsey to Mallaney's office in HR. (App. 431:3-14). There is no evidence in the record that Coppock was even aware of the situation with Rumsey's sit-down restriction on that morning. If the jury had been given the proposed instruction and special interrogatory on the same decision defense, it is entirely likely that the jury would have found that Coppock had not engaged in illegal discrimination.

Mallaney also had the right to have a separate instruction and special interrogatory with regard to whether she made any recommendation to terminate based on discriminatory intent or whether she would have made the same decision absent discriminatory intent. Because Coppock and Mallaney were unfairly prejudiced by not being given any liability instruction or special interrogatories, both are entitled to a new trial.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY NOT DIRECTING A VERDICT IN FAVOR OF DEFENDANTS ON RUMSEY'S DISABILITY, ACCOMMODATION, AND RETALIATION CLAIMS.

Error Preservation. Defendants preserved this error by raising the issue in their motion for directed verdict after the close of Rumsey's case and at the close of evidence at trial, as well as in their timely motion for judgment notwithstanding the verdict. (App. 667:14-682:19; 700:21-701:2; 891-899, 914).

Standard of Review. This Court reviews a lower court's ruling on a motion for directed verdict and a motion for judgment notwithstanding the verdict for correction of errors at law. *See Royal Indem. Co.*, 786 N.W.2d at 846 (citing Iowa R. App. P. 6.907; *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998)); *see also Pavone v. Kirke*, 801 N.W.2d 477, 486-87 (Iowa 2011). Legal questions are for the court. *See Dinsdale Constr., LLC v. Lumber Specialties, Ltd.*, 888 N.W.2d 644, 649 (Iowa 2016).

A. This is not a Workers' Compensation Retaliation Case.

At trial, Rumsey was able to garner significant sympathy for his back injury, which was painful and has lasted through the time of trial and will continue to give him discomfort in the future. Further, Rumsey presented the typical evidence offered in a workers' compensation retaliation case: issues involving medical restrictions and termination while pursuing a workers' compensation claim. *See Springer v. Weeks and Leo Co, Inc.*, 429 N.W.2d 558 (Iowa 1988) (Iowa Supreme Court first recognized exercising workers' compensation rights is a public policy and employee has cause of action for retaliation). However, Rumsey did not plead

or pursue a workers' compensation retaliation case. Having pleaded only ICRA claims, Rumsey was required to prove he was disabled within the meaning of the ICRA or that he was retaliated against for pursuing ICRA rights. An apt observation was made by Justice (then Iowa Court of Appeals Judge) McDonald in considering a similar jury verdict for disability discrimination:

> The Defendants incompetently managed Vetter's work restrictions and callously terminated Vetter's employment. The jury was angry. It punished the Defendants. I am tempted to concur in the majority opinion on the grounds the Defendants received their just desserts, karmic justice was achieved. Except karmic justice is not a legal reason. Legal reasons compel me to respectfully dissent.

Vetter v. State of Iowa, 901 N.W.2d 839, 2017 WL 2181191, at *16 (Iowa Ct. App. 2017). Justice McDonald went on to explain that the Plaintiff in Vetter was not actually disabled within the meaning of the ICRA. *Id*. Similarly, here, Rumsey was not "disabled" within the meaning of the ICRA.

B. Rumsey is Not "Disabled" Within the Meaning of the ICRA.

Under the ICRA, to establish a prima facie disability discrimination claim, a plaintiff must show: (1) the plaintiff has a disability; (2) the plaintiff is qualified to perform the essential functions of the position with or without accommodation; and (3) the circumstances of the termination raise an inference of illegal discrimination. *Goodpaster v. Schwan's Home Serv. Inc*., 849 N.W.2d 1, 6 (Iowa 2014). Defendants have never challenged that Rumsey's back, shoulder, and wrist injuries

are physical conditions constituting a substantial disability under the first element.[4] Indeed, Rumsey took advantage of this by his repeated emphasis at trial of his constant back pain as the result of his injuries.

What Defendants have challenged beginning at summary judgment in this case is whether Rumsey was "qualified" to perform the essential functions of a Material Handler II (or any other regular plant position) with or without accommodation. Considering Rumsey's 10-pound lifting restriction (as well as restrictions on bending and twisting), it is undisputed that Rumsey could not perform the essential functions of this position without accommodation. (*See* App. 722-723). Thus, as a legal requirement to bring his disability claim, Rumsey was required to show a reasonable accommodation that would permit him to perform the essential functions of his position. *Goodpaster*, 849 N.W.2d at 14. Throughout this case, Rumsey has failed to establish such an accommodation. *Id*.

The Iowa Supreme Court has held that it is not bound by federal court interpretations of similar federal law, such as the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. *Goodpaster*, 849 N.W.2d at 9. However, the Court has "looked to the corresponding federal statutes to help establish the framework to

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[4] The ICRA defines a "disability" as "the physical or mental condition of a person which constitutes a substantial disability." Iowa Code § 216.2(5); *Goodpaster*, 849 N.W.2d at 6.

analyze claims and otherwise apply our statute." *Id*. Under the ADA, federal courts have held that an employee's injury may be so severe and result in such limiting lifting restrictions that there is no reasonable accommodation to permit the employee to perform the essential functions of a position. *See Gardea v. JBS USA, LLC*, 915 F.3d 537, 542-43 (8th Cir. 2019) (holding that where lifting up to 100 pounds was an essential function of the employee's job, and the employee was unable to lift up to 100 pounds, that employee was not a "qualified employee" under the ADA as the proposed accommodations were not reasonable); *see also Magnusson v. Casey's Marketing Co.*, 787 F. Supp. 2d 929, 949-50 (N.D. Iowa 2011); *Van Brunt v. Care Initiatives*, 4:04-cv-90356, 2005 WL 8157934, **4-5 (S.D. Iowa Sept. 20, 2005); *Arrendondo v. Howard Miller Clock Co.*, No. 1:08-CV-103, 2009 WL 2871171, **5-8 (W.D. Mich. Sept. 2, 2009) (concluding that the plaintiff employee was unable to perform the essential functions of his job because of his medical restrictions, with or without reasonable accommodations, so the plaintiff was not "a qualified individual" under the ADA at the time he was terminated; summary judgment was therefore appropriate on the issue of whether the employer failed to provide a reasonable accommodation); *Reddick v. Yale Univ.*, No. 3:13cv1140 (WWE), 2015 WL 7428525, *7 (D. Conn. Nov. 20, 2015) (recognizing that a lifting restriction of 5-10 pounds would prevent an employee from performing the essential functions of their job where the job required the

employee to lift or move objects weighing up to 50 pounds, and further holding that it would not be reasonable to expect an employer to hire an additional employee or reassign essential functions of the plaintiff's job to other employees); *Stockton v. Shaw Indus. Grp. Inc.*, No. 3:14-1904-TLW, 2015 WL 427650, *4 (D.S.C. Feb. 2, 2015).

The accommodation Rumsey raised at trial is that Windsor permit Rumsey to do the light-duty position of bead taper permanently—in other words—the employer should create this new regular position for Rumsey. However, an employer is not required to provide light-duty work to an injured employee, and providing light-duty work should not be considered an "accommodation" within the meaning of disability laws. *See Barket v. Nextira One*, 72 Fed. Appx. 508, 511-12 (8th Cir. 2003); *Luckiewicz v. Potter*, 670 F. Supp. 2d 400, 408-09 (E.D. Penn. 2009) (noting the fact that light-duty assignments were provided to the plaintiff employee for several years does not make the plaintiff employee a "qualified individual" for purposes of the Rehabilitation Act); *Strawbridge v. Potter*, Civil Action No. 08-2937, 2009 WL 2208577 (E.D. Penn. July 22, 2009) (same); *see also Shiring v. Runyon*, 90 F.3d 827, 830-31 (3d Cir. 1996). The provision of light-duty work is not a required "reasonable accommodation" because it does not allow the plaintiff employee to perform the essential functions of the job for which they were hired. *Luckiewicz*, 670 F. Supp. 2d at 409; *see also*

Staub v. Boeing Co., 919 F. Supp. 366, 370 (W.D. Wash. 1996) ("The ADA does not impose a duty upon Boeing to create a new, permanent position for Staub in this otherwise temporary-placement position.").

It was Rumsey's burden at trial to establish that he was qualified to work his full-time position. He did not meet that burden, therefore the disability discrimination claim should not have reached the jury. Rumsey was not qualified to perform his previous position (or any production position at Windsor) with or without reasonable accommodation, and thus, the district court should have granted Defendants' motion for directed verdict. *See Gardea*, 915 F.3d at 542-43; *Magnusson*, 787 F. Supp. 2d at 949-50; *Van Brunt*, 2005 WL 8157934, **4-5; *Arrendondo*, 2009 WL 2871171, **5-8; *Reddick*, 2015 WL 7428525, *7; *Stockton*, 2015 WL 427650, *4; *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106 (10th Cir. 1999).

Rumsey's position that he was also disabled because he is deaf does not save his verdict. Rumsey did not present sufficient evidence at trial that Windsor terminated him because he was deaf. Rumsey produced no evidence that on December 15, 2015, either Coppock or Mallaney based their recommendation to terminate him on the fact that he is deaf. Even if the Court were to conclude Rumsey submitted sufficient evidence that his deafness was the cause of the termination, the district court lumped Rumsey's back/shoulder/wrist injuries with his hearing impairment into a single liability question on the verdict form:

"Question 1: Did Plaintiff Ronald Rumsey prove his claim of Disability Discrimination against Defendants as set forth in Instruction No. 17?" (App. 877). There is no way at this point to determine whether the jury found Defendants discriminated against Rumsey because of his back/shoulder/wrist injuries or his hearing impairment.[5] Reversal of this claim is warranted.

C. Rumsey's Failure to Accommodate Claim Should Not Have Been Submitted to the Jury.

1. Rumsey's Request for a Sit-Down Restriction.

Throughout 2015, Rumsey was given severe lifting, pushing, and pulling restrictions, and Windsor returned him to work only on light-duty assignment. (App. 724-726; 186:11; 282:5-7). Indeed, Rumsey was working a light-duty assignment at the bead taping station on December 15, 2015 when he was terminated. (App. 301:25-302:12; 607:16-25). Rumsey's shoulder had not yet reached MMI, and there is no evidence the parties initiated an interactive process of considering a reasonable accommodation based on permanent lifting restrictions. Windsor should not be punished for providing light-duty assignments, nor should the light-duty assignments substitute for Rumsey's requirement to show a reasonable accommodation was available.

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[5] Defendants proposed a verdict form that required the jury to make separate findings as to Rumsey's back/shoulder/wrist impairments and his hearing impairment. (App. 807-844).

Rumsey argued that his request for a sit-down restriction on December 10, 2015 was a reasonable accommodation for his *disability*. (App. 704:23-705:2; 705:23-706:1). This puts the cart before the horse. Clearly, Rumsey was requesting this restriction to ease his back pain while working light-duty assignments. Even assuming the parties were actually discussing a reasonable accommodation to allow him to come back to work full-time, it is undisputed that Dr. Harbach made the medical decision to remove the sit-down restriction on December 11, 2015. (App. 740). Further, at no time has Rumsey explained how a recommendation to sit down at work alleviates the requirement for all production positions of the 50-pound lifting restriction. A sit-down restriction is actually contrary to the requirement to be able to lift 50 pounds. The reasonable accommodation claim based on the sit-down restriction should not have been submitted to the jury.

2. Rumsey's Alleged Request for an Interpreter for a Disciplinary Meeting After Engaging in Misconduct Was Not a Reasonable Accommodation.

Rumsey conceded that after the altercation on the morning of December 15 with Coppock and Mallaney, he was asked to meet with Crivaro. (App. 618:9-23). It was only for purposes of this potential disciplinary meeting with Crivaro that Rumsey requested to have an interpreter present. Rumsey did not request an interpreter to perform essential functions of his light-duty assignment or his

previous full-time position. Rumsey even testified that he requested an interpreter for this meeting because it is difficult for him to understand when multiple people are speaking because he can only read one person's lips at a time. (App. 574:16-19; 497:6-11; 498:22-499:1).

It is undisputed that the disciplinary meeting with Crivaro never occurred. (App. 618:19-619:9; 318:5-7; 442:9-10; 538:17-20). Windsor decided to terminate Rumsey's employment prior to the meeting due to his behavioral misconduct. (App. 445:6-11; 446:2-8). Thus, there was never a need for an interpreter. The request for the interpreter was therefore not reasonable, as a matter of law. *See Novella v. Wal-Mart Stores, Inc.*, 226 Fed. Appx. 901, 903 (11th Cir. 2007) ("communication at a termination meeting, the purpose of which is to give the employee notice of his termination, is not an 'essential function' of an employee's job").

D. Rumsey's Retaliation Claim Should Not Have Been Submitted to the Jury.

At trial, Rumsey presented no evidence that the Defendants terminated him in retaliation for engaging in protected activity on December 15, 2015. Rumsey came nowhere close to meeting his burden of showing causation under Iowa law. *See McCrea v. City of Dubuque*, No. 16-0183, 2017 WL 936096 (Iowa Ct. App. March 8, 2019) (holding "the 'causal connection' requirement is a high standard.").

Rumsey points to two alleged protected activities to support his retaliation claim: (1) requesting an interpreter on December 15, 2015, and (2) requesting sit-down work on December 10, 2015. (App. 676:17-679:1; 857; 924-966). As a threshold matter, requesting an unreasonable accommodation is not protected activity. *See Howell v. Holland*, No. 4:13-CV-00295-RBH, 2015 WL 751590, at *7 (D.S.C. Feb. 23, 2015) (citing *Williams v. Eastside Lumberyard and Supply Co., Inc.*, 190 F. Supp. 2d 1104, 1122 n. 15 (S.D. Ill. 2001)). An employer is not required under the law to eliminate an essential function of the job—i.e., such a request constitutes an *un*reasonable accommodation that is not required by law. *See Rehrs v. Iams Co.*, 486 F.3d 353, 359 (8th Cir. 2007) (applying ADA); *Kallail v. Alliant Energy Corp. Servs., Inc.*, No. C-10-0063, 2011 WL 1833347, *6 (N.D. Iowa 2011) (applying federal analysis to ADA and ICRA claim).

Rumsey's request for an interpreter on December 15, 2015, for the later meeting with Crivaro was not a request for a reasonable accommodation, so it did not constitute protected activity. An interpreter at a later-scheduled disciplinary meeting would not enable Rumsey to perform the essential functions of his job at Windsor. *See Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("an interpreter was not required for Kiel to perform the essential functions of his position"). Rumsey's request for an interpreter on December 15, 2015, therefore could not support a finding that Defendants retaliated against Rumsey for engaging

in protected activity, as a matter of law. Further, Rumsey failed to present any evidence at trial that either Coppock or Mallaney considered Rumsey's request for an interpreter on December 15, 2015, when they recommended to Crivaro that Rumsey should be terminated.

Rumsey's request for sit-down work also cannot support his retaliation claim because it also does not constitute protected activity. Rumsey's full-time job at Windsor included a number of physical requirements, including lifting, pulling, and pushing requirements. (App. 280:4-10; 280:21-281:1; 424:4-11; 722-723). It also was not a job that could be performed sitting down. (App. 895:24-599:9; 693:15-18; 722-723). In fact, the evidence at trial also established that the light-duty assignment that Rumsey was working at the time of his termination could not be performed sitting down due to the actual duties of that job as well as safety considerations on the production floor. (App. 688:25-689:2; 689:22-690:16; 691:3-6). Thus, Rumsey's request for sit-down work, which would have eliminated an essential function of Rumsey's full-time job at Windsor, was a request for an unreasonable accommodation as a matter of law. This request therefore could not constitute protected activity to support Rumsey's retaliation claim. Thus, Defendants' directed verdict motion should have been granted on this claim.

III. THE $450,000 EMOTIONAL DISTRESS AWARD IS EXCESSIVE.

Error Preservation. Defendants preserved error regarding excessive damages in a timely motion for new trial. (App. 888-923).

Standard of Review. The appellate court reviews the denial of a motion for new trial based on excessive damages for an abuse of discretion. Iowa R. Civ. P. 1.1004; *Fry v. Blauvelt,* 818 N.W.2d 123, 132 (Iowa 2012); *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). A new trial should be granted when a "verdict fails to administer substantial justice," and a party has not received a fair trial. *White v. Walstrom*, 118 N.W.2d 578, 582 (Iowa 1962). In evaluating whether the district court abused its discretion in failing to grant a new trial, the appellate court considers the individual or cumulative effects of errors that leave "the integrity of jury's verdict in doubt." *Rosenberger Enters. v. Ins. Servs. Corp.*, 541 N.W.2d 904, 909 (Iowa Ct. App. 1995). A new trial is required "if it appears that prejudice resulted or a different result would have been probable." *Id.* at 907.

A. The Emotional Distress Award is Excessive and Unsupported by the Evidence.

The Court may grant a new trial on damages if the verdict is flagrantly excessive; is so out of reason as to shock the conscience or sense of justice; raises a presumption it is the result of passion, prejudice, or other ulterior motive; or lacks evidentiary support. *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). A verdict is flagrantly excessive when "it goes beyond the limits of fair compensation . . . and fails to do substantial justice between the parties." *Id.*; *see also Sallis v.*

Lamansky, 420 N.W.2d 795, 800 (Iowa 1988); *Ferris v. Riley*, 101 N.W.2d 176, 184 (Iowa 1960) (excessive verdict is one "so large that it appears to be beyond the limits of fair compensation for the injuries shown"); *Tullis v. Merrill*, 584 N.W.2d 236, 241 (Iowa 1998).

Emotional-distress awards are "not without boundaries." *Jasper v. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009). Under the ICRA, a verdict is excessive "when uncontroverted facts show that it bears no reasonable relationship to the loss suffered." *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Commission*, 895 N.W.2d 446, 472 (Iowa 2017).

In *Jasper*, this Court concluded the jury's $100,000 emotional-distress award in an employment discrimination case was excessive. 764 N.W.2d at 772-73. Recognizing that "awards 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, such as anger, confusion, loss of esteem, financial worry, and the effect on marital relationships," this Court ordered a remittitur or new trial. *Jasper*, 764 N.W.2d at 772-73. The *Jasper* Court provided a helpful analysis of emotional distress awards in a similar context:

> In *Shepard*, the court reviewed a host of cases addressing claims of excessiveness of emotional-distress damages in employment cases. While emotional-distress damages tend to range higher in employment cases involving sexual harassment and discrimination and other cases involving egregious, sometimes prolonged, conduct, the awards 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, such as "anger, confusion, loss of esteem, financial worry, and the effect on marital relationships." *Shepard*, 303 F.Supp.2d at 1022-23. In *Kucia v. Southeast Arkansas Community Action Corp*., 284 F.3d 944, 948 (8th Cir. 2002), the court said an emotional-distress award in a wrongful-termination action of $50,000 presented a "close" question of excessiveness. The plaintiff testified in the case that the termination resulted in low self-esteem, general uneasiness, loss of sleep, and marital problems. *Kucia*, 284 F.3d at 947. Some of these problems still persisted at the time of trial. *Id*. In *Frazier v. Iowa Beef Processors, Inc*., 200 F.3d 1190, 1194 (8th Cir. 2000), the court said an emotional-distress award in a wrongful-termination case of $40,000 appeared "generous," but not "excessive." The plaintiff in the case testified he lost his dignity and self-esteem and felt lost and empty. *Frazier*, 200 F.3d at 1193. His wife testified he was a "broken man." *Id*. In *Foster v. Time Warner Entertainment Co., L.P*., 250 F.3d 1189, 1196 (8th Cir. 2000), the court held an award of $75,000 was not excessive. In that case, the termination left the plaintiff devastated, withdrawn, and plagued by back pain, muscle stress, and stomach problems. *Foster*, 250 F.3d at 1196. She had not yet fully recovered by the time of trial and feared she would be unable to find another job. *Id*. Even more egregious circumstances, however, can push the range of emotional-distress damages higher. In *Mathieu v. Gopher News Co.*, 273 F.3d 769, 783 (8th Cir. 2001), the court upheld an emotional-distress award of $165,000. In that case, the plaintiff had worked for the company for thirty-four years, the last sixteen years as the manager, and was close to retirement. *Mathieu*, 273 F.3d at 773. The termination substantially altered his financial future. *Id*.

This sampling of cases provides a helpful context within which to evaluate the excessiveness of an award of emotional-distress damages. These cases reveal that the

> 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. Even the length of the employment, compatibility of the worker in the employment, age and employment skills of the worker, and the span of time necessary to become reemployed impact the amount of emotional-distress damages.
>
> While a broad range of emotional-distress damages in all employment-termination cases may support awards of $200,000 and beyond, termination cases involving a single incident of wrongful-termination conduct producing the more common consequences of any involuntary loss of employment support a much lower range of damages.

Id. at 772-73.

Here, the $450,000 emotional-distress award is excessive. This is a single-incident case. The evidence reflected common garden-variety symptoms from job loss. The evidence of Rumsey's emotional distress was scant, at best. Rumsey testified that he did not seek any professional medical or mental health assistance from any provider to deal with the emotional distress he may have experienced based on his termination. Neither did Rumsey follow any prescribed course of treatment or take any medication to deal with emotional distress. Rumsey's wife also testified that he was "deflated," but gave very little evidence of actual symptoms of emotional distress. (App. 657:1-4).

Existing Iowa case law, based on a line of employment cases, does not support a $450,000 emotional distress award where there is no evidence of medical

treatment by a plaintiff for mental health issues. The first employment trial in Iowa in which a jury considered an emotional distress award was *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir 1997). The plaintiff, alleging race discrimination and retaliation, had no medical treatment to support the emotional distress claim. The jury awarded $1,750,000 in emotional distress. The trial judge found this amount "shocked his conscience" and reduced it to $100,000, which was subsequently affirmed by the Eighth Circuit Court of Appeals. In *Frazier v. Iowa Beef Processors, Inc.*, the plaintiff, alleging retaliation, again had no medical treatment to support emotional distress damages, and similarly to this case, his former spouse testified the plaintiff was a changed man. 200 F.3d 1190 (8th Cir. 2000). The jury awarded $40,000, which the Eighth Circuit found to be "generous" given the evidence, but not shocking enough to reduce. *Id.* at 1193. In *Shepard v. Wapello County*, the jury awarded $250,000 in emotional distress for a plaintiff alleging wrongful termination, without any medical treatment. 303 F. Supp. 2d 1004 (S.D. Iowa 2003). The Court reduced the award to $130,000. *Id.* at 1025.

To be fair, a discussion about emotional distress damages in employment cases must also include the recent 2-1 Iowa Court of Appeals decision in *Vetter*, affirming an emotional distress award in the amount of $435,000. No. 16-0208, 2017 WL 2181191, at *15 (Iowa Ct. App. May 17, 2017). This case is

distinguishable from *Vetter*, which included supervisors who admitted they had mishandled the Plaintiff's situation and that they would have done things differently had they known what they knew as a result of the litigation. *Id.* at *12 n.8. Further, Vetter had worked for the defendant employer for 36 years. *Id.* at *13.

In short, the evidence here is deficient to support a verdict of this size. Defendants are entitled to a new trial based on the jury's excessive verdict. The Court is alternatively empowered to condition the grant of a new trial upon the accepted remittitur of damages to a place beyond which any fairly instructed jury, free of the other improprieties of this proceeding, might have placed damages at their outer limits. *See Jasper*, 764 N.W.2d at 777.

Defendants respectfully request the Court reverse and remand for a new trial or, in the alternative, remit the total emotional distress damages to $50,000.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT INTO EVIDENCE THAT RUMSEY RECEIVED $100,000 IN A WORKERS' COMPENSATION SETTLEMENT AND OTHER BENEFITS.

Error Preservation. Defendants preserved this error regarding admission of the amount of Rumsey's lump-sum $100,000 workers' compensation settlement and his workers' compensation benefits by requesting admission of the information at trial, which the district court disallowed. (App. 133). Defendants then raised this issue in their timely motion for new trial. (App. 902-904).

Standard of Review. The appellate court reviews for an abuse of discretion the district court's decisions regarding admission of relevant evidence. *See Eisenhauer ex rel. T.D. v. Henry County Health Center*, 935 N.W.2d 1, 9 (Iowa 2019). An abuse of discretion occurs when a district court rules "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* (quoting *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000) (en banc)).

A. Defendants Were Unfairly Prejudiced by the Exclusion of Rumsey's $100,000 Settlement.

Under the Iowa Workers' Compensation Act:

> [T]he employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code § 85.33(1) (defining temporary total disability ("TTD") benefits).

Windsor's carrier paid Rumsey $3,136.89 in TTD benefits in 2015 prior to termination for periods of time in which Rumsey was unable to work and could not work light-duty positions. (App. 749). In 2016, after Rumsey's back and shoulder injuries reached MMI, Windsor's carrier paid Rumsey $10,358.25 in permanent partial disability benefits. *See id.* This was based on Rumsey's permanent impairment ratings and an estimate of between two and five percent loss of body as a whole.

After Rumsey's termination on December 15, 2015, Rumsey and his counsel continued to seek TTD benefits and healing period benefits. (*See* App. 750-753). At trial, Rumsey testified that he did not seek other jobs and could not work in 2016 following the termination due to his work injuries suffered at Windsor. On February 7, 2017, Rumsey and Windsor's carrier settled Rumsey's workers' compensation claim for a lump sum payment of $100,000.[6] (App. 745-747). This settlement covered any and all claims, including TTD benefits for periods of time in which Rumsey could not work following his termination as a result of his workplace injuries.

At trial, Rumsey described in great detail his workplace injury, considerable back pain, ongoing medical recovery, issues with doctors and restrictions and medications, and disputes with his employer with regard to his workplace injury restrictions. However, the jury was left to speculate on how much Rumsey received to settle this significant workers' compensation claim. The jury also was not allowed to hear how much Rumsey received in workers' compensation benefits from 2015-2017. Defendants could not respond to the great sympathy created by Rumsey by letting the jury know that more than $13,000 was paid to Rumsey while he worked for Windsor and in 2016; more than $37,000 was paid for his

[6] Rumsey's medical payments were paid separately in the amount of $37,482.30. (App. 749).

medical expenses; and $100,000 was paid to him in February 2017. That compensating Rumsey for his "injury" was on the jury's mind is evidenced by the jury's question during deliberations about how to award back pay in light of his injury. (*See* App. 874).

This evidence was relevant and Defendants were unfairly prejudiced by the exclusion of this evidence. *See Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC.*, No. C 05-3074-MWB, 2007 WL 1297002, at *1 (N.D. Iowa May 2, 2007) (holding evidence of employers role in employee's receipt of workers' compensation benefits is relevant to whether employer had retaliatory animus toward employee with workers' compensation claims).

The $100,000 Rumsey received in February 2017 was also relevant to his claim for past and future emotional distress. Windsor was entitled to introduce evidence of the lump sum payment which ameliorated Rumsey's financial stress and any other alleged symptoms of emotional distress. *See McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 840 (1st Cir. 1998) (allowing admission of disability pension payments to prove Plaintiff was not credible). In particular, the $100,000 Rumsey received in February 2017 was highly probative as to whether he continued to suffer emotional distress after that point or in the future. *See Robinson v. HD Supply, Inc.*, No. 2:12-cv-00604-GEB-AC, 2014 WL 585416, at *1 (E.D. Cal. Feb. 14, 2014) (finding collateral source evidence was admissible to

rebut the severity of alleged emotional distress based on alleged financial hardship in an employment termination case). The jury's substantial emotional distress award demonstrates how Defendants were unfairly prejudiced by not permitting the $100,000 lump sum settlement to be entered into evidence.

Rumsey testified to financial hardship by losing his job right before Christmas 2015 and his inability to afford Christmas presents for his family. (App. 565:13-20). He went on to testify that the financial stress continued into 2016 because his wife also has a health condition and could not always get enough hours at her job. (App. 502:24-503:3; 520:24-521:3; 558:24-559:3). Rumsey's wife in turn testified to the financial problems of her husband being terminated and having a loss of income right before Christmas of 2015. (App. 656:11-22). She also testified that Rumsey was forced to take jobs more conducive to "teenagers" in late 2016. (App. 656:23-657:4).

Defendants should have been given the opportunity to argue that Rumsey's future distress was considerably lessened in February 2017 with the lump sum payment of $100,000. The amount of the settlement was admissible, and Defendants were unfairly prejudiced by its exclusion. *See Equal Emp't Opportunity Comm'n v. Reed Pierce's Sportsman's Grille, LLC*, No. 3:10-cv-541-WHB-LRA, 2013 WL 12123370, at *2 (S.D. Miss. Jan. 11, 2013) (finding evidence that the plaintiff's family provided her with financial support after her

allegedly discriminatory termination was admissible to the issue of whether she suffered emotional distress); *see also Geske v. Williamson*, 945 So.2d 429, 434–35 (Miss. Ct. App. 2006) (finding evidence of a $20,000 mesothelioma settlement was admissible to show lack of financial emotional distress in a fraudulent misrepresentation case); *Peiffer v. State Farm Mut. Auto Ins. Co.*, 940 P.2d 967, 972 (Co. Ct. App. 1996) (finding, in a claim against insurer, evidence of a settlement with the vehicle's driver was admissible to show the plaintiff "had not suffered substantial emotional distress because of her financial inability to pay medical bills").

Defendants should be given a new trial.

V. THE DISTRICT COURT ERRED BY REFUSING TO OFFSET RUMSEY'S BACK PAY AWARD WITH THE LUMP-SUM $100,000 WORKERS' COMPENSATION SETTLEMENT FROM WINDSOR'S CARRIER.

Error Preservation. Defendants preserved this error by raising this issue in their motion for new trial. (App. 823; 913).

Standard of Review.

This Court reviews the district court's decision de novo, as it was a decision within the district court's equitable powers. *See High Development Corp. v. Star of the West Co.*, 2009 WL 1676907, *2 (Iowa Ct. App. June 17, 2009) (citing *SDG Macerich Prop., L.P. v. Stanek Inc.*, 648 N.W.2d 581, 584 (Iowa 2002)).

A. Rumsey's Back Pay Award Should Have Been Offset With the Lump-Sum $100,000 Workers' Compensation Settlement.

As mentioned above, *supra* Section IV, the $100,000 workers' compensation settlement was designed in part to resolve Rumsey's claim for TTD benefits for the period of time he could not work due to his injury after December 2015 and into the future. Rumsey should not be entitled to a second recovery for lost wages through an ICRA claim.

In *Fotheringham v. Avery Dennison Corp.*, No. B187949, 2008 WL 726160, at *17 (Cal. Ct. App. Div. 7 Mar. 19, 2008), the Court offset the amount the plaintiff had received in a workers' compensation settlement from the back pay awarded at trial. *Id.* The court concluded:

> The court's offset ruling prevents the impermissible double recovery; precluding a double recovery where [plaintiff] has no legal entitlement to a double recovery does not impair her action or force her to relinquish a right or forgo a remedy for which she was otherwise entitled. The settlement agreement was not violated by the offset ruling.

Id.

This same issue arose in the case of *Spencer v. Wal-Mart Stores Inc.*, N.O. Civ. A. 03-104-KAG, 2005 WL 697988 (D. Del. Mar. 11, 2005). In that case, the Plaintiff and Defendant had settled a workers' compensation claim prior to trial on a hostile environment claim, and the parties agreed that at least $12,000 of the workers' compensation settlement would be credited against any recovery in the

later litigation. *Id.* at *1. Following trial, the jury awarded Plaintiff $12,000 for emotional distress and $15,000 as lost wages. *Id.* at *5. Subsequently, the trial court determined that Plaintiff was not entitled to the $15,000 award for lost wages because she had not brought a constructive discharge claim. *Id.* at *2. Further, the district court offset the $12,000 emotional distress award with the workers' compensation settlement and held that the Plaintiff would recover no damages in the case. *Id.* at*5.

As a general rule, a Plaintiff suing for employment discrimination is not "allowed back pay during any periods of disability." *Mason v. Ass'n. for Indep. Growth*, 817 F. Supp. 550, 554 (E.D. Pa. 1993); *see Loubrido v. Hull Dobbs Co.*, 526 F. Supp. 1055, 1061 (D.P.R. 1981) (excluding from back pay calculation a period in which plaintiff was disabled "because under such circumstances he could not have worked for the defendant or for anybody else"). "In short, it is clear that an employer who has discriminated need not reimburse the plaintiff for salary loss attributable to the plaintiff and unrelated to the employment discrimination." *Mason*, 817 F. Supp. at 554; *see also Caterpillar Logistics Servs., Inc. v. Amaya*, 201 So.3d 173, 176 (Fl. Ct. App. 2016); ("[W]hen a plaintiff is unable to return to work for an independent reason not caused by the employer, lost past and future wages and benefits may not be awarded."); *Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Comm'n*, 464 N.W.2d 478, 482 (Iowa Ct. App. 1990)

("The Commission should only have awarded back pay and benefits up to the time when she could no longer work.").

Here, it is not disputed that Rumsey suffered a workplace injury in January 2015 and was given permanent medical restrictions prohibiting him from lifting more than ten pounds. Rumsey could not return to his position as Material Handler II or work in any other production positions at Windsor due to his lifting restrictions. Windsor assigned Rumsey light-duty assignment during 2015 while he was attempting to recuperate from his injuries. Even if it is held that Defendants discriminated against Rumsey and terminated him wrongfully, Rumsey cannot collect back pay based on what he could have earned in his prior full-time position as Material Handler II. At best, if Rumsey had not been terminated, he would have been given additional light-duty assignments.

An important corollary to this proposition is that if a plaintiff collects workers' compensation benefits during a period of disability leave, or in a lump sum settlement that reflects payments for periods he could not work, those workers' compensation benefits must be offset with any award of back pay. *See Estate of Schultz v. Potter*, No. 05-1169, 2007 WL 1115209, at *4 (W.D. Penn. Apr. 13, 2007); *see, e.g.*, *McKenna v. City of Philadelphia*, 636 F. Supp. 2d 446, 467 (E.D. Penn. 2009); *Nichols v. Frank*, 771 F. Supp. 1075, 1079 (D. Or. 1991); *Ackerman v. W. Elec. Co., Inc.*, 643 F. Supp. 836, 855 (N.D. Cal. 1986). The court

must offset the back pay award. *See E.E.O.C. v. Yellow Freight Sys., Inc.*, No. 98 CIV. 2270(THK), 2001 WL 1568322, at *1 (S.D.N.Y. Dec. 6, 2001) (stating there is no rationale for penalizing an employer by making them pay for workers' compensation lost wages and back pay for discrimination); *McLean v. Runyon*, 222 F.3d 1150, 1156–57 (9th Cir. 2000) (offsetting back pay "because the damages awarded, together with the FECA workers' compensation benefits, give [the plaintiff] a full recovery for lost wages"); *Mason*, 817 F. Supp. at 558 (stating that failure to offset back pay by workers' compensation "would make [the plaintiff] more than 'whole'"); *E.E.O.C. v. Blue and White Serv. Corp.*, 674 F. Supp. 1579, 1583 (D. Minn. 1987) (stating an offset "is necessary to make the victim of discrimination whole, and not more than whole").

Rumsey argued before the district court that the back pay award should not be offset by the workers' compensation settlement because the settlement was not attributable to Rumsey's lost income. However, "[w]orkers' compensation systems are designed to replace income lost as the result of injury." *McEwen v. Delta Air Lines, Inc.*, 919 F.2d 58, 60 (7th Cir. 1990). The theory that none of the workers' compensation settlement was attributable to lost income is simply incompatible with the nature of workers' compensation. Rumsey attempted to use the fact that the settlement was non-taxable to bolster his argument that the settlement was not attributable to lost income. However, the Iowa Workers'

Compensation Commission has previously found that workers' compensation benefits replacing lost income are non-taxable. *See Harney v. University of Iowa*, File No. 5036605, 2014 WL 12693610 (Iowa Workers' Comp. Com'n July 17, 2014) (discussing non-taxable nature of "weekly workers' compensation benefits" covering lost income).

The district court decided not to instruct the jury to consider the offset, rather keeping this decision for the court after trial. However, after trial, the district court refused to offset any of the back pay award. To the extent the entire case is not reversed on other grounds, the appellate court should remand the matter to the district court to offset the back pay award with the settlement amount.

CONCLUSION

Defendants-Appellants/Cross-Appellees Woodgrain Millwork, Inc., d/b/a Windsor Windows and Doors, Liz Mallaney, and Clay Coppock respectfully request that the Court reverse the judgment of the district court and dismiss the case in its entirety. In the alternative, Defendants request that this Court vacate the judgments and remand the case for a new trial.

REQUEST FOR ORAL ARGUMENT

Defendants-Appellants/Cross-Appellees Woodgrain Millwork, Inc., d/b/a Windsor Windows and Doors, Liz Mallaney, and Clay Coppock respectfully request oral argument regarding the issues presented in this appeal.

RESPECTFULLY SUBMITTED,

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/s/ Randall D. Armentrout

CERTIFICATE OF SERVICE AND FILING

I, Randall D. Armentrout, certify that I did file the attached Proof Brief with the Clerk of the Iowa Supreme Court by electronically filing with the Iowa Judicial Branch on August 6, 2020 which will send notice to the following parties:

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