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**IN THE SUPREME COURT OF IOWA**

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SUPREME COURT NO. 22-1291
POLK COUNTY CASE NO. LACL147358

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SANDY SELDEN
Plaintiff-Appellee/Cross-Appellant
vs.
DES MOINES AREA COMMUNITY COLLEGE
Defendant-Appellant/Cross-Appellee

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

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

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## ARGUMENT

### I. EMOTIONAL DISTRESS DAMAGES ARE AN APPROPRIATE AND ANTICIPATED REMEDY FOR VICTIMS OF SEX-BASED WAGE DISCRIMINATION

In 2009 the Iowa Legislature declared that wage discrimination "threatens the well-being of citizens of this state and adversely affects the general welfare." IOWA CODE § 216.6A(1)(a)(7). Iowa's wage discrimination law "was specifically enacted on public policy grounds to address wage discrimination in the workplace." *Forster v. Deere & Co.*, 925 F. Supp. 2d 1056, 1066 (N.D. Iowa 2013). To combat the serious problem of wage discrimination, the legislature drafted a serious remedy. An enhanced wage remedy compensates victims for the delay in equal pay and deters employers from further misconduct. The remainder of the ICRA's remedial actions ensures a victim would be entitled to appropriate relief for the specific harm the employee experienced.

#### A. WAGE DISCRIMINATION IS AN "UNFAIR OR DISCRIMINATORY PRACTICE" ENTITLING A WORKER TO DAMAGES UNDER SECTION 216.15(9)(A)(8)

If an employer is found to have "engaged in a discriminatory or unfair practice," the affected worker is entitled to payment for damages which "shall include but are not limited to actual damages, court costs and reasonable attorney fees." IOWA CODE § 216.15(9)(a)(8). Sex discrimination is an "unfair or discriminatory practice." IOWA CODE § 216.6. Wage discrimination is also an "unfair or discriminatory practice." IOWA CODE § 216.6A. The legislature has specifically held that both regular discrimination and wage discrimination are "unfair or discriminatory practices," which,

by the plain language of section 216.15(9)(a)(8), entitles a victim to actual damages. By saying wage discrimination was an "additional unfair or discriminatory practice," the legislature expressed that wage discrimination was another practice for which damages under section 216.15(9)(a)(8) could be awarded. *See* IOWA CODE § 216.6A.

### B. SECTION 216.6A CLAIMANTS ARE NOT LIMITED TO THE DAMAGES LISTED IN 216.15(9)(A)(9)

Section 216.6A states it is an "unfair or discriminatory practice for any employer or agent of any employer to discriminate against any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such employee." IOWA CODE § 216.6A(2)(a). When the Iowa legislature passed this wage discrimination law, it included what it called an "enhanced remedy" for wage loss. (https://www.legis.iowa.gov/docs/publications/iactc/83.1/CH0096.pdf). Enhanced is defined as "made greater" and is synonymous with "increased." *Black's Law Dictionary* 529 (6th edition 1990). "Increase" is defined as something in "addition." *Id.* at 767.

Any employer who pays an employee less because of her sex is liable for damages as set forth in section 216.15(9)(a)(9):

> **For an unfair or discriminatory practice relating to wage discrimination pursuant to section 216.6A**, payment to the complainant of damages for an injury caused by the discriminatory or unfair practice which **damages shall include but are not limited to** court costs, reasonable attorney fees, and either of the following:
>
> (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.

(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.

(emphasis added). The first bolded sentence of section 216.15(9)(a)(9) makes clear the enhanced wage remedy applies to only 216.6A claims. But the line, "damages shall include but are not limited to," makes equally clear that the listed damages are not the exclusive damages for victims of sex-based wage discrimination.

"As with all cases involving statutory interpretation, we start with the language of the statute to determine what the statute means." *Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 680 (Iowa 2022). "A word or phrase is ambiguous only if 'two or more quite different but almost equally plausible interpretations' might apply." *Carreras v. Iowa Dep't of Transp., Motor Vehicle Div.*, 977 N.W.2d 438, 456 (Iowa 2022) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 233, 31-32 (2012)). If a statute's meaning is not ambiguous, the court will "go no further and apply the unambiguous meaning of the language used in the provision." *Alcoa, Inc.*, 975, N.W.2d at 680.

There is nothing ambiguous about the phrase "damages shall include but are not limited to." "The term 'including' usually is interpreted as a term of enlargement or illustration, having the meaning of 'and' or 'in addition to.'" *State Pub. Def. v. Iowa Dist. Ct. for Black Hawk County*, 633 N.W.2d 280, 283 (Iowa 2001) (citing Norman J.

Singer, *Sutherland Statutory Construction* § 47.07 (6th ed. rev. 2000); *Black's Law Dictionary* 763 (6th ed. 1990). Here, "damages shall include" means that costs, attorney fees, and a wage multiplier *must* be included in the damages available to a 216.6A claimant. This makes sense, as the wage multiplier was drafted to correspond with the statute's manifest goal to correct and eliminate wage discrimination "as rapidly as possible." IOWA CODE § 216.6A.

The rest of the phrase, "damages shall include <u>but are not limited to</u>" unequivocally states that costs, fees, and a wage multiplier are not the <u>only</u> damages available. The phrase "including but not limited to" "[creates] in the statute the presumption that the scope of its enumerated [items] are not to be interpreted narrowly." *U.S. v. Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993); *Baker v. Shields*, 767 N.W.2d 404, 407 (Iowa 2009) (inclusion of "not limited to" made definitional list of domesticated animal activity sponsors "illustrative, not exclusive.") (citing IOWA CODE § 673.1(4)-(5)); *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 684 (Iowa 2013) (phrases like "included, but not limited to" is "open-ended language"); s*ee also In the Matter of Sterling United, Inc.*, 674 Fed. Appx. 19, 21–22 (2d Cir. 2016) ("The phrase 'including, but not limited to' introduces a subset of, and does not function as a limitation on, [available damages]) (citing *Bloate v. United States*, 559 U.S. 196, 208 (2010) (construing statutory phrase "including but not limited to" to introduce "list of categories" that was "illustrative rather than exhaustive"); *Pierre v. Providence Wash. Ins. Co.*, 784 N.E.2d 52, 61 (N.Y. 2002) (phrase "includes, but is not limited to" indicated a

"nonexclusive definition."); *Taylor v. State*, 260 A.3d 602, 615 (Del. 2021) (striking down a warrant as unconstitutional due to its "open-ended language 'including but not limited to.'"); *Khan v. Delaware State U.*, 2017 WL 815257, at *4 (Del. Super. Feb. 28, 2017) ("The use of 'including but not limited to' language is a tool commonly employed by contract drafters to avoid the application of the *expressio unius est exclusio alterius* rule.").[1]

The open-ended "not limited to" language also makes sense, as section 216.15(9) grants "broad discretion to fashion a remedy." *Gray v. Nash Finch Co.*, 701 F. Supp. 704, 708 (N.D. Iowa 1988); *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 12 (2009) (the court may generally "grant <u>any relief</u> authorized by Iowa Code sections 216.15(8), including granting an injunction; ordering the rehiring, reinstatement or upgrading of an employee; and awarding damages caused by the discrimination."[2]) (emphasis added). Defendant argues section 216.6A claimants are limited to the wage loss enhancements specifically added in section 216.15(9)(a)(9)(a) and (b). This narrow interpretation that damages are "limited" to only those specifically enumerated contradicts the statute's plain language that damages "are <u>not</u> limited" by subsections (a) and (b). IOWA CODE § 216.15(9)(a)(9).

Defendant's Brief quotes the statute, but only selectively. Defendant simply leaves out the words that don't fit its theory. *See* D. Br. 46-47 (omitting the phrase "but

[1] "The expression of one thing is the exclusion of the other," meaning that the reference to one matter excludes the others.
[2] Section 216.15(8) is now section 216.15(9).

are not limited to"). One of the most fundamental rules of statutory construction is that judges must "give effect to all the words in the statute unless no other construction is reasonably possible." *Cox v. Iowa Dep't of Human Serv.*, 920 N.W.2d 545, 553 (Iowa 2018); IOWA CODE § 4.4(2). The words "but are not limited to" are not ambiguous, so we are required to assume those words mean what they say. The statute directs the courts that, in addition to the enhanced wage differential, victims of wage discrimination have the right to recover any other damages "caused by the discriminatory or unfair practice." IOWA CODE § 216.15(9)(a)(9). The jury found that Sandy Selden incurred emotional distress because of wage discrimination. The statute says she is entitled to money damages for it.

In addition to simply ignoring inconvenient words, Defendant advocates for a narrow interpretation of section 216.15(9)(a)(9). Defendant argues that, even if a victim of wage discrimination has suffered emotional distress because of the violation, she cannot recover for it because section 216.15(9)(a)(9) says she can recover her "damages," rather than their "actual damages." Any difference between "damages" and "actual damages" is unclear but ultimately unimportant. Both terms clearly encompass all compensatory damages, as long as they were "caused by the discriminatory or unfair practice." IOWA CODE § 216.15(9)(a)(9).

### C. EMOTIONAL DISTRESS DAMAGES ARE "DAMAGES"

Having established that damages are not limited to those specifically listed in section 216.15(9)(a)(9), we turn now to what these other "damages" could be.

Defendant's argument relies solely on section 216.15(9)(a)(9) not using the phrase "actual damages." But "actual damages" are synonymous with "compensatory damages." *Chauffeurs, Teamsters & Helpers, Loc. Union No. 238 v. Iowa Civ. Rights Commn.*, 394 N.W.2d 375, 383 (Iowa 1986). As compensatory damages, emotional distress damages are available for a 216.6A plaintiff irrespective of whether coined "damages," or "actual damages."

Moreover, it would not have made sense to include the term "actual damages" in section 216.15(9)(a)(9). Section 216.15(9)(a)(8) does not specifically list lost wages as a separate and recoverable component of "damages," but wages are recoverable as part of "actual damages." Since section 216.15(9)(a)(9) deals with lost wages in the enhanced remedy section, it is inherently part of what the legislature intended and including the term "actual damages" would be duplicative.

The legislature's choice of the word "damages" is notable. "Damages may be compensatory or punitive according to whether they are awarded as the measure of actual loss suffered or as punishment for outrageous conduct and to deter future transgressions." *Black's Law Dictionary* 389-90 (6th ed. 1990). The plain language of section 216.15(9)(a)(9) then means that 216.6A claimants are entitled to either compensatory or punitive damages. However, punitive damages are not available under the ICRA "except when it expressly [says] so." *Ackelson,* 832 N.W.2d at 688-89 (comparing IOWA CODE § 216.15(9)(a)(8) with § 216.17A(6)(a), which provides for punitive damages in housing discrimination). Further, this Court has already held that

the phrase "but not limited to" in the context of section 216.15(9) does not imply punitive damages. *Chauffeurs*, 394 N.W.2d at 384.

If the word "damages" under section 216.15(9)(a)(9) cannot mean punitive damages, we are left with compensatory damages. As stated above, it is well-settled that emotional distress damages are compensatory damages and therefore must be included in the definition of word "damages" available under 216.15(9)(a)(9). *See id.* at 382-83.

The open-ended language of section 216.15(9)(a)(9) and the Court's jurisprudence regarding the reading of "damages" make the following clear: (1) a section 216.6A claimant is entitled to "damages" not limited to costs, fees, and a wage multiplier; (2) "damages" can be either compensatory or punitive; (3) emotional distress damages are compensatory damages; and (4) punitive damages are not available to a 216.6A plaintiff. These facts lead to the undeniable conclusion that emotional distress damages may be awarded as compensatory "damages" to victims of sex-based wage discrimination. Or, as expressed under the transitive property of equality:

(A) Damages = (B) Compensatory Damages

(B) Compensatory Damages = (C) Emotional Distress Damages

(A) Damages = (C) Emotional Distress Damages

### D. AWARDING EMOTIONAL DISTRESS IS CONSISTENT WITH THE LAW'S MANDATE TO FASHION APPROPRIATE REMEDIES

Awarding emotional distress has been upheld on two separate grounds. First, as noted above, damages for emotional distress are undeniably compensatory in nature.

Second, "[a]llowing the award of emotional distress damages is also consistent with the commission's discretion in fashioning an appropriate remedy" under section 216.15(9). *Id.*; *see also Smith v. ADM Feed Corp.*, 456 N.W.2d 378, 383 (Iowa 1990), overruled on other grounds by *McElroy v. State*, 703 N.W.2d 385 (Iowa 2005); IOWA CODE § 216.15(9) (If a discriminatory or unfair practice has taken place, the commission "shall . . . take the necessary remedial action . . . that will carry out the purposes of" the Iowa Civil Rights Act.).

Section 216.15(9)(a)(9) states that wage discrimination victims may recover "damages for an injury caused by the discriminatory or unfair practice." While the enhanced wage remedy focuses on the pecuniary *wage* harm, other "damages" are necessary to make the victim whole.

In fashioning the appropriate remedy for each case, the court must be guided by the ICRA's command that it "shall be construed broadly to effectuate its purposes." IOWA CODE § 216.18. The preamble to section 216.6A's recognizes that wage discrimination causes "low employee morale, high turnover, and frequent labor unrest," and "threatens the well-being of citizens of this state and adversely affects the general welfare." IOWA CODE § 216.6A(1)(a).

By pointing out the "unrest" and damage to "morale" that typically accompanies wage discrimination, the legislature expressly recognized that it causes emotional harm. And while section 216.15(9)(a)(9)'s enhanced wage remedy focuses on the pecuniary harm, lost wages are not intended to compensate a victim for emotional distress. "The

ultimate purpose in awarding damages as compensation for injury is to place the injured party in the position he or she would have been in had there been no injury." *Foods, Inc. v. Iowa Civ. Rights Commn.*, 318 N.W.2d 162, 171 (Iowa 1982). To ignore fundamental principles of statutory construction and interpret the ICRA narrowly would contradict the express mandate of section 216.18.

The district court granted JNOV by finding that section 216.6A plaintiffs are given the enhanced wage remedy "instead" of emotional distress. This holding ignores that the statute authorizes "damages . . . not limited to" the wage multiplier, as discussed above. It also conflates Plaintiff's lost wages with emotional distress damages, despite the fact they are two distinct categories of damages intended to compensate an employee for two distinct harms—one, an injury to a plaintiff financially, and the other, an injury to a plaintiff emotionally.

Conflating the purpose of the wage multiplier—to compensate a plaintiff for wages—would also mean that a plaintiff who experienced significant emotional harm but was a low wage earner would have a *de facto* cap on what she could recover on emotional distress, tethered to her wage. It would also unjustly compensate a high earner more, even if there was little evidence of emotional distress, essentially creating a caste system in which emotional distress is worth more based on the marketplace value of worker's services.

### E. IN THE ALTERNATIVE, EMOTIONAL DISTRESS DAMAGES ARE AVAILABLE BECAUSE THE JURY FOUND DEFENDANT ACTED WILLFULLY

Defendant repeatedly stresses the "strict-liability" nature of section 216.6A. Intent is still a factor in a 216.6A case; it is just not the plaintiff's burden to prove it. Section 216.6A *presumes* discriminatory intent unless the employer proves that a factor other than sex was the reason for the wage differential. If an employer fails to carry this burden, intent has been shown.

"Emotional distress damages are compensatory … [and] can be awarded where the discriminatory act is intentional or willful." *Chauffeurs*, 394 N.W.2d at 382–83. Here, Plaintiff proved to the jury that DMACC's violation *was* willful, meaning it was done intentionally. If emotional distress damages are not a default remedy for successful plaintiffs, then the fact that intent is at issue in 216.6A cases implies emotional distress damages become recoverable in those cases where a plaintiff can prove willfulness since "emotional distress may be awarded so long as there is evidence that the employer's "discriminatory acts were the basis for and connected with [the plaintiff's] emotional distress." *Chauffeurs*, 394 N.W.2d at 383.

## II. AN EMPLOYER WHO VIOLATES SECTION 216.6A VIOLATES SECTION 216.6

The Eighth Circuit has long held that the federal Equal Pay Act ("EPA") and Title VII must be interpreted in harmony, so that a violation of the EPA is, *by definition*, a violation of Title VII's broader prohibitions against sex discrimination. *See, e.g. Dindinger v. Allsteel, Inc.*, 853 F.3d 414, n.2 (8th Cir. 2017); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1072 (8th Cir. 2009); *Taylor v. White*, 321 F.3d 710, 715 (8th Cir. 2003);

*Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 718-19 (8th Cir. 2000); *Kindred v. Northome/Indus. Sch. Dist. No. 363,* 154 F.3d 801, 803 (8th Cir. 1998); *EEOC v. Cherry–Burrell Corp.,* 35 F.3d 356, 360 (8th Cir. 1994); *McKee v. Bi-State Devel. Agency,* 801 F.2d 1014, 1019 (8th Cir. 1986). EEOC regulations say the same thing. 29 C.F.R. § 1620.27(a) ("any violation of the Equal Pay Act is also a violation of title VII.").[3]

This means that a plaintiff who proves an EPA violation is entitled to the remedies available under Title VII as well as the EPA. 29 C.F.R. § 1620.27(b). Plaintiffs may recover the highest benefit available under both statutes, "so long as the same individual does not receive duplicate relief for the same wrong." *Id.; see also Broadus v. O.K. Indus.,* 226 F.3d 937, 943 (8th Cir. 2000) (plaintiff entitled to lost wages and liquidated damages under EPA and punitive damages under state civil rights act); *Herndon v. Wm. A. Straub, Inc.*, 17 F. Supp. 2d 1056, 1060 (E.D. MO. 1998) (recovery of wages and liquidated damages under EPA and emotional distress under Title VII).

This Court has followed Eighth Circuit precedent on this issue. The plaintiff in *Dutcher v. Randall Foods*, 546 N.W.2d 889, 891 (Iowa 1996) won her EPA claim and sought emotional distress damages for the violation under the ICRA. Although the district court's holding that Randall suffered no emotional distress on account of the

[3] Defendant argues the opposite is true, citing one Seventh Circuit case from 1989 and ignoring the bevy of case law to the contrary from the Eighth Circuit and other appellate courts. D. Br. 52 n.18.

violation was not disturbed on appeal, the Court did not question that such damages were available since sex discrimination violates the ICRA. *Id.* at 894.

Defendant repeatedly states that Plaintiff is arguing "for the first time," that she pursued a claim under section 216.6. D. Br. 49. Again, Defendant misrepresents both the timing and substance of Plaintiff's claims. Plaintiff has consistently argued, both before, during, and after trial, that the enhanced wage remedy was "in addition to, not in substitution of," other damages available under 216.15(9)(a). P. MIL Res. ¶ 11. After all, they are all part of the same statutory subsection.

Defendant also argues that Plaintiff did not prove sex discrimination. Again, this is undisputedly wrong. "Certainly the right to hold employment without discrimination on the basis of gender encompasses the right to be paid for that employment without discrimination on the basis of gender." *Broadus*, 226 F.3d at 943. Sex discrimination in employee compensation is one type of sex discrimination. *See Dindinger v. Allsteel*, 860 N.W.2d 557, 567 (Iowa 2015). ("We have no difficulty concluding that wage discrimination is potentially actionable under Iowa Code section 216.6."). The only way Defendant could have been found liable of violating section 216.6A was if the jury found that Defendant by discriminated against Sandy by paying her lower wages "because of . . . sex" in violation of section 216.6.

## III. SECTION 216.6A CLAIMS ARE VIEWED AS A CONTINUING VIOLATION

Defendant claims this Court has never intimated that section 216.6A incorporates the continuing violation doctrine. Not so.

> In 2009, the legislature provided a different statute of limitations for claims under Iowa Code section 216.6A, allowing the employee to recover "for the period of time for which the complainant has been discriminated against." 2009 Iowa Acts ch. 96, § 3 (codified at Iowa Code § 216.15(9)(*a*)(9)(a)). *This language appears to allow the employee to recover for the entire period of discrimination, so long as some equal pay violation occurred within 300 days of the employee's administrative complaint.*

*Dindinger*, 860 N.W.2d at 572 n.7 (emphasis added). This is not mere dicta. The Court also examined other jurisdictions' approaches to equal pay claims. States with specific wage discrimination laws that incorporated the continuing violations doctrine, such as Tennessee and Ohio, obviously applied that doctrine. *Id.* In the absence of specific statutory language, most other states decided that each paycheck came with its own limitation period. *Id.* at 573-75 (examining decisions from the District of Columbia, Illinois, Massachusetts, New Jersey, and New York). The Supreme Court then looked at the language of the ICRA and found that "[e]xcept for the new cause of action added in 2009, the ICRA does not have language as in Ohio or Tennessee that would allow the claimant to revert to the date when the employer initially discriminated against the employee." *Id.* at 575 (emphasis added).

**CONCLUSION**

The plain language of 216.15(9)(a)(9) directs courts to award damages "not limited to" lost wages and liquidated damages. Emotional distress damages are undeniably part of that broad category. Consistent with the remedial purposes of the

Iowa Civil Rights Act, Plaintiff requests that the Court reverse the district court's order granting Defendant judgment notwithstanding the verdict and order Defendant to compensate Sandy Selden for the emotional distress she suffered due to Defendant's unfair and discriminatory practice of paying her less because of her sex.

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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 Reply Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

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I, Cheryl Smith, hereby certify that on the 27th day of March, 2023, I electronically filed the foregoing Reply Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

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