IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0135

POLK COUNTY CASE NO. LACL138889

RONALD RUMSEY
Plaintiff-Appellee/Cross-Appellant

vs.

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

PLAINTIFF-APPELLEE/CROSS-APPELLANT'S AMENDED FINAL REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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ARGUMENT

I. THE COURT ERRED IN DENYING FRONT PAY

Front pay in lieu of reinstatement is an equitable question. "The standard of review for equitable questions is de novo." *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 540 (Iowa 1996). Defendants argue at length for "essentially an abuse of discretion standard" and claim the district court's decision "should not be disturbed 'unless it appears flagrantly excessive or lacks evidentiary support.'" Def. Brief 35 (quoting *Ayers v. Food & Drink, Inc.*, 2000 WL 1298731, at *5 (Iowa Ct. App. Aug. 30, 2000)). However, the "flagrantly excessive" quote refers to damages awarded by "the trier of fact." *Id.* *Ayers*, and the case it cites, were reviewing jury verdicts, not judicial determinations of front pay. *Id.* (citing *Lynch v. City of Des Moines*, 454 N.W.2d 827, 837 (Iowa 1990). Defendants cite solely unpublished or

federal opinions, and do not respond to the clear language of *Vaughan*. The Eighth Circuit may use an abuse of discretion standard, but Iowa does not.

A. Ron's Physical Limitations Do Not Preclude Front Pay

Defendants argue the district court did not err in denying front pay because Ron's physical limitations "would likely prevent him from obtaining future employment . . . which was already addressed by his workers' compensation settlement." (Def. Brief 38). As described in Section III(A) of Plaintiff's Brief, it is legally impossible to construe Ron's compromise settlement as payment for future earnings, so the court erred as a matter of law. *See* IOWA CODE § 85.35(9) ("payment made pursuant to a compromise settlement *shall not be construed* as the payment of weekly compensation") (emphasis added).

Denying front pay because of Ron's physical limitations also improperly focused on Ron's physical condition rather than the consequences of Defendants' illegal conduct. The goal of front pay is to make the plaintiff whole and restore him, "so far as possible . . . to a position where he would have been were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Absent Defendants' unlawful discrimination, Ron would likely still be working and earning full pay and benefits at Woodgrain. If Ron's future job prospects were damaged because of his physical condition, then front pay is *even more* appropriate. *See Dix v. Casey's Gen. Stores, Inc.*, 2020 WL 105087 (Iowa Ct. App. Jan. 9, 2020) (upholding $96,871.72 in front pay to a plaintiff who had not

applied for any subsequent jobs due to her physical limitations). Defendants admitted they could and would have accommodated Ron's restrictions. Ron would not have faced the difficulty of finding a new job had Defendants not illegally deprived him of his old one.

B. The District Court Cannot Deny Front Pay on a Theory the Jury Rejected

Defendants argue Ron failed to mitigate his damages. (Def. Brief 39). The jury soundly rejected this theory at trial, and the district court did not have the authority to deny equitable relief on a basis that contradicts the jury's determination of facts. *See Borgan v. MTD Consumer Group, Inc.*, 919 F.3d 332, 337-38 (5th Cir. 2019) (and cases cited therein). Defendants also claim Ron should be denied front pay because he was sometimes able to make more money after Windsor fired him than he did working at Windsor in 2015. There are two problems with this argument. First, it contradicts Defendants' earlier claim that Ron's physical limitations prevented him from obtaining subsequent employment—how could Ron ever make *more* money after his termination if he was actually physically unable to obtain any future employment? Next, Ron was injured in 2015 and missed a lot of work because of pain and for doctor's appointments. (T-Day 4, 106:23-107:6). The year 2015 was not a "normal" one for Ron financially. *Id.* Front pay should not be based on an objectively anomalistic time period.

Courts have awarded front pay when the plaintiff did not even *apply* for jobs after being fired. In *Vetter v. State*, the district court awarded front pay and equitable relief to a victim of disability discrimination. 2017 WL 2181191. The defendants argued Vetter had not looked for any subsequent employment and was not entitled to front pay. District court Judge Robert Hanson rejected the argument:

> The court finds that the job possibilities presented by defendants are not substantially equivalent to plaintiff's position with the DNR in terms of their compensation or their responsibilities, for all the reasons cited by plaintiff. The court also finds there is no reasonable likelihood that a man of plaintiff's age and abilities-or disabilities, as the case may be-would be able to find substantially equivalent employment even if he had made a concerted effort to find same. Taking into account all of the factors cited by plaintiff at page 2 of his supporting brief, especially his age, the duration and specific nature (both compensation-wise and responsibility-wise) of his employment with defendants, his work and life expectancies, and his abilities and/or disabilities, the court concludes that an award of front pay in the amount requested by plaintiff is in order.

Id. The district awarded $88,690.19 in front pay, upheld on appeal. *Id.*; *see also Dix*, 2020 WL 105087.

The most glaring differences between *Vetter* and this case are that (1) Defendants presented no evidence of other job possibilities, and (2) Ron went above and beyond to find work. Ron was not required to "go into another line of work, accept a demotion, or take a demeaning position." *See Mathieu v. Gopher News Co.*, 273 F.3d 769, 784 (8th Cir. 2001). Ron did all three. He took a massive pay cut and went from a skilled laborer to a pizza delivery guy. (T-Day 4, 23:3-24:17). Delivering food is honorable work but was a clear step down from the

skilled labor Ron performed for Defendants. Ron then worked to obtain his CDL, even though he had to petition the federal government for a variance due to his deafness. *Id.* Defendants offered zero evidence to counter Ron's admirable efforts at mitigation. In such a situation, the plaintiff is entitled to judgment as a matter of law on any mitigation defense. *Pittington v. Great Smoky Mountain Lumberjack Feud, LLC*, 880 F.3d 791, 800 (6th Cir. 2018).

The fact that Ron was let go from the trucking job he held before trial cannot be held against him in calculating his lost wages. The employer's liability for lost wages is tolled only when the plaintiff quits his job (and working conditions are not unreasonable) or when he is fired for gross, egregious, or willful misconduct. *Maverick Trans., LLC v. U.S. Dep't of Labor*, 739 F.3d 1149, 1157 (8th Cir. 2014); *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 381 (1st Cir. 2004) (it is "error to [completely] cut off, as a matter of law, the ability of a successful Title VII plaintiff to receive further back pay or front pay once he is fired for misconduct from the position he takes after leaving the discriminatory employer."); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996), *opinion amended on denial of reh'g*, 97 F.3d 833 (6th Cir. 1996) (back pay not tolled despite employee being fired from subsequent employer); *NLRB v. Ryder Sys,*

Inc., 983 F.2d 705, 713-14 (6th Cir. 1993);[1] *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992) *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 513 (7th Cir. 1991) (no reduction of back pay award when defendant did not prove plaintiff's discharge was for "gross misconduct."); *Brenlla v. Lasorsa Buick Pontiac Chevrolet, Inc.*, 2002 WL 1059117, at *11 (S.D.N.Y. May 28, 2002); *Smith v. The Berry Co.*, 1997 WL 358123, at *14 (E.D. La. June 24, 1997). The employer has the burden to prove that backpay should be tolled. *Thurman*, 90 F.3d at 1169; *P*I*E*, 923 F.2d at 513-14.

> The facts in *Thurman* provide a good illustration of these principles.
>
> > Yellow Freight claims that Thurman failed to mitigate his damages because Riggs Trucking Company, his subsequent employer, fired him for cause. During his probationary period at Riggs, Thurman drove a truck under an overpass that was too low. As a result, he bent the exhaust pipe. Riggs discharged him due to the accident. There was no evidence that Thurman acted intentionally. Thus, Yellow Freight failed to establish that Thurman acted willfully or committed a gross or egregious wrong.

Id. *Thurman* is on point. Ron lost his job because he, as a newly minted CDL driver, had three unintentional and minor traffic mishaps over his first four and a half months on the job. (T-Day 4, 37:2-38:22). Even the district court's order

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[1] Because the lost wages remedies in Title VII were modeled after those contained in the National Labor Relations Act, those cases are particularly persuasive in deciding appropriate remedies for employment discrimination. *See Moody*, 422 U.S. at 419.

acknowledged Ron's job loss was due to "his own poor work performance," not misconduct. (12.24.19 Order on Equitable Relief, p. 9). Just like in *Thurman*, Defendants "failed to establish that [Ron] acted willfully or committed a gross or egregious wrong." *Thurman*, 90 F.3d at 1169. Defendants are responsible for the full amount of Ron's lost wages.

The district court felt Ron's physical impairment and recent job loss created uncertainties for Ron's future employment, then used that uncertainty as a reason to deny front pay. This violated the longstanding principle that any uncertainties in deciding lost wages in civil rights cases must be resolved against the employer. *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 531 (Iowa 1990); *Van Meter Indus. v. Iowa Civil Rights Comm'n*, 675 N.W.2d 503, 514 (Iowa 2004); *Boyle v. Alum-Line Inc.* 2008 WL 3916453 at *2, (Iowa Ct. App. August 27, 2008); *Pittington*, 880 F.3d at 799. "[U]nrealistic exactitude is not required." *Hy-Vee*, 453 N.W.2d at 530; *Boyle*, 2008 WL 3916453 at *2. This Court should find the district court erred and remand for an award of front pay.

II. THE DISTRICT COURT WRONGLY EXCLUDED PRIOR ACTS OF DISCRIMINATION COMMITTED AGAINST PLAINTIFF HIMSELF

"In a claim of disparate treatment in employment, proof of the employer's motive is critical," although it "will rarely be announced or readily apparent." *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 263 (Iowa 1991). Given the difficulty of proving an employer's motivation in discrimination cases, "[a]

plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987).

Iowans have the right to enter a workplace free from discrimination, and if they believe they have been discriminated against, to have their case decided by a jury of their peers, whose "sole duty is to find the truth and do justice." (Inst. 1); IOWA CODE § 216.6; *McElroy v. State*, 703 N.W.2d 385 (Iowa 2005). To properly assess human motivation, juries need to hear the whole story. In removing Defendants' decision to fire Ron from the context in which it was made, the district court took an artificially restrictive evidentiary approach never adopted by an Iowa appellate court. The law does not cordon off pieces of evidence into rigid boxes that do not interact. That is not how humans operate. Human actions can rarely be fully explained in the moment they are taken, and the law reflects that.

A. The District Court's Exclusion of Evidence Gave the Jury an Incomplete Picture

In 1808, during his long struggle with his descent into deafness, Ludwig van Beethoven premiered his Fifth Symphony. The Fifth is popularly referred to as the "Fate Symphony" due to Beethoven allegedly saying of the iconic "Ba-ba-ba-bum" introduction: "Thus fate knocks at the door." In four emotional movements, Beethoven struggles, vacillates, and finally succeeds in his quest to "seize fate by the

throat." Where the first movement is intimidating, the final movement is triumphant. At around the three-and-a-half-minute mark, the movement almost goes silent. Beethoven then resurrects the opening movement's formidable four-note phrase. Yet, while the phrase is the same, the notes have been rendered harmless--almost playful--as if Beethoven is thumbing his nose at fortuitous circumstances that before had nearly led to his suicide.

It is a brilliant musical turn. But if someone heard just the fourth movement, the four-note phrase would make no sense and seem out of place. It would be impossible for someone to understand the depth of feeling in those four flittering notes and *why* Beethoven placed them in the final movement without hearing their arresting use in the first. It is no wonder (and a little too on the nose) that those small, musical phrases are called "motives."

Ron's jury was tasked with deciding the facts of what happened, but the district court's creation and use of its own admissibility test deprived the jury of the whole story. The district court allowed Ron to enter some, but not all, of his evidence, forcing Ron to tell his story by patching together sometimes disjointed scenes. For example, Ron could talk about his requests for closed captioning on training videos, even though it traced all the way back to Ron's hiring. At the same time, the district court forbid Ron from testifying about the multiple disability discrimination complaints he made—just months before he was fired—to the very people who fired him. (T-Day 3, 145:19-147:4) (App. 489-91); (T-Day

4, 10:12-11:18; 12:16-14:14); (T-Day 3, 5:22-7:13) (App. 404-06). This was error because:

> Particularly in the discrimination area, it is often difficult to determine the motivations of an action and any analysis is filled with pitfalls and ambiguities. A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990) (superseded in part by statute).

B. Prior Acts are Admissible in Claims Involving Discrete Acts

Defendants fail to understand the difference between admitting evidence of the actual adverse action versus admitting evidence to help show background and motive. Defendants keep talking about a "hostile work environment" claim, but Ron did not bring a hostile work environment claim. Ron brought a claim of disparate treatment based on discrete acts of discrimination.

A hostile work environment claim, by its "very nature involves repeated conduct . . . It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Natl. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). A hostile work environment plaintiff may use acts within and without the filing period to establish a causal chain of repeated conduct. For this reason, so long as one "act contributing to the claim

occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Id.* at 117.

A claim based on discrete acts is different:

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice."

Id. at 114. For such a claim, only acts falling within the filing period are actionable. *Id.* But, as the *Morgan* Court made clear, prior acts are admissible "as background evidence to support a timely claim." *Id.*

In *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733 (Iowa 2003), the Iowa Supreme Court fully and unanimously adopted the *Morgan* Court's holding.

In December 2015, Defendants failed to accommodate Ron and then fired him. Ron filed timely charges addressing those facts, and upon those acts the jury found Defendants liable. Ron's other evidence of past acts of discrimination against him was absolutely admissible as "background evidence" supporting his timely claims. *See id.* at 741.

A plaintiff may prove a claim with evidence of events occurring prior to the statute of limitations cut off because "[s]tatutes of limitations apply to *claims*, not the *evidence* supporting the claims." *Boggs v. Kentucky*, 1996 WL 673492, at *2 (6th Cir.

Nov. 20, 1996) (emphasis added) (citing *Black Law Enforcement Officers Ass'n v. City of Akron*, 824 F.2d 475, 482–83 (6th Cir. 1987)).

Here is just a sprinkling of the many other cases holding similarly:

- *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (A discriminatory act for which the employer's liability is time-barred "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.");
- *Clements v. Gen. Acc. Ins. Co. of Am.*, 821 F.2d 489, 492 (8th Cir. 1987) (discriminatory remarks made "several years prior to the [plaintiff's] termination" and in reference to positions other than the job at issue in the case were "nonetheless probative of a general intent to inclination to discriminate");
- *Wells v. New Cherokee Corp.*, 58 F.3d 233, 236 (6th Cir. 1995) (plaintiff may offer defendant's time-barred "conduct as evidence of its motivation for eventually firing" the plaintiff);
- *Petrosino v. Bell Atl.*, 385 F.3d 210, 220 (2d Cir. 2004) ("evidence of earlier promotion denials may constitute relevant 'background evidence in support of a timely claim'");
- *West v. Ortho-McNeil Pharm. Corp.*, 405 F.3d 578, 581–82 (7th Cir. 2005) (*Morgan* is not limited to hostile work environment claims, and where a plaintiff timely alleges a discrete discriminatory act—like termination based on protected status and in retaliation for filing a complaint—acts outside the statutory time frame can be used to support the timely claim);
- *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 177-78 (2d Cir. 2005) ("relevant background evidence, such as statements by a decisionmaker or earlier decisions typifying the retaliation involved, may be considered to assess liability on the timely alleged act").

Defendants claim Ron cannot enter *evidence* that was not specifically set forth in his civil rights complaint. This is absurd. A civil rights charge need include only the acts upon which the claim is based. *See* IOWA CODE § 216.13 ("a claim under this chapter shall not be maintained unless a complaint is filed with

the commission within three hundred days after the alleged discriminator or unfair practice occurred.").

Defendants' confusion is like the employer's in *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988) (overruled in part on other grounds by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Estes*, a black former employee alleging race discrimination was barred from introducing prior acts of discrimination against black customers. *Id.* at 1104. At trial, the defendant successfully excluded the evidence by arguing it was insufficient to "prove that Ford's usual business practice was to discriminate." *Id.* The Eighth Circuit reversed:

> Ford confuses the sufficiency of evidence to establish a violation with its admissibility. Evidence of prior acts of discrimination is relevant to an employer's motive in discharging a plaintiff, even where this evidence is not extensive enough to establish discriminatory animus by itself.

Id.

Iowa Rule of Evidence 5.404(b) grants admission of "evidence of other crimes, wrongs, or acts . . . as proof of motive, opportunity, intent . . ." Defendants' argument and brief completely flout this established Rule of Evidence.

The second element of the district court's on-the-fly admissibility test was that there must be "clear proof" the acts were committed. (T-Day 3, 13:22-14:18)

(App. 408-9).[2] Notwithstanding the dubious suitability of this standard, after hearing Ron's offers of proof, the district court conceded "there has been showing sufficient to find clear proof of the acts based on the testimony of Ms. Mallaney, and I think, presumably, that the plaintiff will testify that these acts occurred, so I think that the clear proof standard has been met." (T-Day 3, 15:20:16-9). Despite the reliability of the evidence, the district court still excluded it by deciding it lacked a "causal connection" to the claims before the jury and would be relevant only if there were a "claim for a hostile work environment." *Id.* As argued above, conflating the admissibility of background evidence in a discrete act claim with causally connected evidence in a hostile work environment claim was error.

C. Prior Discrimination Against the Plaintiff, By the Defendants, is Clearly Admissible

The exclusion of evidence was particularly erroneous because the evidence showed discrimination that happened to Ron, while working for the Defendants.

An employer's prior discriminatory acts may be against the plaintiff or against non-parties. Evidence of discrimination against non-parties "'should normally be freely admitted at trial' because 'an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate

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[2] It remains unclear what "clear proof" means. Regardless, in no other circumstance do the Rules of Evidence force a party to convince a judge his evidence is accurate before the judge will consider its admissibility.

treatment are a pretext for intentional discrimination.'" *Dindinger v. Allsteel, Inc.*, 853 F.2d 414, 425 (8th Cir. 2017) (quoting *Hawkins v. Hennepin Tech. Ctr.*, 900 F.2d 153, 155-56 (8th Cir. 1990); *Estes*, 856 F.2d at 1102-04 ("It defies common sense to say, as Ford implies, that evidence of an employer's discriminatory treatment of black customers might not have some bearing on the question of the same employer's motive in discharging a black employee."). Any limitation on admissibility depends on whether the evidence is "relevant 'in the context of the facts and arguments' in the case." *Dindinger*, 853 F.2d at 425 (quoting *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008)). This "depends on many factors, including how closely related to the evidence is *to the plaintiff's circumstances* and theory of the case." *Sprint*, 552 U.S. at 388 (emphasis added).

If relevant acts of discrimination against non-parties should be "freely admitted," prior acts of discrimination against the plaintiff should always be admitted. *See Dindinger*, 853 F.2d at 425. After all, if the strength of non-party evidence depends on its resemblance to the plaintiff's case, Ron's evidence was staring back from an evidentiary mirror. One of the most direct ways an employee can establish an employer's unlawful motive is "by showing that the employer in the past had subjected [him] to unlawful discriminatory treatment." *Edmond v. Plainfield Bd. of Educ.*, 171 F. Supp. 3d 293, 306 (D.N.J. 2016) (internal citations omitted).

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the United States Supreme Court soundly rejected the notion that evidence of bias becomes

less relevant just because it is not directly connected to the adverse action alleged. The Court took the lower court to task for acknowledging the potential damning nature of age-related comments but discounting them on the ground that they were not made in the direct context of the plaintiff's termination. *Id.* at 152-53. If discriminatory statements without a "causal connection" to the adverse action at issue can be the basis to overturn summary judgment (as in *Reeves*), then they are undoubtedly admissible.

The Polk County District Court excluded Defendants' prior acts of disability discrimination against Ron and Defendants' failures to accommodate Ron's disabilities. The supervisors involved were the named Defendants. Finally, the excluded evidence was not evidence of discriminatory acts against others, but against Ron Rumsey. It was patently admissible.

D. The Evidence was Admissible to Rebut Defendants' Positions

Even if this Court determined that the prior acts of discrimination against Ron were irrelevant to his claims of discrimination, Defendants made the evidence relevant by repeatedly eliciting testimony from their witnesses that there had been no prior complaints. Defendants wrongly claim Plaintiff's only other argument for admitting the prior acts was to support of his retaliation claim. As argued in Plaintiff's Brief, the jury was entitled to hear Ron's evidence of his own prior complaints of discrimination because it contradicted Defendants' position and

undermined their credibility. Here were the questions defense counsel posed to Mallaney, Coppock, and Crivaro:

To Mallaney:

> Q: In all the time you've worked at Windsor, has any employee brought a claim against you for disability discrimination?
>
> A: No, they have not.
>
> Q: Would Mr. Rumsey be the first?
>
> A: Correct.

(T-Day 2, 137:10-15). To Coppock:

> Q: In the time you've been at Windsor, has an employee ever brought a claim against you for discrimination? Like this present light duty, for example?
>
> A: I've been in the window business for 36 years, 7 of those at Windsor, and I've never been through this before in all my years.
>
> Q: So Mr. Rumsey is the first person to bring a discrimination suit against you?
>
> A: In all my years in this - - in this window and door business, yes.

(T-Day 2, 260:20-261:5). And to Crivaro:

> Q: In all the time you've been at Windsor, I think you said it was 22 years, has any employee brought a claim against Windsor for disability discrimination that you're aware of?
>
> A: They have not.
>
> Q: Is Mr. Rumsey the first to bring a lawsuit against Windsor for disability discrimination that you're aware of?
>
> A: Yes, he is.

(T-Day 3, 77:14-22).

A "claim" may be an assertion of one's rights or it can be a cause of action. BLACK'S LAW DICTIONARY 247 (6th ed. 1990). The first questions defense counsel asked each witness could reasonably be understood to convey to the jury that no employee had ever before "claimed" disability discrimination or made an internal complaint of disability discrimination. This is true particularly in light of the second question asked of and Coppack and Crivaro, differentiating against a "claim" and a "lawsuit."

Crivaro acknowledged outside the presence of the jury that his testimony was intended to convey the message that "not a single person has made a complaint about disability discrimination in the 22 years" he had worked there. (T-Day 3, 79:16-25). These questions gave a false impression to the jury that Defendants have never had external or internal complaints of disability discrimination. (T-Day 3, 80:6-18). The district court denied Ron's argument that these questions opened the door:

> "although it is a close call - - and I am telling counsel for the defendants that you need to be very careful about opening the door for this information because this is a very close call - - I think, based on the questioning so far outside the presence of the jury, that has no opened the door to these other claims.

(T-Day 3, 84:20-85:1). The district court's warning was moot because the damage had been done. And because the district court prevented Ron from asking Defendants if Ron had made complaints of discrimination, the testimony went unchallenged. (Tr. Day. 2, 15:18-16:13).

E. Plaintiff Does not Need to Show Prejudice

Defendants claim that even if the district court's decision to exclude the evidence was error, it was "harmless" because Ron "still obtained a jury verdict of $508,000." Def. Brief, 45. Defendants are apparently admitting Ron's evidence at trial was sufficient to support the jury award, because that is the only way additional evidence could be harmless. More elementary, because Ron is not seeking a reversal of the verdict, there is no burden to show prejudice.

The Court need address Plaintiff's cross appeal only if Defendants are successful in their demand for reversal.

CONCLUSION

For the reasons articulated above, Plaintiff requests the Court affirm the jury's verdict and the district court's denial of Defendants' JNOV, reverse the district court's ruling regarding its denial of front pay, and remand the case for consideration of the attorney fees and costs incurred since the last order.

If the Court reverses the judgment against Defendants, Plaintiff requests that it give the district court guidance so the same mistakes to exclude relevant evidence are not repeated in any retrial.

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ATTORNEY'S COST CERTIFICATE

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

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