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' REPLY/CROSS-APPELLEES' BRIEF
ORAL ARGUMENT REQUESTED

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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.

A. The Iowa Supreme Court Did Not Impose Strict Liability on Individuals in *Vivian v. Madison.*

In his Brief, Rumsey states that an "individual may personally violate the ICRA by: Initiating, approving, or *otherwise participating* in a discriminatory adverse action. There are undoubtedly other ways, that are limited only by the imagination and the language of the law." Rumsey Brief at 22 (emphasis added). Rumsey cites no authority for this stunning expansion of Iowa law. His position runs counter to both the Iowa Civil Rights Act ("ICRA") and *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999).[1]

Defendants agree that the Supreme Court in *Vivian* was answering a narrow certified question from the federal court: "Is a supervisory employee subject to individual liability for unfair employment practices under Iowa Code section 216.6(1) of the Iowa Civil Rights Act?" *Id.* at 872. Although the Supreme Court

[1] The Supreme Court narrowed the group of "persons" that could be individually liable under the ICRA to those in a supervisory capacity in *Godfrey v. State*, 898 N.W.2d 844, 878 n.8 (Iowa 2017) ("To the extent the individual defendants are not 'supervisors' of Godfrey, they are not within the scope of the Iowa Civil Rights Act and there is no adequate remedy as to them."). The Court in *Godfrey* did not discuss the standard or circumstances under which a supervisor may violate the ICRA.

held that a supervisor may be individually liable under the ICRA, the Court did not conclude that all supervisors in any way involved with a termination decision were individually liable. To the contrary, the Court explained why it did not find the physician in *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997) individually liable under the Act:

> In *Sahai*, we simply denied that the Physician was *in a position to control the company's hiring decisions . . .*

Id. at 876 (emphasis added). Thus, clearly, although a supervisor may be subject to individual liability, the supervisor must be "in a position to control the company's hiring decisions." *Id*.

This makes sense based on the plain language of the ICRA. Although a "person" may be individually liable, the person must violate some provision of the Act. In other words, to be held individually liable under the ICRA, a person must engage in an unfair employment practice. *See* Iowa Code § 216.6(1)(a). This is no small feat for a person without authority from the employer to make employment decisions on behalf of his or her employer. Iowa Code section 216.6(1)(a) provides:

> 1. It shall be an unfair or discriminatory practice for any:
> a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability . .

Federal courts have consistently interpreted *Vivian* as requiring evidence that a person was in a position to control the company's hiring decisions before imposing individual liability under the ICRA. *See Neppl v. Wells Fargo Bank*, No. 4:19-cv-00387-JAJ, 2020 WL 3446280, at *3-4 (S.D. Iowa March 27, 2020) (dismissing individual defendant where no factual allegations supported finding she was in position to control employment decisions and noting imposing individual liability in such circumstances "would conflict with Iowa law stating that a person must be in a position to effectuate an employment practice to be held liable") (citing Iowa Code § 216.6(1)(a); *Vivian*, 601 N.W.2d at 878); *Johnson v. BE & K Constr. Co., LLC*, 593 F. Supp. 2d 1044, 1049-50 (S.D. Iowa 2009) ("[W]hen an actual person is acting 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 'employer.'") (quoting *Vivian*, 601 N.W.2d at 876); *Nelson v. Wittern Group, Inc.*, 140 F. Supp. 2d 1001, 1009 (S.D. Iowa 2001) (granting motion for summary judgment for individual defendant and explaining, "[b]efore 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).

Before trial, Defendants Proposed Instruction Number 23:

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)

Proposed Instruction Number 23 is an accurate statement of Iowa law. *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) ("Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions.") (quoting *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994)). The failure to give any instruction on individual liability was unfairly prejudicial to individual Defendants Mallaney and Coppock. *See Conner v. Menard, Inc.*, 705 N.W.2d 318, 322 (Iowa 2005). It permitted the jurors to find individual liability simply because they were

"involved" in some way with the termination. Indeed, Rumsey argued as much to the jury.

B. Rumsey Had the Burden to Establish Individual Liability.

It is not disputed that Rumsey, as the Plaintiff, had the burden to establish individual liability against Coppock and Mallaney. Defendants' proposed Instruction Number 23 expressed that it was Rumsey's burden to establish the elements of his claims against each individual. At trial, however, Rumsey's counsel did not ask any witnesses—including Coppock or Mallaney, or their supervisor Pete Crivaro—whether Coppock and Mallaney had the authority to terminate Rumsey or had control over the process. To try to sidestep this gap in the evidence, Rumsey argues on appeal that Defendants' counsel elicited the missing evidence through general questions about the reasons for the termination and the timing of the termination. Rumsey's position is meritless.

In his Brief, Rumsey argues that both Coppock's and Mallaney's authority to terminate can be inferred or divined from the following testimony of Mallaney on cross examination:

> A. . . . So at that time Mr. Coppock and I both came to the conclusion that we didn't feel that we could have Mr. Rumsey back into our workplace.
> Q. So did you decide to terminate him at that point?
> A. We did.

(App. 319:22-320:6; Rumsey Brief at 12). Rumsey simply ignores the rest of Mallaney's testimony, beginning with the very next question:

> Q. Did you want to run this by Mr. Crivaro?
> A. I did. It's been a sensitive case. It's been a long case with his light duty. Mr. Rumsey was employed with us since 2007. Yeah, this was a -- this was a different termination for us. We don't do many of these.
> . . .
> Q. So that day, when you made the decision to recommend termination, what was, in your mind, the reason for the termination?
> A. The language, the anger, the threatening gesture toward me with pointing his finger and the look in his eyes that morning. I was scared, you know, and I am concerned about myself and the people in the workplace.
> Q. Ms. Mallaney, tell us right now, was any part of that reason to terminate the fact that Mr. Rumsey is deaf?
> A. The only reason why he was terminated was the language used that morning and the gestures and the anger that he showed to coworkers and not having respect.
> Q. Was any part of it the fact that he had back or shoulder injuries?
> A. No, not at all.
> Q. Did Mr. Crivaro then talk to you about your recommendation to terminate?
> A. Once Mr. Crivaro showed up -- Mr. Crivaro is my manager. Clay and I walked over to his office, explained to him what happened. We gave him our recommendation on why we felt Mr. Rumsey should be terminated, and he agreed.

(App. 320:2-321:5). This evidence that Mallaney and Coppock merely made a recommendation to Crivaro, who made the ultimate decision, was not refuted at any time during the trial. No evidence supported a finding that either Mallaney or

Coppock had the authority to terminate Rumsey on their own. Even assuming that some of the open-ended questions asked during trial raised an inference that Mallaney or Coppock had some level of control over termination decisions, at best this created a fact issue that should have been decided by the jury. However, no instruction such as that proposed in Defendants' Instruction Number 23 was given to the jury, and the jury was therefore free to find individual liability simply because Coppock and Mallaney work for Windsor. This is not harmless error. The absence of the proposed instruction had the practical effect of rendering the claims against Coppock and Mallaney as sounding in strict liability.

Further, even if Coppock had the ability to control the termination decision, Rumsey put forth no evidence that Coppock *violated the ICRA*. *See Vivian*, 601 N.W.2d at 876. Coppock found himself in the unfortunate position of having been called to the plant floor at the time Rumsey was refusing to sign his medical restrictions. There is no evidence, however, that Coppock was even aware that Rumsey's doctor had removed a sit-down restriction. Coppock simply observed the aftermath of an admittedly "confused Ron," and escorted him to the human resources offices. Rumsey Brief at 17. Indeed, in his Brief, Rumsey concedes: "Coppock did not appear to know what Mallaney had done either." *Id.* At trial, Rumsey's counsel confirmed this with Mallaney by asking:

Q. And again, to be clear, both Mr. Lauridsen and Mr. Coppock, neither of them had any idea what had happened with the restrictions, correct?
A. Correct.

(App. 257:21-24). Rumsey's counsel likewise confirmed this with Coppock himself:

Q. And at the time you didn't know what Ron was talking about concerning changed sit-down restrictions; right?
A. No.
Q. Because on December 15, Liz Mallaney never told you that she had changed them; right?
A. No. I did not know.

(App. 380:1-7).

The complete failure of proof that Coppock violated the ICRA underscores the prejudice to him in not receiving a liability instruction or a special interrogatory requiring the jury to assess the evidence against him individually, as further explained below in Sections I.C. and D.

C. Coppock and Mallaney Presented Sufficient Evidence to Warrant the Giving of Same Decision Instructions for Each.

Surprisingly, Rumsey argues that neither Coppock nor Mallaney introduced sufficient evidence to warrant the giving of a "same-decision" instruction for each under *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261 (Iowa 2019). He contends that "Defendants not only failed to enter substantial evidence; they never even asked witnesses the question." Rumsey Brief at 28. Nothing could be further from the truth in this case.

In *Hawkins*, the Supreme Court held that "Defendants may avoid liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the Plaintiff's gender [or other protected characteristics] into account." *Id.* at 272 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)). The Court held that a defendant is entitled "to an instruction on the same-decision defense recognized in *Price Waterhouse*, if properly pled and proved." *Hawkins*, 929 N.W.2d at 272. Thus, Coppock and Mallaney were entitled to a same-decision instruction so long as they put forward evidence of non-discriminatory and non-retaliatory reasons for their recommendation to terminate Rumsey. *See id.*; *see also Mora v. Savereid*, 222 N.W.2d 417, 419 (Iowa 1974).

At trial, Mallaney and Coppock presented ample reasons for terminating Rumsey, all of which had nothing to do with his injuries or deafness. On the morning of December 15, 2015, after Coppock asked Rumsey why he would not sign his medical restrictions, Coppock testified as follows in questioning from Rumsey's counsel:

> Q. And you also testified that he was saying, "Fuck this, fuck this, I am not going to sign these fucking restrictions. I need sit-down work"; is that true?
> A. Yes. Among other things, yes.
> . . .
> Q. And at this time you were concerned that Ron was going to start fighting you physically; right?
> A. I was, yes.

Q. But Ron didn't say that he was going to fight you, did he?
A. No.
Q. And Ron never threatened to hurt you down on the plant floor, did he?
A. Threatened me, yes.
. . .
Q. What do you mean by "threatened"?
A. Thank you. I mean, he turned, he got nose to nose with me, nose to nose, enough where I could see the dry spit in his mouth because it hit me in the face, and he said, "Hey, fucker, I don't need to listen to anything you have to say." I felt threatened.
Q. And you considered that a threat of violence?
A. I did.

(App. 370:17-372:2) Coppock further testified that on the stairs leading up to the human resources offices:

A. Rumsey got to about third or fourth step, and I was probably two -- if he was on the fourth step, I was on the second step. If he was on the third step, I was on the first step. And he turned -- Ron, like this again, right to left, and he got nose to nose to me, and he said, "I'm not going to fucking listen to you. I'm not going to fucking talk to you. You don't need to fucking be here," stuff of that sort, and I had -- I know I had my hand on the right railing and the other railing because I -- something was going to happen. I was going to try to keep him contained on the steps. And then he just turned and then headed up.
Q. How were you feeling at that time?
A. Well, I was hoping that I could get a minute with Liz alone to prep her because I didn't want him storming in there and hurting Ms. Mallaney.

(App. 434:7-24).

Mallaney testified that when Coppock brought Rumsey into her office and she attempted to show Rumsey Dr. Harbach's written work restrictions, Rumsey knocked the papers out of her hand back onto the desk. (App. 313:23-314:25). Mallaney further testified:

> A. Really got my attention when he takes his finger -- he's about, you know, his finger is about maybe a foot, 10 inches from my face, "This is bullshit. You fucking changed my restrictions behind my back."
> . . .
> Q. How did you yourself feel about it?
> A. I felt threatened. Shocked. Concerned for my safety a little bit because I haven't seen an outburst like this so you don't know what's going to happen. I'm also concerned about the employees that I have within the factory.
> . . .
> Q. Did you ever have a fear that he might return?
> A. Yes, yes.
> Q. That day?
> A. That day, even -- even today I still wonder. It's kind of an unfinished business, you know. Is he going to come up that back stairway and -- it's just how I feel. I can't get that to go away.

(App. 315:6-9; 317:24; 318:4; 318:18-24).

It was Rumsey's counsel that pinpointed Rumsey's misconduct on December 15 as the catalyst for the termination of his employment. In fact, it was Rumsey's counsel that actually asked whether "the same decision" would have been made absent his misconduct that day:

> Q. Now, another thing to be clear on. If you had not -- you say you decided to fire Ron based on what happened in

that meeting. So if that meeting hadn't happened, you certainly would not have still fired Ron; correct?

. . .

Q. On December 15, you had no other reason to fire Ron; correct?
A. Correct.
Q. So other than your allegations of Ron's language and conduct, you wouldn't have made the same decision; correct?
A. Correct.

(App. 257: 7-24).

Coppock also testified directly as to why he recommended terminating Rumsey:

A: We just -- we told Pete what had happened that morning. We told Pete that we had had a discussion afterwards, and we told Pete that we recommended that we just didn't know how we were going to bring Ron back, how he'd come back to Windsor and work. That we recommended that we terminate his employment because of that incident that took place that morning. And Pete agreed.
Q: Do you believe that Mr. Rumsey's conduct that day violated the Windsor standards of conduct that we talked about earlier?
A: I do.
Q: Why was Mr. Rumsey terminated by Windsor on December 15, 2015?
A: Violence in the workplace, intimidating behavior, threatening behavior, insubordination.

(App. 446:2-16).

Based on testimony from both Coppock and Mallaney, sufficient evidence was presented that they would have made the same decision to recommend

terminating Rumsey, even if his back or wrist injury or his deafness had "played a part" in the recommendation to terminate. *See Hawkins*, 929 N.W.2d at 272. Thus, each was entitled to a separate same-decision instruction. *See id.* Because neither received the requested same-decision instructions or a separate line on the verdict form for the jury to consider why each individual recommended termination, Coppock and Mallaney were unfairly prejudiced. *See Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 11 (Iowa 2009).

D. Under the Verdict Form, if Any One Defendant was Liable, All Were Liable.

The evidence that Coppock and Mallaney individually provided at trial with regard to Rumsey's severe misconduct in the workplace, including threatening behavior, cannot be brushed under the rug by simply stating the jury "made the call" against the *Defendants*, plural. Because the jury was not asked to consider the elements of liability separately for each of the Defendants, it is impossible now to distinguish the liability finding between the Defendants. The lack of special interrogatories for each individual defendant denied the jury the opportunity to find an individual defendant not liable. Even if the jury believed Coppock or Mallaney lacked the intent to discriminate or would have made the same decision based on Rumsey's misconduct, it had no way to absolve one or both from liability. The single lines for liability on the verdict form precluded the jury from finding only

one defendant was liable. Coppock and Mallaney should not face guilt by association.[2]

Rumsey's attempt to distinguish *Fox v. D.C.*, 990 F. Supp. 13 (D.C. 1997) is unavailing. In *Fox*, the plaintiff sued the District of Columbia Lottery Board (the "employer") and Sylvia Kinard, a deputy director of the employer's board, for alleged constitutional violations under 42 U.S.C. § 1983. *Id.* at 15. Notwithstanding a dispute regarding whether Kinard was named in her official capacity or individual capacity, Rumsey misses the point of this case. When the case was given to the jury, the special verdict form listed the "defendants" collectively, with the potential liability of the employer and Kinard placed on a single line of the verdict form. *Id*. at 22-23. After the jury found that the defendants were liable, the plaintiff requested a judgment against Kinard individually. *Id.* at 22. The court noted that the jury instructions "suggested that Kinard's liability was co-extensive" with the employer's liability and found it

[2] For example, the jury may have agreed with Rumsey's theory that liability should be imposed because Mallaney and Cathy Sams from Gallagher Bassett "went behind Rumsey's back" and contacted his workers' compensation doctor to change his sit-down restriction. It is undisputed that Coppock had nothing to do with changing the restriction and was not even aware of it on the morning of December 15, 2015. However, the verdict form did not give the jury the opportunity to find only Mallaney liable and not Coppock. Based on the verdict form, Coppock was in the same boat as Mallaney, and both were subject to whatever liability determination the jury reached as to Windsor.

significant that the single-lined jury form referred to the "defendants" collectively. *Id.* In declining to impose individual liability on Kinard, the court explained:

> The foregoing points strongly to the conclusion that the case against Kinard was submitted to the jury as an official capacity suit. Their verdict cannot be characterized or "clarified" *ex post facto* as a finding of individual liability.

Id. at 23. The court granted Kinard's motion for a new trial with regard to the claim against her individually. *Id.* Similarly, here, based on the single lines of liability for all three "Defendants," there is no way that the findings of liability can be characterized as separate findings of individual liability against Mallaney and Coppock. *Compare id.* at 22-23, *with* App. 877-884 (verdict form). Because the erroneous omission of the requested instructions and the single-lined verdict form materially affects their substantial rights, both are entitled to a new trial. *See* Iowa R. Civ. P. 1.1004; *Bangs v. Pioneer Janitorial of Ames, Inc.*, 570 N.W.2d 630, 632 (Iowa 1997).

Further, Rumsey did not distinguish the other cases cited by Mallaney and Coppock holding that each individual defendant should be given his or her own line on the jury verdict form, thus requiring the jury to consider the liability of each individual separately. *See Chuman v. Wright*, 76 F.3d 292, 294-95 (9th Cir. 1996) (reversing judgment where trial court's instructions allowed the jury "to lump all the defendants together, rather than require it to base each individual's liability on his own conduct"); *see also Wilson v. Cross*, 845 F.2d 163, 165 (8th Cir. 1988)

(affirming instruction that required jury to find individualized intent to impose liability on a particular defendant).

Finally, Rumsey states: "Regardless of this Court's holding on the individual liability of Coppock and Mallaney, the judgment against Woodgrain is undisturbed." Rumsey Brief at 29. He does not argue he is entitled to additional damages against Mallaney or Coppock individually that have not already been awarded to him based on the combined Defendants' verdict. Thus, in the event that the Court affirms or modifies the verdict against Windsor, the employer, Mallaney and Coppock request that the Court vacate the judgments against them individually.

II. The District Court Committed Reversible Error By Not Directing a Verdict in Favor of Defendants on Rumsey's Disability, Accommodation, and Retaliation Claims.

A. Rumsey Was Not Qualified to Perform the Essential Functions of Any Position on the Plant Floor.

The evidence that Rumsey was not *qualified* to perform the essential functions of his job at Windsor,[3] a required element of his disability claim under the ICRA, was undisputed. Rumsey was working as a Material Handler II on the day he was injured, a position that requires the ability to lift, carry, push, and pull

[3] Windsor Windows and Doors was Rumsey's employer and is the employer of Crivaro, Mallaney, and Coppock. Windsor is a subsidiary of Woodgrain Millwork, Inc.

50 pounds, as well as frequent standing, walking, kneeling, and bending. (App. 722-723). Further, every hourly position on the plant floor has the same requirements. (App. 325:18-24). Rumsey presented no evidence refuting his inability to perform the essential functions of any full-time position.

To make an end run around this fatal flaw in his disability case, Rumsey contends he could perform the light-duty assignment of bead taping. Rumsey erroneously argues Windsor was required to create a full-time position for him as bead taper and did so by permitting him to perform the work on light duty with his significant physical restrictions. Rumsey's argument goes: because he could not perform his ordinary duties and Windsor allowed him work at the bead taping station as a temporary light-duty assignment, the court must look to essential functions of the light-duty bead taping assignment to determine if he was qualified under the ICRA. Rumsey's argument comes full circle when he states he could perform the light-duty job, and thus, the termination from this job is disability discrimination. Rumsey's argument is meritless for two reasons: (1) Windsor did not permanently assign Rumsey to the bead taping station, where he only worked for two weeks on reduced hours; and (2) Windsor was not required to create a new position to accommodate him.

First, "bead taping" or "beader" is not an independent position; it is merely a part of the Fabricator position. The Fabricator job description is set forth in full in

Exhibit GG. Working at the bead taping station is "a little bit of a job that an employee does" at Windsor. *See* App. 302:6-19; 345:25; 346:2) Thus, when Rumsey was performing the bead taping assignment as a light-duty option while recovering from his workplace injury, he was tasked with performing the sub-part of someone else's full-time job. *Id.; see also* App. 363:1-13 (describing how the bead taping task worked both in the context of a full-time, full-duty Fabricator role as well as in the way it was assigned in isolation as a light-duty assignment while Rumsey was recovering from his workplace injury); App. 683:14-684:15 (describing how if someone were to perform the bead taping role on a full-time, eight-hours-a-day basis, this would result in approximately four times the bead that is needed to complete allotted window sashing at Windsor, so they would never assign someone to that task on a full-time, eight-hours-a-day basis).

The evidence at trial shows that Rumsey started working on that light-duty assignment less than a month before his termination, and he never worked a full 40-hour week at that assigned task. Rumsey had surgery on his shoulder in September 2015. (App. 602:17-22). He was then off of work following his surgery until November 16, 2015. (App. 602:17-603:1; 604:2-7). When Rumsey came back to work after his surgery, he was initially performing a light-duty assignment that involved him "sitting down watching glass and metal" go by. (App. 603:2-7). The first week he was back at work in November 2015, he worked

a total of seven hours the entire week. App. 606:5-15; *see also* App. 786-7. In fact, Rumsey did not work full-time hours, five-days a week, after he returned to work on November 16, 2015. (*See* App. 607:1-12; 786-787). Rumsey worked only six hours at the bead taping station during the entire week before he was terminated (December 7-11). (*See* App. 786-7). Clearly, Windsor did not assign Rumsey to the bead taping station as a permanent position.

Second, Windsor was not required to create a position to accommodate Rumsey. 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) (holding plaintiff's disability discrimination claim failed as a matter of law where at time of termination, plaintiff could not perform essential functions of his position and was restricted to light-duty work); *Luckiewicz v. Potter*, 670 F. Supp. 2d 400, 408-09 (E.D. Penn. 2009) (noting the provision of light-duty assignments did 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) (concluding where "no amount of accommodation" would have made it possible for plaintiff to perform essential functions, he was not "otherwise qualified" for position).

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.") (citation omitted). This makes sense. Employers would be discouraged from bringing injured employees back to work on light duty if the light-duty assignments are considered evidence that the employer considered the employee to be "disabled" and the assignments were also "accommodations" within the meaning of the ICRA.

Yet, that is exactly Rumsey's position in this case. Rumsey conflates workers' compensation light-duty assignments with "accommodations" for his disability under the ICRA. *See* Rumsey Brief at 26. Rumsey continues to point to Mallaney's and Windsor's workers' compensation carrier's handling of his doctor's restrictions while on light duty as the key evidence of disability discrimination. He accuses Mallaney of going "behind his back" and communicating with Dr. Harbach about his work restrictions without his permission. (*See, e.g.* App. 204:17-205:16; 521:7-22; 565:1-11; Plaintiff's Brief pp. 17-18.) However, when an employee has a workers' compensation claim, an

employer or its insurance carrier may communicate directly with a physician's office about a work-related restriction. *See* Iowa Code § 85.27(2); *see also Morrison v. Century Eng'g*, 434 N.W.2d 874, 876 (Iowa 1989) (finding workers' compensation claimant had no right to have her attorney present when employer's counsel interviewed claimant's treating physician; claimant waived any privilege pertaining to release of information concerning physical or mental condition).

Throughout the time Rumsey was recovering from his workplace injury, Windsor provided him temporary, light-duty assignments, although it was not required to do so. These were not intended as permanent disability accommodations. Had Rumsey reached MMI on all of his injuries prior to discharge, Crivaro testified that the parties would have reassessed the situation with the full scope of his permanent restrictions. (App. 468:19-469:3). For purposes of establishing he was qualified to perform his job at Windsor, Rumsey must show he could perform the essential functions of his job as Material Handler II or any other full time position. The record in this case is clear; Rumsey cannot perform the essential functions of any full time position at Windsor. Because he was not "qualified" within the meaning of the ICRA, the district court should have granted a directed verdict in Defendants' favor on this claim.

B. Rumsey Failed to Establish his Failure to Accommodate and Retaliation Claims.

Rumsey's failure to accommodate claim fails for the same reason; he again elevates his workers' compensation light-duty assignments to "reasonable accommodations" for permanent full-duty positions. It is not disputed that Rumsey never requested "accommodation" for a "disability" at any time after his injury—to the contrary, he often sought to stay home altogether due to his back pain. (App. 604:9-12; 767-776; 777-783). The goal should be to try to return injured workers to the workplace on light duty, rather than simply place them on leave to see what happens. *See, e.g., Strubbe v. Crawford Cty. Mem'l Hosp.*, No. C15-4034-LTS, 2017 WL 8792692, **1, 8 (N.D. Iowa Dec. 6, 2017) (noting EMT-B in the ambulance department with a 70-pound lifting requirement was given workers' compensation light-duty assignments like "removing staples and scanning documents" and other clerical work while she was recovering from her work-related injury). Rumsey was tasked with many temporary light-duty assignments while he was recovering from his work-related injury, none of which were full-time, full-duty positions at Windsor. (*See* App. 281:7-25). Thus, his accommodation claim fails as a matter of law.

Rumsey's argument related to his request for an interpreter also fails. He asked for an interpreter for the meeting with Crivaro only *after* he had engaged in what Windsor perceived to be terminable misconduct. (*See* App. 249:8-24; 250:6-10). In fact, he asked for an interpreter on his way out the door after his interaction

with Mallaney and Coppock. *Id.* An employee cannot create the basis for an ICRA claim after engaging in terminable misconduct. *Fitzgerald v. Hy-Vee, Inc.*, 2017 WL 936121, at *10 (Iowa Ct. App. Mar. 8, 2017) (holding a request for an accommodation is untimely when the request is made after the employee was notified they would be terminated); *Schaffhauser v. United Parcel Serv., Inc.*, 794 F.3d 899, 906 (8th Cir. 2015) ("[L]iability is not established where 'an employee engages in misconduct, learns of an impending adverse employment action, and then informs his employer of a disability that is the supposed cause of the prior misconduct and requests an accommodation.'") (citation omitted); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (holding a request for an accommodation by a bus driver, after she fell asleep twice while on the job, is untimely because the request was made after she engaged in terminable misconduct).

As was thoroughly addressed in Defendants' opening brief, because Rumsey's alleged protected activity—his requests for sit-down work and for an interpreter for the meeting that did not occur with Crivaro—did not constitute reasonable accommodations as a matter of law, his retaliation claim premised on those alleged protected activities must also fail.

III. The $450,000 Emotional Distress Award is Excessive.

Rather than point this Court to record evidence establishing he experienced emotional distress as a result of his termination, Rumsey reverts to the theory he advanced throughout this litigation: that Windsor should be responsible for his lifetime of hard knocks. Rumsey complains that when he "was about four, his mother gave him up as ward of the state." Rumsey Brief at 13. He bemoans that when he was in junior high his peers bullied him. *Id*. Rumsey further laments that he was expelled from the Iowa School for the Deaf. Rumsey Brief at 47. While certainly a series of unfortunate circumstances, Windsor can only be legally responsible for Rumsey's actual symptoms of emotional distress caused by the termination on December 15, 2015. *See Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009). Because the record reflects that Rumsey suffered very minor symptoms of emotional distress as a result of the termination, the jury's $450,000 award is not supported by the evidence.

Rather than discuss the minor symptoms, Rumsey argues he is entitled to the large award because the Defendants "subjected him to prolonged discriminatory conduct and ignored years of accommodation requests." Rumsey Brief at 46. Such an argument runs counter to the actual evidence presented to the jury in this case. Rumsey put forward no evidence of "discriminatory conduct" prior to the conduct he complains of on the morning of his termination, December 15, 2015.

Indeed, Rumsey argued at trial that it was the altercation between Mallaney, Coppock, and Rumsey on December 15 that directly resulted in his discharge. (*See* App. 257:7-24). Rather than a case of prolonged discrimination, this case is a classic example of a single, isolated incident of alleged discrimination.

Further, Rumsey cannot rely on his allegation that Defendants ignored "years of accommodations requests" to justify the jury's award of emotional distress. It is undisputed that this evidence was not admitted at trial, and in fact, it is one of Rumsey's cross appeal points in this case. Rumsey failed to administratively exhaust those alleged claims and the district court correctly excluded all evidence about the stale claims. *See infra*, section VI. B.

Rumsey's reliance on *Smith v. Iowa State University*, 851 N.W.2d 1 (Iowa 2014) misses the mark. In *Smith*, the plaintiff presented evidence that he "experienced mental trauma over an extended period of time, substantiated by his psychologist, that manifested itself physically when he became sick to his stomach and light-headed. Smith suffered from insomnia, the inability to eat properly and weight loss." *Id.* at 30. The Court held that "Smith manifested symptoms that were more significant than merely feeling down or depressed." *Id.* at 31. The Court also pointed out that "Smith sought treatment from a psychologist and was diagnosed as suffering from extreme stress and anxiety that the doctor indicated

was significantly impacting his life." *Id.* In light of these severe and prolonged symptoms, the Court affirmed a $500,000 emotional distress award. *Id.*

Rather than support Rumsey's effort to maintain his $450,000 emotional distress award, the decision in *Smith* actually underscores that the emotional distress award in this case was excessive and should be remitted. Here, Rumsey did not seek medical treatment or counseling.[4] Unlike the plaintiff in *Smith*, Rumsey presented no evidence of severe or extreme emotional distress or mental trauma over an extended period of time. He testified to no symptoms, such as physical symptoms manifesting themselves as a result of emotional stress. Based on the decision in *Jasper*, the award of $450,000 for emotional distress is excessive and should be remitted. *See Jasper*, 764 N.W.2d at 772.

IV. The District Court's Refusal to Admit Into Evidence that Rumsey Received $100,000 in a Workers' Compensation Settlement in February 2017 was an Abuse of Discretion.

The $100,000 workers' compensation settlement Rumsey received in February 2017 should have been admitted into evidence for all the reasons raised

[4] Rumsey wrongly argues that the Defendants contend medical testimony is required for an award of emotional distress. *See* Rumsey Brief at 50-51. At no time have Defendants argued that medical testimony is required. Rather, Defendants' argument is when a plaintiff's evidence does not include medical treatment or a medical diagnosis, such evidence only supports awards in the lower range, as explained in *Jasper*, 764 N.W.2d at 772.

by Defendants in their Opening Brief.[5] Defendants' Brief at 56-60. Rumsey gave short shrift to Defendants' argument that the settlement was relevant to his claim for past and future emotional distress, citing no cases, and attempting to confuse the Court on the timing of his claims. *See* Rumsey Brief at 63-64.

Rumsey and his wife testified at length about their financial distress and how it affected their emotional distress after Rumsey's termination. (App. 558:24-559:3; 565:13-20; 656:11-23; 657:4; 502:24-503:3; 520:24-521:3). It does not matter that Rumsey and his wife did not testify about financial distress from 2017-2019 (which is exactly Defendants' point; they had no such stress due to the lump

[5] In addition, the district court should have offset the jury's back pay award with the $100,000 Rumsey received, which was paid to him in part to cover wages for periods of time he could not work in 2015-2016 due to his work injuries. In their Opening Brief, Defendants pointed out that following termination, Rumsey did not immediately seek other jobs and "could not work in 2016" due to his work injuries. Def. Brief at 57. Defendants agree that Rumsey later found some jobs in 2016. Defendants' point is that even Rumsey conceded at trial that there were periods of time he could not work at all in 2016. Rumsey's statement that Defendants' reference to Rumsey's testimony is "unequivocally false" is taken out of context and histrionic. Rumsey Brief at 62-63. Rumsey did indeed testify that he did not immediately look for work after he was terminated, rather: "I had to heal up a little bit with my back first." (App. 558:3-12). Rumsey also testified he collected $9,123 in unemployment benefits in 2016 and only had income from other employment of $5,878. (App. 633:19-634:7). Further, Rumsey is incorrect in his assertion that Exhibit EE (total paid workers' compensation benefits) and Exhibit FF (Rumsey's workers' compensation interrogatory answer in which he seeks TTD and TPD benefits for periods he could not work in 2015-2016) are not in the record. (*See* App. 749; 750-753). Defendants submitted them to the district court to allow the court to consider the legal argument that the jury's back pay award should be offset with the workers' compensation settlement. Even exhibits not admitted to the jury are in the record if submitted to the district court.

sum settlement, yet Defendants could not say this to the jury). Rumsey maintained his claim for "past" emotional distress from December 2015 to the date of trial, August 2019, and maintained his claim for "future" emotional distress. As the settlement in February 2017 fell in the middle of the so-called "past" period, it was certainly relevant to this claim. It was also relevant to the claim of future emotional distress. The lump-sum payment of $100,000 in February 2017—particularly for someone who made $14,519 in wages, salaries, and tips for the entirety of 2015 and who received $15,001 in wages, salaries, tips, and unemployment benefits in 2016—was clearly relevant to the issue of whether Rumsey's financial and related stress was ameliorated due to that settlement. *See* (App. 760-761; 762-763).

Further, the source of the funds does not matter. *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").

Rumsey's receipt of the $100,000 settlement was relevant to his emotional distress claims, particularly in light of his reliance on the financial distress he allegedly suffered, and Defendants were unfairly prejudiced by the exclusion of this evidence. The district court abused its discretion by refusing to admit this evidence.

CROSS-APPEAL ARGUMENT

V. The District Court's Denial of Front Pay Should Be Affirmed.

A. The Standard of Review is Abuse of Discretion.

Defendants agree that Rumsey preserved error on this issue. Rumsey is incorrect, however, regarding the standard for this Court to use in reviewing the district court's denial of front pay. An award or denial of front pay should not be disturbed "unless it appears flagrantly excessive or lacks evidentiary support." *Ayers v. Food & Drink, Inc.*, No. 0-023, 2000 WL 1298731, at *5 (Iowa Ct. App. Aug. 30, 2000) (*citing Lynch v. City of Des Moines*, 454 N.W.2d 827, 837 (Iowa 1990)). Federal courts interpreting the ICRA, and the Iowa Court of Appeals in recent years, have held that this is essentially an abuse of discretion

standard. *See Boyle v. Alum-Line, Inc.*, No. 07–0372, 2008 WL 3916453, at **3, 4 (Iowa Ct. App. Aug. 27, 2008), *vacated on other grounds*, 773 N.W.2d 829, 830 (Iowa 2009); *Thannisch v. Teikyo Marycrest Univ.*, No. 1999-377, 2000 WL 204121, at *2 (Iowa Ct. App. Feb. 23, 2000) ("A court's decision whether to order reinstatement or front pay is reviewable for an *abuse of discretion*.") (emphasis added); *see also Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 806 (8th Cir. 2013) ("Front pay is an equitable remedy, and we review the decision to award front pay as well as the calculation of front pay for *abuse of discretion*.") (emphasis added); *Ollie v. Titan Tire Corp.*, 336 F.3d 680, 687 (8th Cir. 2003) ("We review the district court's award of front pay for *abuse of discretion*.") (emphasis added); *Rasmussen v. Quaker Chemical Corp.*, 993 F. Supp. 677, 683 (N.D. Iowa 1998) ("The choice between the remedies of reinstatement and front pay is within the discretion of the court.").

B. The District Court Did Not Abuse its Discretion in Declining to Award Front Pay.

The district court thoroughly reviewed the relevant legal factors and the relevant facts in exercising its discretion to deny Rumsey's award of front pay, and its denial should be affirmed. Rumsey's complaints about the district court's order on this issue include three discrete attacks on the district court's decision: (1) the workers' compensation settlement was improperly construed as earnings; (2) the comparison of Rumsey's eight years of working at Windsor to the entirety of his

career was improper; and (3) consideration of the other monetary awards received by Rumsey in this case was improper. *See* Rumsey's Brief pp. 64-65.

In considering Rumsey's request for front pay, the district court applied the relevant facts in this case to eleven factors set forth in *Ogden v. Wax Works, Inc.*, 29 F. Supp. 2d 1003 (N.D. Iowa 1998). (*See* App. 994-1000). Rumsey agreed that this was the appropriate test to apply before the district court. (*See* App. 994).

Rumsey argues on appeal that the district court rejected his front pay request because the "workers' compensation settlement already compensated him for future loss of earnings." *See* Rumsey's Brief p. 65 (citing 12.24.2019 Order, p. 8). A thorough reading of the district court order cited by Rumsey, however, tells a different story. The district court concluded that:

> Plaintiff has not met [his] burden of proving that any loss of his future earnings is not more likely the result of Plaintiff's physical limitations and injuries, for which he has already been compensated by workers compensation benefits, and not the result of his wrongful termination.

(App. 997). The district court later states as follows with regard to the workers' compensation settlement:

> Since the award of front pay is denied, the Court need not address Defendants' claim that any front pay award must be offset by Plaintiff's workers' compensation award. By separate order, the Court has already concluded that Plaintiff's award of back pay is not properly set off by such workers' compensation award.

(App 1000). The district court did not offset the workers' compensation settlement against an award of front pay, nor did the district court improperly consider that settlement in its analysis of Rumsey's request for front pay. The district court simply recognized that Rumsey failed in his burden to establish that any loss of future earnings was due to his termination from Windsor in light of the fact that he also had physical limitations that would likely prevent him from obtaining future employment—the latter of which was already addressed by his workers' compensation settlement. *See id.*

Rumsey also ignores the full context of the district court's analysis related to his tenure at Windsor. The district court stated the following on that issue:

> In considering Plaintiff's request, the Court also finds noteworthy that Plaintiff worked at Windsor Windows for a relatively short portion of his work life – eight years – and he was an at-will employee. Neither factor weighs in favor of an award of front pay. Plaintiff's position is that, absent the discrimination he was subject to, it is highly likely that Plaintiff would have remained in his position at Windsor Windows until his retirement. This is clearly speculative at best, given Plaintiff's age, his future physical limitations, and the cyclical nature of Windsor Windows' business – which the evidence at trial established – is largely dependent on economic factors outside its employees' control, like demand for new residential construction.

(App. 997). Viewed in context, the district court's consideration of Rumsey's tenure at Windsor was entirely proper, and it certainly does not serve as a basis to overturn the district court's denial of front pay.

Finally, Rumsey attacks the denial of front pay based on the district court's reference to Rumsey's "substantial monetary award" for emotional distress. *See* Rumsey's Brief p. 65 (citing 12.24.2019 Order, p. 8). This reference is actually found on page 11 of the district court order, and the discussion about the emotional distress award was not improper given the factor the district court was analyzing in that portion of its order – the length of time it will take Rumsey to secure comparable employment. (*See* App. 999-1000).

Defendants would be remiss if they did not address one other factor that strongly weighs in favor of the district court's denial of Rumsey's request for front pay: Rumsey's clear ability to obtain employment post-termination, his later voluntary departures from employment, and his eventual termination due to misconduct shortly before trial in this case. The district court recognized in its order that Rumsey found work with multiple employers after he was terminated from Windsor; he worked in food delivery, and after obtaining job training, as a truck driver. (App. 996). The district court also noted that the reason Rumsey was unemployed at the time of trial was because he had recently lost his job as a truck driver "due to his own actions in causing damage to his truck and other trucks due to driver-error related collisions. In other words, Rumsey's recent loss of employment was due solely to his own poor work performance." (App. 998). The

district court recognized that there was "no reason to suggest Plaintiff will not be able to find a new position in the trucking field." (App. 998-999).

The district court thoroughly analyzed the relevant facts in this case and weighed the eleven *Ogden* factors before determining that an award of front pay was not warranted. This Court should affirm the district court's denial of front pay.

VI. The District Court Did Not Abuse Its Discretion in Denying Admission of Evidence Regarding Alleged Acts that Were Not Administratively Exhausted.

A. Preservation of Error and Standard of Review

Defendants agree that Rumsey preserved error on this issue. On appeal, this Court reviews the district court's decisions regarding admission of relevant evidence for an abuse of discretion. *See Eisenhauer ex rel. T.D. v. Henry Cty. Health Ctr.*, 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)).

B. The District Court Did Not Abuse its Discretion in Refusing to Allow Presentation of Evidence Regarding Alleged Failures to Accommodate that Rumsey Failed to Administratively Exhaust.

The district court granted the Defendants' motion for summary judgment with regard to alleged claims arising prior to December 10, 2015, as Rumsey failed

to administratively exhaust those claims. (*See* App. 30-31). Though Rumsey conceded this was correct, he nevertheless sought to admit evidence of those unexhausted claims at trial. (App. 31). The evidence dates back as far as 2008 and includes, among other things, allegations that Windsor did not take certain steps to accommodate Rumsey's hearing impairment. App. 113-118; 554:22-555:7; 143:9-25).

The district court, in an order dated August 23, 2019, addressed the parties' respective motions in limine, including Rumsey's request to present evidence on five alleged acts of discriminatory conduct in the workplace. (*See* App. 130). The basis upon which Rumsey sought to submit this evidence to the jury at that time was to show Defendants' discriminatory "motive and bias in their conduct within the limitations period," erroneously comparing the case to a hostile work environment claim. (*See* App. 123). Rumsey did not allege a hostile work environment claim in this lawsuit. (*See* app. 9-14). In its August 23 Order, the district court determined that two of the five categories of alleged discriminatory conduct could be admitted at trial based on the probative nature of those types of conduct in relation to the claims brought within the statutory period: (1) Rumsey's request that training videos at Windsor use closed captions; and (2) Rumsey's request for tornado and fire signs rather than just sirens. (*See* App. 131-132).

In a motion for reconsideration of the Court's August 23 Order, Rumsey altered his argument, instead contending that the alleged prior acts of discrimination that had occurred before the statute of limitations period served as the basis for his retaliation claim—that these acts were somehow the alleged "protected activity" upon which that claim was premised. (*See* App. 397). Defendants responded through counsel on the record at trial and noted that the Motion for Reconsideration, filed on the third day of the jury trial, was the *first time* in this case in which he had asserted the conduct occurring prior to the 300-day statute of limitations period served as the basis for his retaliation claim. (*See* App. 465:22-466:23). He did not assert these facts as the basis of his retaliation claim before the ICRC, in his Petition, or in the many other briefs submitted in this case. *Id.* The district court agreed with Defendants' argument and understanding of the facts on this issue, and reaffirmed its decision at the summary judgment stage and in its prior order on the motions in limine. (App. 466:24-467:2.)

Again, on appeal, Rumsey argues that evidence of these unexhausted claims of alleged discrimination should have been allowed because the mid-trial pivot in his retaliation theory suddenly encompassed these prior alleged acts of discrimination. Furthermore, for the first time in this case, Rumsey now claims that part of his retaliation claim is based on the fact that he was allegedly informed by someone at Windsor that "he could not be a lead because he could not hear the

walkie-talkie or phones." *See* Rumsey's Brief p. 67. Rumsey briefly provided testimony about an unidentified person at Windsor telling him he would not be promoted because of his inability to hear, but he never tied this in any way to his retaliation or other claims. (*See* App. 554:2-14).

Altering his retaliation claim mid-trial, and continuing to advance this novel theory now on appeal, is certainly a creative attempt to argue evidence from years ago is somehow relevant to the claims actually part of the trial. If the district court had allowed Rumsey to admit evidence of these alleged prior acts, it would have resulted in multiple mini trials within a trial, delving into issues irrelevant to the claims that were properly plead in this case. Rumsey did not bring a hostile work environment claim or a failure to promote claim. If Rumsey truly believed he was retaliated against because of these alleged prior acts, he should have included those acts in his filings before the ICRC and in his Petition in state court.

Notably, the only Iowa case Rumsey cites in support of his argument for admission of this evidence is this Court's decision in *Hamer v. Iowa Civil Rights Commission*, 472 N.W.2d 259 (Iowa 1991). *See* Rumsey's Brief p. 67. The Court in *Hamer*, however, addressed the standard of admissibility for administrative hearings, which is a different standard than that of a jury trial. *See Hamer*, 472 N.W.2d at 262-63. Notably, the *Hamer* court made this point abundantly clear. *See id.* 262 ("The standard for admissibility in administrative hearings is that the

evidence be 'the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs . . . even if it would be inadmissible in a jury trial.' This section conforms with the general rule that administrative agencies are not bound by technical rules of evidence.") (internal citations omitted) (quoting Iowa Code § 17A.14(1) (1989), then citing *McConnell v. Iowa Dep't of Job Serv.*, 327 N.W.2d 234, 237 (Iowa 1982)). Only after clarifying that the Court was addressing evidentiary standards in the context of an administrative hearing did the Court provide the language that Rumsey relies upon in this case. *See Hamer*, 472 N.W.2d at 262-63. *Hamer* is therefore inapposite.[6]

Even if the district court abused its discretion in preventing the admission of this evidence, an error regarding the admission or non-admission of evidence "does not require reversal 'unless a substantial right of the party is affected.'" *Mohammed v. Otoadese*, 738 N.W.2d 628, 633 (Iowa 2007) (quoting Iowa R. Evid. 5.103(a)). This means the complaining party must show prejudice due to the district court's abuse of its discretion. *Mohammed*, 738 N.W.2d at 633. Rumsey has wholly failed to demonstrate that he suffered any prejudice as a result of the district court's ruling. In fact, Rumsey still obtained a jury verdict of $508,000.00.

[6] The other cases cited by Rumsey from out-of-state courts did not address the admissibility of evidence at trial in factual circumstances even remotely similar to the present case; they are therefore inapposite.

Because the district court did not err in refusing to admit evidence related to claims that Rumsey failed to administratively exhaust, and because any purported error in the exclusion of such evidence would be harmless, this Court should affirm the district court's evidentiary decisions.

CONCLUSION

If Windsor had placed Rumsey on leave after his work place accident in January 2015, this disability discrimination/retaliation/failure to accommodate case would not exist and could not have been brought. In hindsight, we now know that by January 2016, Rumsey's injuries did not heal to the point that he could perform the essential functions of his position, or any other hourly plant floor position—he had reached MMI on all of his workplace injuries. The Workers' Compensation Act, Chapter 85, exists to deal with this exact situation, and Rumsey filed a workers' compensation claim. Simply because Windsor attempted to find light-duty assignments for Rumsey in 2015, it should not face liability for disability discrimination under the ICRA. Further, liability under the ICRA is not created because an employee is terminated while on workers' compensation light duty. Iowa law provides for a claim of retaliation for exercising the public policy right to pursue workers' compensation benefits, but Rumsey did not bring such a claim. What is evident from the record in this case is Rumsey was permitted to transform a workers' compensation retaliation case into a disability discrimination

case. Defendants-Appellants/Cross-Appellees respectfully request that the Court reverse the judgments of the district court and dismiss the case in its entirety. In the alternative, Defendants request that this Court vacate the judgments for the reasons raised by Defendants and remand the case for a new trial.

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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