In the Iowa Supreme Court
Supreme Court No. 22-1291

SANDRA SELDEN,

Plaintiff-Appellee/Cross-Appellant,

vs.

DES MOINES AREA COMMUNITY COLLEGE,

Defendant-Appellant/Cross-Appellee.

Appeal from the District Court for Polk County
The Honorable Scott Rosenberg

Appellant's Final Reply Brief/Cross-Appellee's Brief
(Oral Argument Requested)

Randall Armentrout, AT0000543
Katie Graham, AT0010930
Haley Hermanson, AT0014174
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: rdarmentrout@nyemaster.com
Email: klgraham@nyemaster.com
Email: hhermanson@nyemaster.com
Attorneys for Defendant-Appellant/Cross-Appellee
Des Moines Area Community College

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Reply Argument

I. Because DMACC Proved that the Wage Differential is Based on Legitimate Factors Other than Sex as a Matter of Law, the District Court Committed Legal Error in Denying DMACC's Directed Verdict and JNOV Motions.

On appeal, Sandra Selden invites this Court to do what she encouraged the jury to do: ignore Bryan Tjaden's nearly 16 years in the ASA2 position before Selden's hire in 2013 and compare only the years of prior general work experience that she and Tjaden had on their respective hire dates. *See* Selden Brief at 19 *(*"It was the jury's job to compare the qualifications Tjaden and Sandy possessed *when they were hired…*").[1] In fact, Selden describes Tjaden's 16 years of

[1] Selden's questions to DMACC witnesses involved in Selden's hire 16 years after Tjaden's hire, asking them to compare the reasons for each's starting salary, resulted in anachronistic assumptions. *See* Selden Brief at 20 ("None of defendant's witnesses could say why defendant first decided to pay Tjaden more than Sandy."). Because Selden was not an employee when Tjaden was hired (and would not be for another 16 years), the only way for a witness to answer such a question would be to enter a time warp. Nevertheless, even witnesses who did not work at DMACC at the time of Tjaden's hire could testify about DMACC's business records, policies, and procedures in place in 1997-1998. Iowa R. Evid. 5.803(6); Iowa R. Civ. P. 1.707(5); *see also Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006) (recognizing a corporate representative "testifies 'vicariously,' for the corporation, as to its knowledge and perceptions").

longevity as a "red herring." *See* Selden Brief at 23 ("The whole point in isolating hiring rates was to account for Tjaden's longevity and ***eliminate it*** as a possible explanation for the pay disparity.") (emphasis in original). Of course, that is not the law in Iowa.

As explained in DMACC's opening brief, longevity or seniority is often a crucial factor other than sex justifying a wage differential in an Equal Pay Act ("EPA") claim. (DMACC Brief at 44-46). Selden cites to no authority involving a strict-liability claim to support her position, and she does not even try to distinguish the numerous cases in which courts have granted summary judgment based on the male comparator's years of longevity or seniority in the same position. *Compare* DMACC Brief at 43-46, *with* Selden Brief at 18-25. Nor does she even mention the Eighth Circuit's recent decision addressing experience as a "factor other than sex" defense to strict-liability wage-discrimination claims under the EPA and ICRA. *See Mayorga v. Marsden Bldg. Maint. LLC,* 55 F.4th 1155, 1160-61 (8th Cir. 2022).

As a matter of law, Tjaden's additional 16 years' experience at DMACC in the very same position constitutes a factor other than sex within the meaning of section 216.6A(3)(d). *See Schottel v. Neb. State*

Coll. Sys., 42 F.4th 976, 981-82 (8th Cir. 2022); *Holder v. City of Cleveland,* No. 1:05CV2402, 2006 WL 3421863, at *5 (N.D. Ohio Nov. 27, 2006).

Further, Tjaden had 13 years' experience in computer programming when he started at DMACC, which must be considered in addition to his 16 years' longevity and experience in the ASA2 position. (JA.III-48).[2] By the time Selden started at DMACC in 2013, Tjaden had 29 years of relevant experience. *Id.*; JA.III-140-146. Even giving Selden credit for the 16 years of relevant experience that she now claims she had prior to her hire, this experience pales in comparison to Tjaden's 29 years. Thus, DMACC established its affirmative defense as a matter of law. Reasonable minds could not differ on this conclusion. *See Mayorga,* 55 F.4th at 1161; *Galindo v. City of Roma Police Dep't,* 265 F.3d 1059, 2001 WL872779 (5th Cir. July 6, 2001).

[2] DMACC refers to the Joint Appendix as "JA," followed by the volume and page number; for example, "JA.I-10" is Joint Appendix, Volume I, page 10.

Additionally, the evidence at trial established the different economic conditions for computer programmers in 1997-1998, when Tjaden was hired, and in 2013, when Selden was hired. (JA.I-436-437[62:15-63:1]; *see* JA.I-1107-1123[16:21-32:7], 1130-1132[39:22-41:20]). Contrary to Selden's view, in *Dindinger v. Allsteel, Inc.,* 853 F.3d 414 (8th Cir. 2017), the Eighth Circuit did not foreclose differing economic conditions as a factor other than sex to prove an employer's affirmative defense. *Id.* at 424. Rather, the court simply held that the employer had not presented evidence that economic conditions caused the pay differentials the plaintiffs experienced based on the facts of that case. *Id*. In its opening brief, DMACC cited cases in which courts have recognized that different market conditions can justify a wage differential as a matter of law. *See* DMACC Brief at 52-53; *Kalu v. Fla. Dep't of Child. & Fams.,* 681 F. App'x 730, 733-34 (11th Cir. 2017).

Moreover, Selden attempts misdirection by citing to a question to Linda Fiderlick at trial, in which Plaintiff's counsel asked whether DMACC hired employees in 1998 *to directly address* the Y2K problem. *See* Selden Brief at 22. Her argument ignores the testimony by

longtime DMACC employees about the college's concerns as Y2K neared. (JA.I-1043-1044[219:19-220:16], 1223-1224[144:22-145:6]). And regardless of whether DMACC was worried about Y2K, it is undisputed that the nationwide concerns created an increased demand for computer programmers at that time, making the labor market for employees with programming skills competitive. (JA.I-1113[22:15-23:6]; DMACC Brief at 50-51).[3] Against this backdrop, DMACC had just recently implemented the Banner system and urgently needed to hire. (JA.I-442[68:17-25], 482[108:18-23], 573-574[199:21-200:16], 1043[219:1-14]).[4]

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[3] Selden's claim that Haefner had "no idea whether Y2K affected the college" (Selden Brief at 22) ignores Haefner's testimony: "I can tell you about what was happening in colleges in Iowa at that time because I was at Iowa State [University]" and "looked at [College and University Professional Association] data." (JA.I-1263-1264[185:21-186:1]).

[4] Selden's contention that DMACC did not present evidence of its urgent hiring needs in 1997-1998 contradicts testimony by several longtime DMACC employees. *See id.* And her broad generalizations about "the women" hired around that time (Selden Brief at 26) disregards each individual's unique background—and the fact that the three other employees hired in 1997-1998 applied for and were hired into different positions (SSS1) than Tjaden (SSS2). *See* DMACC Brief at 19-22.

Perhaps changes in the labor market conditions and DMACC's hiring needs over the course of sixteen years would not have been enough to carry the day on DMACC's affirmative defense standing alone, but these changes must be considered in conjunction with Tjaden's significantly greater experience and tenure. *See Prewett v. Ala. Dep't of Veterans Affs.*, 533 F. Supp. 2d 1160, 1177-78 (M.D. Ala. 2007) (explaining different aspects of the "factors other than sex" defense "should be analyzed comprehensively as a whole" and holding employer proved its defense as a matter of law). In short, the district court committed legal error in denying DMACC's motions for directed verdict and JNOV.

II. The Record Lacks Substantial Evidence of a Willful Violation.

Selden's arguments regarding a willful violation are helplessly mired in her position that she truly was trying a claim under section 216.6 for intentional discrimination. Selden's first four bullet points all address alleged intentional discrimination against other female ASA2s. *See* Selden Brief at 32-33. The only "evidence" that Selden argues supports a willful violation against her on the strict-liability

section 216.6A claim is that DMACC "took no action to fix the pay differential after Sandy's complaints in 2018 and 2019," and did not take corrective action after she filed the lawsuit. *Id*.

As an initial matter, considering that Tjaden's 29 years of experience support his higher salary, there is nothing for DMACC to "correct" simply because Selden does not understand why she makes less than Tjaden. *See Weidenbach v. Casper-Natrona Cnty. Health Dep't.*, 563 F. Supp. 3d 1170, 1180 (D. Wyo. 2021).

Moreover, courts generally require evidence that the employer knew or was put on notice that its conduct violated the law, through prior investigations or complaints by other employees, to establish a willful violation. *See Brooks v. Tire Discounters, Inc.*, No. 3:16-CV-02269, 2018 WL 1243444, at *8 (M.D. Tenn. Mar. 8, 2018) (collecting cases). The record here is devoid of any such facts. Adopting Selden's logic—that her own complaints suffice to establish a willful violation—would "create a situation where every violation is willful so long as the plaintiff complained about her own treatment before an adverse action prompting a lawsuit." *Wiler v. Kent State Univ.*, No. 5:20-CV-00490, 2022 WL 15633387, at *5 (N.D. Ohio Oct. 28, 2022).

"That position improperly converts every violation to a willful one and finds no support in the law." *Id.*

Though Selden insists Fiderlick's involvement was irrelevant (Selden Brief at 34), it is undisputed that Fiderlick recommended Selden's starting salary—the very pay decision that Selden contends was discriminatory. And she cites no authority supporting the proposition that events occurring years after-the-fact (such as DMACC not raising her salary in 2019) can establish a willful violation.

As the party seeking to establish a willful violation, Selden bore the burden of proof on this issue. *See* Iowa R. App. P. 6.904(3)(e); JA.I-1478. She wholly failed to meet her burden. There is not substantial evidence to support the jury's finding of a willful violation.

III. Selden Did Not Challenge a Pay Practice Regulated Under Section 216.6A.

A. DMACC preserved error.

Considering DMACC's extensive arguments that Selden's starting-salary pay-range penetration theory was improper and inadmissible in its pre-trial filings, objections during trial, and post-trial motions, Selden's position that DMACC did not preserve error is hard to believe.

Upon learning of Selden's intent to challenge a pay practice (and seek damages) outside the scope of the governing statute, DMACC repeatedly and consistently objected to the inclusion of the novel theory at trial. (JA.I-179).[5] In its motion for directed verdict, DMACC urged that Selden's starting-salary pay-grade percentage theory was not a proper method to prove her strict-liability wage-discrimination claim:

[5] Though Selden now claims she used hiring rates to calculate damages long before trial (Selden Brief at 28), she never presented those calculations in discovery, and regardless, it was improper to allow her to argue that the starting-salary percentages were probative of *liability*.

> [C]omparing starting pay range penetration is not an unfair or discriminatory practice under Section 216.6A. The statute does not regulate the practice that Plaintiff challenges in this case. Tellingly, Plaintiff established her prima facie strict-liability case under Section 216.6A by comparing salaries at a given point in time.…Yet Plaintiff argues the discriminatory practice under Section 216.6A is that she was hired at 15.85% range penetration in 2013 while Tjaden was hired at 54.74% range penetration in 1998. As a matter of law, Plaintiff has failed to establish a discriminatory employment practice.

(JA.I-1348; *see also* JA.I-1066-1069; JA.I-747[134:17-135:7]; JA.I-1404-1405[128:21-129:5]). In its JNOV motion, DMACC reiterated that, as a matter of law, Selden's starting-salary range-penetration theory "does not constitute the unfair or discriminatory practice defined by section 216.6A." (JA.I-1527-1528).[6] The district court considered and necessarily rejected these arguments in denying both motions. (JA.I-1498-1500, 1819-1822).

[6] Selden acknowledges DMACC preserved error on the corollary argument that she could not request damages based on any calculation that deviated from the statutorily-prescribed "wage differential." (Selden Brief at 28). *See* JA.I-0132-0138, 1356-1359; DMACC's Trial Brief, p. 8-9.

B. Selden cannot shoehorn her novel theory into an unfair or discriminatory practice as defined by section 216.6A.

Selden's starting-salary range-penetration theory does not challenge a practice the legislature intended to regulate in proscribing employers from "paying wages" at lesser rates based on protected-class characteristics. Iowa Code § 216.6A(1); *see also id.* § 216.6A(2) ("It shall be an unfair or discriminatory practice for any employer… by *paying wages* to [an] employee at a rate less than the rate paid to other employees…") (emphasis added). The corresponding remedy provision, providing for damages "in the amount equal to" two- to three-times the "wage differential," reinforces this conclusion. Iowa Code § 216.15(9)(a)(9)(a)-(b).

Selden does not explain how or why she believes her novel theory fits within the specific unfair or discriminatory practice defined by governing statute, and her attempts to shoehorn her allegations into the statutory definition are unavailing. For example, she broadly declares that "comparing hiring rates …is nothing new," without any support for her sweeping declaration. (Selden Brief at 29). She does not (and cannot) cite any authority relying on a

comparison of the starting-salary pay-grade percentages of two employees hired at different points in time, with different applicable pay-grade ranges, at starting salaries recommended by different decisionmakers.[7] And a straightforward comparison of the actual hiring rates undermines her claim—because Selden's starting salary ($70,000) far exceeded Tjaden's ($46,000). (JA.III-105, JA.III-337). While she acknowledges that comparing hiring rates "can sometimes be complicated by non-discriminatory factors like inflation or employees having varying years of service," she insists she solved the "dilemma" simply by comparing the percentages of the applicable pay-grade at the time of each employee's hire. (Selden Brief at 29-

[7] None of the cited cases support her contentions. *E.g.*, *E.E.O.C. v. Reichhold Chem., Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993) (affirming dismissal of wage-discrimination claim but reversing award of employer's attorney fees); *Cooper v. United Air Lines, Inc.*, 82 F. Supp. 3d 1084, 1104 (N.D. Cal. 2015) (granting summary judgment on EPA claim); *Hodgson v. Sec. Nat. Bank of Sioux City*, 460 F.2d 57, 58 (8th Cir. 1972) (considering whether females hired into lower-paying positions performed "equal work" as males hired into higher-paying positions under the guise of management-training program); *Marshall v. J.C. Penney Co.*, 464 F. Supp. 1166 (N.D. Ohio 1979) (analyzing employer's arguments that wage differentials were based on directly-related sales experience, management training, and sales volume).

30).[8] But Selden's new criterion does not override the explicit language chosen by the Iowa legislature in addressing strict-liability wage discrimination. *See* Iowa Code § 216.6A. And her insistence that "the law contemplates the comparison of the initial compensation paid to employees hired at different times" is contrary to the plain language of section 216.6A and is otherwise unsupported. (Selden Brief at 29).

Though Selden correctly observes that discriminatory compensation can conceivably occur "in a broad range of circumstances" (Selden Brief at 29), only unequal pay for equal work is redressable under the statute governing strict-liability wage discrimination. *See* Iowa Code § 216.6A; *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 564 (Iowa 2015) (noting the statute imposes "strict liability on the part of employers for *paying unequal wages*") (emphasis added).

[8] Yet ironically, Selden accuses DMACC of trying "to make wage discrimination claims far more complex than they are or need to be." (Selden Brief at 28).

To that end, courts have consistently recognized that the EPA is narrower in scope than Title VII. *E.g., Hofmister v. Miss. State Dep't of Health*, 53 F. Supp. 2d 884, 889 n.11 (S.D. Miss. 1999) ("The EPA addresses the 'classic' sexually discriminatory practice of unequal pay for equal work, while Title VII covers a broader range of discriminatory pay practices."); *Glunt v. GES Exposition Servs.*, Inc., 123 F. Supp. 2d 847, 862–63 (D. Md. 2000) (observing the "prohibition of unequal pay for equal work is viewed as being narrower in scope than Title VII's mission to [root] out discrimination in compensation") (citing *E.E.O.C. v. Aetna Ins. Co.,* 616 F.2d 719, 724 n.5 (4th Cir. 1980) (agreeing the EPA "is more limited in scope, applying only to claims of unequal pay for equal work based upon sex")); *accord Prewett*, 533 F. Supp. 2d at 1185; *Donovan v. KFC Servs., Inc.*, 547 F. Supp. 503, 505 (E.D.N.Y. 1982). *See also Dindinger*, 860 N.W.2d at 565 (discussing the distinctions between section 216.6 and section 216.6A claims).

A plaintiff is free to challenge any form of discriminatory compensation through an intentional-discrimination claim brought under section 216.6 or Title VII, but only wage disparities are

actionable through strict-liability wage-discrimination claims under section 216.6A or the EPA. *E.g., Gunther v. Washington Cnty.*, 623 F.2d 1303, 1311 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981) (noting the EPA "applies only to situations where a plaintiff contends there has been a denial of equal pay for equal work"); *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643, 655 (4th Cir. 2021) (observing the EPA "unambiguously states" that an employer cannot "discriminate ... paying wages to employees ... *at a rate* less than the *rate* at which he pays wages to employees of the opposite sex") (quoting 29 U.S.C. § 206(d)(1)); *Bertroche v. Mercy Physician Assocs., Inc.*, No. 18-CV-59-CJW-KEM, 2019 WL 4307127, at *6 (N.D. Iowa Sept. 11, 2019) (expounding the EPA "explicitly refers to 'wage rate' multiple times and prohibits 'wage rate' discrimination"); *Caetio v. Spirit Coach, LLC*, 992 F. Supp. 2d 1199, 1213 (N.D. Ala. 2014) (holding allegations of discriminatory work assignments were not cognizable under the EPA "because such claim does not assert that defendant paid unequal wages to its employees"); *Wolotka v. Sch. Town of Munster*, 399 F. Supp. 2d 885, 902–03 (N.D. Ind. 2005) (granting summary judgment on EPA claim based on disparate working times and pension-vesting

requirements but denying summary judgment on Title VII claim based on same allegations). *See also Price v. N. States Power Co.*, 664 F.3d 1186, 1192-93 (8th Cir. 2011) ("Equal pay for equal work is what the EPA requires, and those elements are the focus of the prima facie case."). Selden's position would put an employer at risk of a strict-liability wage-discrimination claim any time there is an adjustment to the range of a pay grade, which would have a corollary impact on the percentages within the pay grade.

Selden now boldly claims that she actually tried and proved an intentional-discrimination claim under section 216.6. (Selden Brief at 70-71). This contradicts her summary-judgment resistance, in which she told the court that she brought her wage-discrimination claim "under Iowa Code section 216.6A—not section 216.6." (Plaintiff's Brief in Resistance to Defendant's Motion for Partial Summary Judgment, p. 5, n. 1; *see also* Ruling on Partial Motion for Summary Judgment, p. 4 ("Selden specifically claims that the wage discrimination she endured was predicated on Iowa Code section 216.6A."); Section VIII.B, *infra*). By pursuing her claim under section

216.6A, Selden enjoyed the benefits of the lesser burden, and she was not required to prove discriminatory intent. *See Dindinger*, 860 N.W.2d at 565 (explaining, in enacting section 216.6A, the legislature created "a new cause of action with fewer elements than before"). If successful, she was also entitled to the corresponding enhanced remedy, doubling or tripling the amount of the "wage differential." Iowa Code § 216.15(9)(a)(9).

But at trial, Selden did not challenge DMACC's "paying wages to [Selden] at a rate less than the rate paid to [Tjaden]," and she did not ask the jury to award her damages for equal pay literally. *Id.* § 216.6A(2).[9] That is, Selden sought to invoke the benefits of the strict-liability statute while simultaneously challenging a practice outside its scope. Consequently, she did not establish an unfair or discriminatory practice as defined by section 216.6A. *See Dindinger*, 860 N.W.2d at 564 (observing "section 216.6A *defines* discrimination as the act of paying lower wages") (emphasis original). None of her

[9] The court did not instruct the jury on the elements of an intentional-discrimination claim, nor was the jury asked to decide whether Selden proved sex-based discriminatory intent for purposes of section 216.6. (JA.I-1476).

arguments on appeal can overcome the simple reality that the statute upon which she premised her claim does not regulate the employment practice she put at issue in this case.

IV. The District Court Committed Reversible Error by Permitting Selden to Recover Damages Beginning on the First Day of Her Employment in 2013.

In her arguments regarding the period of recovery for section 216.6A claims, Selden overstates the authority in support of her position. (Selden Brief at 42-45). This Court has not held that strict-liability wage discrimination is a continuing violation. Rather, the *Dindinger* Court held: "Separate discriminatory paychecks should be evaluated separately for limitations purposes." 860 N.W.2d at 575; *see also id.* at 571-72 (holding a paycheck is a discrete discriminatory act and thus "not a basis for invoking the continuing violation theory").[10]

Additionally, the ICRA requires a complainant to "follow the statutory processes to obtain relief," which includes fulfilling the

[10] Contrary to Selden's repeated assertions (Selden Brief at 42-43), the footnote dictum in the *Dindinger* opinion is not binding precedent. *See Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 391 (Iowa 2009). In its certified questions, the federal court did not ask the Supreme Court to address the recovery period applicable to claims for strict-liability wage discrimination. *See Dindinger*, 860 N.W.2d at 559, 575-576.

requirement of timely filing an administrative charge. *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 680 (Iowa 2013); *see* Iowa Code §§ 216.15 (1), 216.16(1). For employment practices, the ICRA sets a 300-day complaint-filing period, a requirement that has been in effect since 2008. *See* Iowa Code § 216.15(13); 2008 Iowa Acts ch. 1028. When the legislature added the strict-liability cause of action and the corresponding remedy just one year later in 2009, it did not exempt claims brought under section 216.6A from the 300-day requirement. *See* Iowa Code § 216.15(9)(a)(9)(a)-(b), (13); 2009 Iowa Acts ch. 96.

As discussed in DMACC's opening brief, the most logical interpretation of the remedy provision is that the legislature intended to provide a remedy of two- or three-times the wage differential for the period beginning 300 days before the filing of an administrative complaint and continuing for any subsequent period of discrimination, as contemplated by the forward-looking language contained in section 216.6A(2)(b) ("including each time wages, benefits, or other compensation is paid, *resulting in whole or in part from such a decision or other practice*") (emphasis added). This approach is "consistent with the language of the ICRA, which requires the

complaint to be filed with the ICRC 'within three hundred days after the alleged discriminatory or unfair practice occurred.'" *Dindinger*, 860 N.W.2d at 572 (citation omitted). A contrary interpretation would encourage any employee who believes he or she is a victim of wage discrimination to sit back and let damages accrue for as long as possible before pursuing a legal claim.

V. The District Court Abused Its Discretion on Evidentiary Rulings.

A. Selden's improper, irrelevant theory tainted the trial and unfairly prejudiced DMACC.

Selden offers no meaningful argument to support the district court's admission of her improper and irrelevant starting-salary range-percentage theory. Nor could she. Fiderlick—Selden's hiring supervisor and the decisionmaker who recommended her starting salary—testified that she never looked back at the salary-grade percentage for another employee's starting salary when setting pay for a new hire. (JA.I-611[237:1-19]). In fact, at the time she made a starting-salary recommendation for Selden in 2013, Fiderlick did not even know what Tjaden's starting-salary pay-grade percentage had been nearly sixteen years earlier, in 1998. (JA.I-608[234:2-4, 234:15-

22]). Because the theory had no bearing on the actual pay-setting decisions at issue in this case and challenged a practice outside the scope of the governing statute, any evidence or argument to that effect was irrelevant and should have been excluded. Iowa R. Evid. 5.402.

Selden does not so much as address DMACC's arguments about how the admission of this irrelevant, improper evidence and argument tainted the entire trial. *See* Iowa R. Evid. 5.103(d), 5.401–5.403; *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 158 (Iowa 2004); *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000). When irrelevant evidence is improperly admitted, this Court "presume[s] prejudice and reverse[s] unless the record affirmatively establishes otherwise." *McGrew v. Otoadese*, 969 N.W.2d 311, 325 (Iowa 2022) (citation omitted). The record here is clear and confirms that the inclusion of Selden's theory was unfairly prejudicial to DMACC, had an improper effect on the jury, and should have been excluded. *State v. Liggins*, 978 N.W.2d 406, 422 (Iowa 2022).

B. Admitting irrelevant evidence about damages unavailable for Selden's 216.6A claim was unfairly prejudicial.

Again, Selden resorts to mischaracterizing the record instead of addressing DMACC's arguments head-on. Contrary to her appellate assertions (Selden Brief at 36), DMACC objected to Selden's proposed damages instruction on numerous grounds, including that the instruction would allow the jury to award emotional-distress damages "for harm caused by employment practices other than the actions at issue in this case… and, in fact, does not limit the damages to an unlawful employment practice at all." (JA.I-309; JA.I-1389-1394[45:8-49:11, 50:23-25 (reiterating concerns that the "conduct needs to be specified")]). The district court overruled DMACC's objections and instructed the jury as requested by Plaintiff. (JA.I-1396[52:10-12]).

As discussed in DMACC's opening brief, only the damages authorized by section 216.6A's "complementary subsection" are recoverable for strict-liability wage discrimination. *Dindinger*, 860 N.W.2d at 560; *see* Iowa Code § 216.15(9)(a)(9). Over DMACC's objections, the district court permitted the jury to hear inflammatory evidence and argument about emotional-distress and other damages

unavailable for Selden's strict-liability claim. (DMACC Brief at 36-37, 64-67). Though the district court ultimately agreed and struck the emotional-distress damages awarded for Selden's section 216.6A claim, the conclusion reached in its post-trial ruling was too little, too late. (JA.I-1815).

Considering that Selden could not recover emotional-distress damages for her section 216.6A claim, this evidence was irrelevant and lacked any probative value. *See* Iowa R. Evid. 5.401, 5.402; *McClure*, 613 N.W.2d at 235.[11] And even if it could be considered marginally probative, the evidence was unfairly prejudicial, misled the jury, and unquestionably confused the issues. Iowa R. Evid. 5.403; *Pexa*, 686 N.W.2d at 158. Put simply, the evidence and argument regarding improper damages tainted the entire trial and spilled into the jury's liability findings.

"To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any

[11] The same is true for evidence related to Selden's claimed lost benefit damages and damages based on her novel starting-salary range-percentage theory. *See* Iowa Code § 216.15(9)(a)(9).

means." Iowa R. Evid. 5.103(d). Where, as here, "the jury was allowed to consider plainly irrelevant and prejudicial evidence," this Court "do[es] not hesitate to reverse." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000) (citation omitted). The district court's evidentiary errors constituted an abuse of discretion and require a new trial.

C. The district court abused its discretion in the conflicting evidentiary rulings regarding the other ASA2s.

Selden's contradictory arguments about the evidence related to other ASA2s fare no better. Contrary to her contentions, the Eighth Circuit in no way condoned allowing plaintiffs to argue wage-discrimination on behalf of non-parties, and her misplaced reliance on *Dindinger* ignores the different purposes of the evidence and arguments presented in that case.

In *Dindinger*, three female plaintiffs brought claims under section 216.6A, the EPA, and Title VII, alleging sex-based wage discrimination. *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 419 (8th Cir. 2017). For its affirmative defense on the strict-liability claims, Allsteel argued that the differentials were based on the male comparators'

prior education, outside experience, and seniority. *Id.* at 420. To rebut this defense and to show pretext on the intentional-discrimination claim, the plaintiffs presented evidence "that other female Allsteel employees were paid less than male employees despite their comparative seniority, experience, or education." *Id.* On appeal, the Eighth Circuit noted that "me-too" evidence can sometimes "illustrate that the employer's asserted reasons for disparate treatment are a pretext for *intentional discrimination*." *Id.* at 424 (emphasis added). It also found that the evidence tended to show that "Allsteel did not uniformly pay higher wages to employees with more seniority and education." *Id.* at 525.

Unlike the *Dindinger* plaintiffs, Selden did not assert a claim for intentional discrimination, and thus, the evidence related to her female colleagues was not relevant because pretext was not at issue. *See id.* at 424-25. And unlike the facts in *Dindinger*, the evidence related to Wood, Gleason, and Bebout did not contradict DMACC's affirmative defense. DMACC has consistently argued that Tjaden's greater experience and seniority justifies higher pay—and critically, all the ASA2s who have worked at DMACC since 1998 receive higher

salaries than Selden, commensurate with their greater seniority. (JA.III-327).

Selden's broad generalization about her female colleagues having "comparable qualifications" (Selden Brief at 38) is not admissible evidence which could be used to rebut the reasons for Tjaden's starting salary, nor does it take into account the unique skillsets that each individual brought to their respective positions. (JA.III-17, 53, 70, 88). Moreover, as Selden astutely observes: "The question is **not** whether Defendant's treatment of women as a whole has been comparable to its treatment to men as a whole." (Selden Brief at 41) (emphasis in original).

Selden's position that evidence related to her female colleagues (hired 16 years before she was) was relevant but the evidence related to Pedro Navarro was irrelevant because he was hired 8 years later is untenable. (Selden Brief at 42). Given that the district court permitted Selden to introduce evidence and argument that her female coworkers also experience wage discrimination, it was completely inconsistent to bar any reference to Navarro. *See* DMACC Brief at 68-70.

Selden's reliance on "a long line of Title VII cases" again overlooks that she chose not to pursue a claim for intentional discrimination. (Selden Brief at 40). And she points to no evidence that could support her conclusory accusation that DMACC created the sixth ASA 2 position or hired Navarro as a sham to generate favorable evidence to support its position in this case.

The fact that DMACC offered Navarro a starting salary at the lower end of the pay grade was not a "curative measure," as Selden suggests, but a consistent application of its hiring policies and practices. (JA.III-368; JA.I-583[209:1-9]; JA.I-620-621; JA.I-1242[163:6-14]).[12] That Navarro makes less than Selden—who in turn makes less than Tjaden, Wood, Gleason, and Bebout—further supports the conclusion that DMACC's pay structure is designed to reward longevity. DMACC presented several offers of proof establishing just

[12] Selden's argument about "other acts" evidence (Selden Brief at 42) overlooks the fact that Fiderlick requested higher starting salaries for other employees demonstrated she knew how to do so and could have requested a higher starting-salary for Selden, if she felt that was appropriate. (JA.I-680[67:9-22]). Fiderlick proposed the starting salary that she felt was fair based on Selden's experience. (JA.I-590[216:1-10]).

that. (JA-I.1166-1167[75:16-76:2], JA.I-1050[226:18-21]; *see* JA.I-1306-1307[228:23-229:2]; JA.I-829-831[216:14-218:25]). The district court's exclusion of any evidence related to Navarro was an abuse of discretion and unfairly prejudiced DMACC, especially given Selden's persistent efforts to argue wage-discrimination claims on behalf of her female colleagues.

VI. The District Court Committed Reversible Error by not Directing a Verdict in Favor of DMACC on Selden's Retaliation Claim.

DMACC preserved error on this issue. DMACC argued both in its directed verdict and JNOV motions that Selden failed to prove each element of her retaliation claim, including that she failed to prove she was qualified for the supervisor position because she lacked the requisite educational degree. (*See* JA.I-1086-1094; JA.I-1545-1553).

Contrary to Selden's view, there is nothing "made-up" about the requirement under Iowa law that Selden needed to establish she was qualified for the position in order to establish her retaliation claim simply because there is no Iowa appellate case directly addressing a failure-to-promote claim based on alleged retaliation;

there is ample Iowa law on both failure-to-promote claims and retaliation claims in general.[13] The elements of a prima facie case for a failure-to-promote claim have long been established. *See Merritt v. Iowa Dep't of Transp.*, No. 03-0858, 2004 WL434143, at *3 (Iowa Court App. March 10, 2004) (noting plaintiff's prima facie case included establishing she was qualified for position); *see also Hamer v. Iowa Civ. Rts. Comm'n*, 472 N.W.2d 259, 263 (Iowa 1991) (in failure-to-hire context, requiring applicant to show she "applied for and was qualified for a job for which the employer was seeking applications."). Further, this Court recently reiterated the three-factor test for establishing a retaliation claim, albeit for alleged reduction in salary, in *Godfrey v. State, 9*62 N.W.2d 84, 106-07 (Iowa 2021). In short, for Selden to save her retaliatory failure-to-promote claim, she is

[13] Some federal courts have already combined the basic prima facie case with the retaliation elements for retaliatory failure to promote cases: (1) the plaintiff applied for a particular position; (2) which was vacant; and (3) for which the plaintiff was qualified. *See Velez v. Janssen Ortho, LLC*, 467 F.3d 802, 806-07 (1st Cir. 2006). Under either test, Selden's burden includes establishing she was qualified for the position.

required to point out substantial evidence in the record establishing that she was qualified for the supervisor position.

The record is clear: the supervisor position required a bachelor's degree in computer science or related field. (JA.III-227). Rather than address her lack of the required degree directly, Selden insists that her coworkers felt she was qualified for the position. But members of the hiring committee repeatedly testified that no candidate—for any position—moves onto the hiring committee for consideration or interviews if he or she lacks the required education. (JA.I-1193-1194[102:14-103:1], 1202[111:10-17], 1211[120:10-14], 1224-1225[145:13-146:1]). And though Selden claims it was up to the jury to decide whether she was qualified (Selden Brief at 48, 50), determining the requisite qualifications for the supervisor position was DMACC's decision to make. *See Danzl v. N. St. Paul-Maplewood-Oakdale Indep. Sch. Dist.*, 706 F.2d 813, 817 (8th Cir. 1983) (stating a "court cannot substitute its judgment for the employer's" in assessing candidates' qualifications).

Further, Selden argues that DMACC had an "either/or" format when considering education and experience, pointing to Tjaden's

qualifications at the time he applied for the SSS2 position. (Selden Brief at 48). Selden takes liberties with the record in this regard. The posting for the SSS2 position in 1997 explicitly provided: "Additional required experience [developing, implementing, or supporting an IT system, which included or was supplemented by programming] may substitute for up to 4 years of the required education." (JA.III-22). The posting for the supervisor position in 2019 did not permit experience in lieu of the required education. (JA.III-227).

The fact that Fiderlick held the job with an associate's degree in computer programming, beginning in 1997, also does not excuse Selden's lack of the required degree. (JA.I-571-573[197:2-8, 198:25-199:16]). After the degree requirement was added as part of the job-evaluation process in 2007, Fiderlick continued to hold the position, consistent with DMACC policy. (JA.I-652-654[39:3-10, 40:9-41:7]; JA.III-201, 207).[14] Contrary to Selden's unsupported assertions (Selden Brief at 48), there is no evidence that DMACC was flexible

[14] As a member of the job evaluation committee testified, the committee evaluates the position, not the incumbent. (JA.I-1176[85:12-18]; *see* JA.I-1174-1176[83:20-85:8]).

with the education requirements after 2007. Jocic's degree in Management of Information Systems is plainly a degree in a field "related to" computer science, and Selden's argument to the contrary is unavailing. (JA.III-237-238, 291-292).

Selden's causation arguments also fall flat. She invents an alternative timeline to try to establish the causal element between her "complaint" and being screened out from the supervisor position, asserting that she had made a wage-discrimination complaint "just weeks before." (Selden Brief at 52). The clear evidence in the record shows that Selden had her discussion with Fiderlick about pay equity on January 9, 2019. (*See* JA.I-697-698[84:15-85:4], 701-702[88:2-89:12]). There is no evidence that Selden "complained" or even talked about pay with anyone at DMACC between that discussion and April 2019, when DMACC screened Selden out of the applicant pool because she lacked the requisite degree. (JA.III-229, 235). And as discussed in DMACC's opening brief, this temporal proximity is insufficient to establish causation. *See* DMACC Brief at 87-88.

Because substantial evidence does not support a conclusion that Selden met the required qualifications for the supervisor position

and there is no evidence of causation, the district court should have granted a directed verdict on the retaliation claim.

VII. The $434,375 Emotional Distress Award for Retaliation is Excessive.

In attempting to point to evidence in the record to support the $434,375.00 emotional-distress award for retaliation, Selden resorts to gross hyperbole and takes wide liberties with the record. Selden posits: "**Imagine how devastating something must have been for a father to say he does not recognize his own daughter**." (Selden Brief at 57 (emphasis in original)). Yet Selden's father, who testified at trial briefly, said no such thing. When asked if his daughter seemed different after *both* the claimed wage discrimination and alleged retaliation, her father testified "she doesn't seem as outgoing" and "it seemed like she lost that focus on her family." (JA.I-971[147:7-16]). Further, Selden claims that she "and her family testified that she had trouble sleeping and was often up at 3:00 AM." (Selden Brief at 58 (citing JA.I-976-977[152:20-153:17])). But these "facts" are not supported by the cited testimony, nor by any other evidence in the record.

Selden herself gave sparse testimony regarding her claimed emotional distress related to the alleged retaliation. In fact, the only evidence that Selden had any emotional distress with regards to retaliation claim came in her non-responsive answer at trial:

> Q. Sandy, tell the jury how it feels each day knowing that DMACC is still paying your male counterpart in the same job so much more money based on that hiring rate and yet going to work every day?
>
> A. It's hard. I mean, I go and I do my job and I do it well, but it's hard. Like I said earlier, I don't understand why they get me at a discount. I just don't. I do the same work and I do it well.…
>
> You know, it was humiliating to have – *I think I'm answering a different question when I'm going to talk about part of what was humiliating*, but it was humiliating to have people ask me, "why didn't you apply for that position," for the supervisor position, and for me to say to them, "I did. I didn't get an interview."
>
> I mean, there was several people that asked me why I didn't apply and they didn't know. They didn't know. So I told them I did and then I would go back to my desk and cry. I tried to keep it together talking to them, and then I'd go back to my desk and cry.

(JA.I-777-778[164:19-165:15] (emphasis added)). Selden further testified:

> Q. How did it make you feel knowing that members even on the search committee advocated for you to be included, but that you still weren't allowed to interview?

> A. You know, it was actually -- I was very happy that my coworkers have that kind of faith in me and believe in me and would advocate for me. But it was also very disappointing that I still did not have that opportunity to interview.

(JA.I-765[152:2-10]).[15]

It is undisputed that Selden did not seek medical treatment or counseling for the emotional distress she claims to have experienced when she was screened out of the applicant pool for a position that she was not qualified to hold because she lacks the requisite degree. She attempts to take DMACC to task for arguing the lack of medical expert testimony "is a consideration in *reviewing awards* for emotional distress under the ICRA," but her attack misses the mark. (Selden Brief at 59). This Court has repeatedly held when a plaintiff's evidence does not include medical diagnosis or treatment, an appropriate emotional-distress award is one in the lower range. *Jasper v. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009); *Simon Seeding & Sod,*

[15] The coworkers that Selden claimed "advocated" for her to be considered for the supervisor position denied doing so. (JA.I-1006-1007[182:25-183:13]; JA.I-1179-1180[88:22-89:12], 1183-1184[92:7-93:19]).

Inc. v. Dubuque Human Rts. Comm'n, 895 N.W.2d 446, 472 (Iowa 2017) (collecting cases). Contrary to Selden's ad hominem attack, it is not "fearmongering" to ask the court to carefully review the jury's emotional-distress damages award in light of existing Iowa law.[16]

Based on the actual evidence of emotional distress related to Selden's retaliation claim, the jury's award of $434,375.00 is excessive and should be remitted. *See Jasper*, 764 N.W.2d at 772. Selden's comparison to the $35,000.00 emotional distress in *Rumsey v. Woodgrain Millwork*, No. LACL138889 (Iowa Dist. Court, Polk County April 11, 2021), is apt. Although post-trial motions in that case are pending and there is yet to be an appellate decision, the plaintiff

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[16] Further, Plaintiff's counsels' vitriolic and uncivil attacks on Amici Iowa Community Colleges and Iowa Association of Business and Industry ("ABI") for their arguments regarding emotional-distress awards have no place in briefs submitted to this Court. *See* Selden Brief at 65-68 ("AMICI ARE NO FRIENDS OF THE COURT"), 67 ("Amici casts jurors as malleable idiots, discrimination victims as rapacious charlatans, lawyers as snake oil salesmen, and Iowa judges as passive enablers."). The Iowa Supreme Court has found amicus briefs, including an amicus brief from ABI, to be particularly helpful in interpreting the ICRA. *See Ackelson*, 832 N.W.2d at 686 (citing concerns raised by amicus in holding the ICRA does not permit punitive damages). It is fine to disagree with the arguments made by Amici, but the abusive tenor of Plaintiff's brief does not contribute to the enlightened discourse expected at Iowa's highest Court.

there sought emotional-distress damages for his ICRA claim, and like Selden, he did not seek medical treatment. The jury's $35,000 award for emotional-distress damages in that case comports with the lower range of damages, as explained in *Jasper*, and exemplifies the $434,375 emotional-distress damages award in this case is excessive.

Cross-Appeal Argument

VIII. The District Court Correctly Concluded that "Actual Damages" are Not Recoverable Under Section 216.6A and Struck the Emotional-Distress Damages Awarded for Selden's Strict-Liability Claim.

A. "Actual damages" are not available for claims brought under section 216.6A.

The ICRA specifies the relief available to a plaintiff who has experienced an unfair or discriminatory employment practice. Iowa Code §§ 216.15(9), 216.16(6). For most practices prohibited under the ICRA, available remedies include the "actual damages, court costs, and reasonable attorney fees" for the injury caused by the discriminatory or unfair practice. *See* Iowa Code § 216.15(9)(a)(8). For more than thirty years, this Court has interpreted the statutory "actual damages" language as allowing a prevailing plaintiff to recover damages for emotional distress and lost benefits. *See Simon*,

895 N.W.2d at 471; *Chauffeurs, Teamsters & Helpers, Loc. Union No. 238 v. Iowa Civ. Rts. Comm'n*, 394 N.W.2d 375, 382–83 (Iowa 1986).[17]

For claims brought under section 216.6A, however, the legislature departed from the usual remedy. 2009 Iowa Acts ch. 96, § 2(b) (codified at Iowa Code § 216.6A(2)(b)). As discussed in DMACC's opening brief, in enacting section 216.6A, the General Assembly "create[d] an entirely new cause of action: strict liability on the part of employers for paying unequal wages." *Dindinger*, 860 N.W.2d at 564. Along with this new cause of action, the legislature "simultaneously enacted a separate, enhanced remedy for violations of section 216.6A." *Id.* at 562. The corresponding remedy provides that a prevailing plaintiff can recover court costs, attorney fees, and "either of the following" damages:

> (a) An amount equal to two times the wage differential paid to another employee compared to the complainant for the period of time for which the complainant has been discriminated against.

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[17] The legislature is presumed to be aware of how courts interpret legislation—a presumption that is particularly strong when the Court's interpretation has been consistent for so many years. *See Ackelson*, 832 N.W.2d at 688.

> (b) In instances of willful violation, an amount equal to three times the wage differential paid to another employee as compared to the complainant for the period of time for which the complainant has been discriminated against.

Iowa Code § 216.15(9)(a)(9)(a)-(b). Tellingly, the legislature imposed a severe penalty for strict-liability wage discrimination—two- to three-times the wage differential—yet chose to omit the remedies usually available in ICRA claims. *See id.*

The omission of "actual damages" for violations of section 216.6A makes clear that a plaintiff prevailing under that provision cannot recover compensatory damages, including damages for lost benefits and emotional distress. *See In re Guardianship of Radda*, 955 N.W.2d 203, 209 (Iowa 2021) ("[L]egislative intent is expressed by omission as well as by inclusion.") (citation omitted). Indeed, this Court has found "the legislature's selective inclusion of [a] phrase… to be dispositive" in statutory construction. *Id.* (collecting cases). Courts must also "read statutes as a whole." *Petro v. Palmer Coll. of Chiropractic*, 945 N.W.2d 763, 771–72 (Iowa 2020). Section 216.15(9)(a)(8) expressly provides for the recovery of "actual damages" for any other violation of the ICRA. *See Dindinger*, 860

N.W.2d at 562 (contrasting the remedies available for section 216.6A claims with the remedies available for "any other ICRA claim"). The legislature could have included "actual damages" as a measure of recovery in section 216.15(9)(a)(9), but it chose not to—an omission evincing legislative intent. *See Radda*, 955 N.W.2d at 209; *Petro*, 945 N.W.2d at 772.

Notably, both the cause of action and the remedy were added in 2009 by the same legislation. *See* 2009 Iowa Acts ch. 96 (codified at Iowa Code §§ 216.6A, 216.15(9)(a)(9)(a)–(b)). "When two subjects are covered by the same legislation and the legislature takes the time to spell out the interplay between those two subjects"—as it did with the cause of action in section 216.6A and the corresponding remedy in section 216.15(9)(a)(9)—courts "should be hesitant to add to what the legislature wrote." *Petro*, 945 N.W.2d at 772. This is especially true given that the remedies delineated by the ICRA are exclusive and preemptive. *See Smidt v. Porter*, 695 N.W.2d 9, 17 (Iowa 2005).

When the legislative intended to provide "actual damages" as a measure of recovery, it did so expressly. *See, e.g.*, Iowa Code § 216.15(9)(a)(8). If the legislature intended to allow emotional-distress

damages or lost benefits for violations of section 216.6A, it would have explicitly authorized the relief to include "actual damages." *See id.* Instead, it chose to allow court costs, reasonable attorney fees, and two- to three-times the wage differential. *See id.* § 216.15(9)(a)(9). *Cf. id.* § 216.15(9)(a)(8) (allowing recovery of "court costs, reasonable attorney fees, and actual damages"). The Court should give effect to the plain language of the statute and uphold the district court's post-trial conclusion that emotional-distress damages are not available as a remedy for violations of section 216.6A.

B. Selden did not pursue, much less prove, a claim for intentional sex-based wage discrimination.

In her resistance to DMACC's post-trial motions, for the first time, Selden decided to disavow her earlier pleadings in an attempt to recast and broaden her claim. (JA.I-1599; *see* JA.I-1663-1667). After electing to rely solely on a strict-liability theory leading up to and throughout trial, Selden cannot now claim that she also asserted a claim under section 216.6—much less that she proved the additional elements required on an intentional-discrimination claim such that she should be entitled to the remedies under section 216.15(9)(a)(8).

Both parties' pre-trial filings and proposed jury instructions addressed only section 216.6A claims—which is hardly surprising, given Selden's position throughout the case that her claim was solely one for strict-liability wage discrimination. And after hearing the evidence and argument at trial, the district court did not instruct the jury on the elements of an intentional-discrimination claim under section 216.6. (JA.I-1476-1478). Instead, the case was tried and submitted to the jury solely on a strict-liability theory of wage discrimination. *Id.*

At trial, Selden took advantage of every available opportunity to remind the jury that her claim was one for strict-liability wage discrimination—albeit one focused on an alleged unfair or discriminatory practice outside the scope of section 216.6A. As early as opening statements, Selden's theory of the case at trial tracked the elements required for a strict-liability wage-discrimination claim under section 216.6A, with counsel telling the jury that Selden "has to prove three things," not one of which was discriminatory intent. *Compare* JA.I-0356-0357[167:17-168:6], *with* Iowa Code § 216.6A(2)(a).

That theory remained consistent for the duration of trial; Selden's counsel utilized a demonstrative, listing the three elements she was required to prove for her strict-liability wage-discrimination claim. In closing argument, Selden's counsel again referenced his belief that Selden had proved those three elements (and reiterated the same in rebuttal). (JA.I-1421-1422[145:24-146:11], 1456[200:11-14]). And while Selden presented her starting-salary range-percentage theory alongside these elements, she never pitched that theory using an intentional-discrimination framework.

Furthermore, Selden's belated argument that her claim for strict-liability wage discrimination also included an intentional wage-discrimination claim overlooks that the two claims are distinct causes of action with differing elements. *See Dindinger*, 860 N.W.2d at 565 (observing section 216.6A "establishes a new cause of action with fewer elements than before"). At trial, she did not present evidence or argument that would have permitted a finding that she also proved the additional elements required for intentional discrimination. *See id.* ("And it is not open to dispute that there are some cases where the employee will be able to prevail now and would not have been able

to prevail before. In that middle group, section 216.6A imposes liability that did not previously exist.").[18] Nor was the jury asked to decide whether DMACC intentionally discriminated against Selden. (JA.I-1476-1478).

Selden "is the master of her pleadings and may assert the causes of action as she sees fit." *Kostoglanis v. Yates*, 956 N.W.2d 157, 161 (Iowa 2021). She chose to pursue only a strict-liability claim under section 216.6A—as confirmed by her summary-judgment resistance and pre-trial filings, as well as counsel's opening statement, closing arguments, and repeated references throughout trial. She cannot now contend that her strict-liability wage-discrimination claim was also one for intentional discrimination. *Id.*; *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 579 (Iowa 2017) (noting plaintiff's reliance on a particular theory for ICRA claim

[18] This comports with decisions under analogous federal law. Though similar in some aspects, the EPA and Title VII "are nonetheless distinct," particularly as to the elements of the claims and the differing burdens of proof. *Fallon v. State of Ill.*, 882 F.2d 1206, 1218 (7th Cir. 1989). Thus, "a finding of [EPA] liability, without more, will not lead automatically to liability under Title VII." *Id.* (collecting cases).

determined her burden of proof). Selden's claim was and is exclusively one for strict-liability wage discrimination under section 216.6A, and her remedies are thus limited to those enumerated in the corresponding remedy provision, section 216.15(9)(a)(9).

Conclusion

DMACC believed it was defending a strict-liability wage-discrimination claim under section 216.6A. At trial, DMACC presented uncontradicted evidence that Tjaden had 29 years of relevant experience, including almost 16 years in the ASA2 position, when Selden was hired in 2013. The unrefuted evidence of Tjaden's longevity and greater experience constitute factors other than sex, establishing DMACC's affirmative defense as a matter of law. The district court erred in denying DMACC's motions for directed verdict and JNOV. This Court should not entertain Selden's post-trial attempts to change this case to one of intentional discrimination.

Similarly, the district court erred in denying DMACC's directed verdict and JNOV motions on the retaliation claim because Selden was not qualified for the supervisor position and the record is devoid of any evidence establishing causation. For these reasons, as well as

those discussed in this brief and DMACC's opening brief, DMACC respectfully requests the Court reverse the jury's verdict in its entirety and dismiss all claims. In the alternative, DMACC requests the Court grant a new trial.

/s/ Randall Armentrout, AT0000543
/s/ Katie Graham, AT0010930
/s/ Haley Hermanson, AT0014174
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: rdarmentrout@nyemaster.com
Email: klgraham@nyemaster.com
Email: hhermanson@nyemaster.com
Attorneys for Defendant-Appellant/Cross-Appellee Des Moines Area Community College

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/s/ Haley Hermanson

Certificate of service and filing

I hereby certify that on March 13, 2023, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

David Albrecht
Madison Fiedler Carlson
Fiedler Law Firm, P.L.C.
8831 Windsor Parkway
Johnston, IA 50131
(515) 254-1999
Email: david@employmentlawiowa.com
Email: madison@employmentiowa.com
ATTORNEYS FOR PLAINTIFF/APPELLEE SANDRA SELDEN

/s/ Amy Johnson