In The Iowa Supreme Court
Supreme Court No. 17-1892

GREGORY HAWKINS,

Plaintiff-Appellee,

vs.

GRINNELL REGIONAL MEDICAL CENTER, DAVID NESS, and DEBRA NOWACHEK,

Defendants-Appellants.

Appeal from the District Court for Poweshiek County

The Honorable Randy S. DeGeest

Appellants' Final Brief

Oral Argument Requested

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Statement of Issues Presented for Review

This is a case about a plaintiff's burden of proof on claims of discrimination and retaliation under the Iowa Civil Rights Act ("ICRA"). Defendant-Appellant Grinnell Regional Medical Center ("GRMC" or "Hospital") terminated the employment of Plaintiff-Appellee Gregg Hawkins, the manager of the Hospital's laboratory ("Lab"). At trial, Defendants presented evidence Hawkins's poor job performance was the reason the Hospital terminated his employment. Hawkins presented evidence that his age (61), disability (cancer survivor), and retaliation (treatment by management following his leave of absence), were "motivating factors" in the termination. After trial, a jury returned a verdict in Hawkins's favor on all claims, against all Defendants, and awarded $4.28 million in emotional-distress damages and $222,000 in lost wages. The questions presented on this appeal are:

1. Did the district court err in refusing to instruct the jury that it must find for the Hospital if the evidence showed it would

have made the "same decision" regardless of Hawkins's age, cancer status, and engaging in protected activity?

Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)
Boelman v. Manson State Bank, 522 N.W.2d 73 (Iowa 1994)
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Miller v. Davenport Cmty. Sch. Dist., No. 99-0650, 2000 WL 210292 (Iowa Ct. App. Feb. 23, 2000)
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2. Did the district court err in instructing the jury it could award emotional-distress damages for any "wrongful conduct" during Hawkins's employment, (even outside the applicable statute of limitations), not just emotional distress caused by the termination?

Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678 (Iowa 2013)
Bellach v. IMT Ins. Co., 573 N.W.2d 903 (Iowa 1998)
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Iowa Code § 216.16(6) (Iowa 2017)
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3. Is a $4.28 million award for emotional distress, to a plaintiff who did not seek or receive medical treatment for any symptoms of emotional distress, excessive under Iowa law?

City of Hampton v. Iowa Civil Rights Comm'n, 554 N.W.2d 532 (Iowa 1996)
Ferris v. Riley, 101 N.W.2d 176 (Iowa 1960)
Foster v. Time Warner Entm't Co., 250 F.3d 1189 (8th Cir. 2001)
Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190 (8th Cir. 2000)
Fry v. Blauvelt, 818 N.W.2d 123 (Iowa 2012)
Goettelman v. Stoen, 182 N.W.2d 415 (Iowa 1970)
Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009)
Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997)
Kucia v. Southeast Arkansas Cmty. Action Corp., 284 F.3d 944 (8th Cir. 2002)
Mathieu v. Gopher News Co., 273 F.3d 769 (8th Cir. 2001)
Rees v. O'Malley, 461 N.W.2d 833 (Iowa 1990)
Rosenberger Enters., Inc. v. Ins. Serv. Corp., 541 N.W.2d 904 (Iowa Ct. App. 1995)

Russell v. Chicago, Rock Island & Pac. R.R. Co., 86 N.W.2d 843 (Iowa 1957)
Sallis v. Lamansky, 420 N.W.2d 795 (Iowa 1988)
Shepard v. Wapello Cnty., Iowa, 303 F. Supp. 2d 1004 (S.D. Iowa 2003)
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Vetter v. State, No. 16-0208, 2017 WL 2181191 (Iowa Ct. App. May 17, 2017)
White v. Walstrom, 118 N.W.2d 578 (Iowa 1962)
WSH Props., L.L.C. v. Daniels, 761 N.W.2d 45 (Iowa 2008)
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4. Did the district court abuse its discretion in admitting evidence of hearsay notes from Hawkins's friends and family, gruesome photos of cancer treatment taken when Hawkins was on medical leave, and the CEO's salary?

Beane v. Utility Trailer Mfg. Co., No. 2:10 CV 0781, 2013 WL 12183533 (W.D. La. Mar. 6, 2013)
Blake v. Clein, 903 So.2d 710 (Miss. 2005)
Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993)
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Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004)
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Gomaco Corp. v. Faith, 550 So.2d 482 (Fl. Dist. Ct. App. 1989)
Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000)
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Iowa R. Evid. 5.402
Iowa R. Evid. 5.801(c)
Iowa R. Evid. 5.802

5. Did Plaintiff's counsel's misconduct in closing argument, by violating the "golden rule" and asking the jury to punish Defendants, inflame the jury with passion and unfair prejudice?

Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678 (Iowa 2013)
Andrews v. Struble, 178 N.W.2d 391 (Iowa 1970)
Cardamon v. Iowa Lutheran Hosp., 128 N.W.2d 226 (Iowa 1964)
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Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)
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Gilster v. Primebank, 747 F.3d 1007 (8th Cir. 2014)
Jackowitz v. Lang, 975 A.2d 531 (N.J. Super. Ct. App. Div. 2009)

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)
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Russell v. Chicago, Rock Island & Pac. R.R. Co., 86 N.W.2d 843 (Iowa 1957)
Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982)
State v. Greene, 592 N.W.2d 24 (Iowa 1999)
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State v. Musser, 721 N.W.2d 734 (Iowa 2006)
State v. Phillips, 226 N.W.2d 16 (Iowa 1975)
Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996)
Iowa Code § 216.15(9)(a)(8) (Iowa 2017)
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Routing Statement

In Haskenhoff v. Homeland Energy Solutions, LLC, 897 N.W.2d 553 (Iowa 2017), the Supreme Court enunciated that a plaintiff's trial burden in ICRA employment retaliation cases, like discrimination cases, is to prove a plaintiff's exercise of protected conduct was a "motivating factor" in the employer's decision to terminate. The Court did not address whether application of the "motivating-factor" standard for both discrimination and retaliation cases requires a jury instruction allowing an employer to prove it would have made the "same decision" regardless of the protected class status or protected activity when there is evidence of legitimate reasons for the termination. In the present case, the district court refused to give the "same-decision" instruction, instead instructing the jury that it may find for Plaintiff if the protected conduct or a protected characteristic only "played a part" in the termination.

This case presents a substantial question of enunciating or changing legal principles. See Iowa R. App. P. 6.1101(2)(f). Guidance

from the Iowa Supreme Court is needed for the district courts and counsel handling employment discrimination and retaliation cases.

Statement of the Case

Defendants, GRMC, David Ness, and Debra Nowachek appeal from a $4.5 million jury verdict in favor of Gregg Hawkins on his ICRA claim relating to the termination of his employment.

GRMC operates an 81-bed, non-profit hospital in Grinnell, Iowa, employing approximately 400 people. (JA-I 1050-1051 [33:13-34:9]). At all relevant times, Todd Linden was the Hospital's CEO, Ness was the Hospital's Vice President of Operations, and Nowachek was the Human Resources Director. (JA-I 438 [66:4-5], 965 [227:8-10], 1095 [78:10-12]). Hawkins was employed as the Hospital's Laboratory Director until June 3, 2015, when his employment was terminated. (JA-I 14-23).

On February 4, 2016, Hawkins initiated this lawsuit, alleging the termination of his employment was the result of illegal discrimination (age and disability) and retaliation. (JA-I 14-23).

The case was tried to a jury July 11-24, 2017. (JA-I 2916). After deliberating less than ninety minutes, the jury returned a verdict in Hawkins's favor on all claims against all Defendants. The jury awarded $222,009.68 in backpay, $2,000,000 for past emotional distress, and $2,280,000 for future emotional distress. (JA-I 2132-2134).

On August 8, 2017, Defendants filed a motion for new trial and remittitur of damages under Iowa Rule of Civil Procedure 1.1004(1), (2), (4), (6), and (8). (JA-I 2148-2186). On August 9, 2017, Hawkins filed a bill of costs. (Bill of Costs). On September 5, 2017, Hawkins moved for equitable relief and attorneys' fees, which Defendants resisted. (JA-I 2256-2517, 2573-2666).

In an October 26, 2017 ruling, the district court denied Defendants' motion for new trial. (JA-I 2914-2922). The district court

awarded Hawkins $241,746.46 in front pay through December 31, 2019, and attorneys' fees of $615,208.33.[1] (JA-I 2923-2929).

On November 22, 2017, Defendants filed a notice of appeal. (JA-I 2950-2952).

Statement of the Facts

A. Hawkins's employment with the Hospital.

In 1976, the Hospital hired Hawkins as a laboratory "bench tech." (JA-I 15, 1248 [231:4-19], 1279 [9:14-18]). In 1985, the Hospital named him laboratory director. (JA-I 15, 1279-1280 [9:19-10:7]). As laboratory director, Hawkins was accountable for daily operations of the laboratory, histology, and mobile services. (JA-II 298-305). For most of Hawkins's employment, an off-site contract pathologist served as the Lab's medical director. (JA-I 528 [156:7-23], 709-710 [177:17-178:7]).

[1] The district court later awarded Hawkins $45,963.57 in fees for post-trial motions.

B. **The Hospital received physician complaints about the Lab and Hawkins.**

Dr. Ronald Collins joined the medical staff at the Hospital in April 2011. (JA-I 1868 [131:10-14]). Dr. Collins practices in internal medicine, became the president-elect of the medical staff in 2013, and the president in 2015. (JA-I 1869-1871 [132:19-134:20]). In 2012, Dr. Collins began documenting issues with the Lab and Hawkins's management, which continued through 2014, as evidenced in a series of emails. (JA-III 337-425). Issues included delays in receiving lab cultures, delays in receiving lab reports, and issues with obtaining historical lab results. (JA-I 1879-1880 [142:17-143:18]).

One of Dr. Collins's paramount concerns was the Lab failing to report critical lab values in patients' cultures to providers in a timely manner, or even at all. (JA-I 1880 [143:17-18]). On October 18, 2012, Dr. Collins met with Hawkins regarding these issues, but the issues continued. (JA-I 1879 [142:17-24], 1880-1904 [143:25-167:19]).

Other providers, such as Dr. Lauren Graham and Dr. Michelle Rebelsky, testified about similar concerns in 2013 and 2014. (JA-I 1729

[229:13-14], 1775 [38:8-13], 1778-1782 [41:23-45:5], 1783-1800 [46:21-63:24], 1838-1839 [101:15-102:13]). On February 19, 2013, the Medical Executive Committee met with Hawkins to discuss his failure to timely communicate lab culture results to physicians. (JA-I 1896-1897 [159:9-160:21]). The Committee "counseled [Hawkins] to address physician issues by putting action plans in place when issues have been identified." (JA-I 1897 [160:19-21]). According to Dr. Collins, "a lot of people lost trust" in the Lab and a few providers in the area stopped using the Lab. (JA-I 1904 [167:15-16]).

Dr. Rebelsky, a family-practice physician in Grinnell, reported she and "everybody" had concerns with the Lab in 2013-2014. (JA-I 1729 [229:13-14]). One concern involved a standard test given to a newborn baby to measure the level of bilirubin in the baby's blood. If the level is too high, it can cause brain damage. (JA-I 1838-1839 [101:15-102:3]). Although it takes 45 minutes to run the sample for a bilirubin test, the Lab would sometimes take two or three hours to obtain the results. (JA-I 1839 [102:10-13]). This delay also delayed the

decision of whether or not the baby needed to be admitted to the hospital. Id.

By July 21, 2013, Hawkins's supervisor, Suzanne Cooner, decided to put together an action plan for Hawkins and the Lab. Cooner sent an email to Hawkins stating:

> At the clinic providers meeting last Thursday night the lab was identified as a source of frustration . . . I need to talk to you before I leave on vacation to come up with an action plan. The negativity toward lab is getting more widespread and I need to understand it and we need to come up with an action plan together….

(JA-III 426-427).

C. **Hawkins's cancer diagnosis and treatment, and the Hospital's accommodations.**

In November 2013, Hawkins was diagnosed with Stage III breast cancer. (JA-I 15, 1260-1261 [9:14-10:5]; JA-II 906; JA-III 241-242). On December 4, 2013, Hawkins underwent a left breast surgical mastectomy, followed by chemotherapy treatment and radiation. (JA-I 15, 17; JA-II 906; JA-III 243-248, 251-254, 278-281). Hawkins took medical leave under the Hospital's policies and the Family and Medical Leave Act (FMLA). (JA-I 15-16; JA-III 306).

Hawkins remained off work on FMLA until March 19, 2014, when Hawkins's treating oncologist released him to work with a four hours per day restriction. (JA-I 15; JA-II 914). Hawkins continued to use FMLA for partial-day absences through May 17, 2014. (JA-I 15-16). After Hawkins exhausted his FMLA leave, the Hospital granted him thirty days' additional leave. (JA-I 15-16, 459 [87:3-9], 460 [88:1-5], 477 [105:11-16]). At this point, Hawkins had exhausted all possible medical leave, but his doctor had not released him to return to work full time. Id.

On June 2, 2014, Linden, Ness, and Nowachek met with Hawkins to discuss when Hawkins could return to work on a full-time basis. (JA-I 16, 465 [93:6-12]). Hawkins reported that his part-time restriction was indefinite, but he hoped to return full time by year-end. (JA-I 669 [71:4-15]).

After weighing the options, the Hospital determined it could not continue employing Hawkins in a part-time role indefinitely. (JA-I 458-460 [86:16-88:5], 1064 [47:8-21]). Based on Hawkins's inability to

perform an essential function of the laboratory director job (work full time), the Hospital offered Hawkins the option of resignation, in lieu of involuntary termination, and discussed characterizing the resignation as retirement. (JA-I 458-459 [86:16-87:18], 465-466 [93:24-94:7], 669 [71:4-15]). At that time, Hawkins did not make a decision. (JA-II 891-893).

On June 11, 2014, Hawkins sent Ness an email proposing they allow Hawkins to return to work in six months. (JA-I 17; JA-II 895-897). On June 12, 2014, Ness sent an email to Nowachek and Linden stating: "We have a problem." (JA-II 894). Nowachek responded: "He's going to make us term him." (JA-II 894). At trial, Hawkins's counsel branded these internal emails, not seen by Hawkins, as the smoking gun evidence of retaliation.

On July 10, 2014, Linden reconsidered the Hospital's position and granted Hawkins's request for an additional open-ended leave. (JA-I 1066 [49:12-49:25]; JA-II 895-897, 898; JA-III 307). Hawkins took leave and did not report to work at all. (JA-III 307). The Hospital

appointed a full-time interim laboratory director, and held the laboratory director position for Hawkins anticipating his return to full-time work. (JA-I 18, 547-548 [175:16-176:12], 1065-1066 [48:23-49:25]; JA-III 307).

D. **Hawkins's return to work.**

On September 19, 2014, Dr. Heddinger, Hawkins's oncologist, released Hawkins to return to work "limited to 40 hours of work/week." (JA-I 18, 1509 [9:21-22]; JA-II 911-914;). On October 6, 2014, Hawkins returned to work,[2] with the 40-hour restriction. (JA-I 18). On November 24, 2014, Dr. Heddinger released Hawkins to return to work with no restrictions. (JA-I 18; JA-II 1913).

On December 1, 2014, Hawkins returned to work as full-time laboratory director. (JA-III 334). At that time, the cancerous tumor had been completely removed, with no evidence of disease

[2] Frustrated that Hawkins had not completed his annual training required to return to work, on October 15, Nowachek sent an email to Ness stating: "I just have to vent! . . . Grrrrrrrrrrrrr." (JA-II 919). Hawkins's counsel repeatedly stressed this email as evidence of Nowachek's evil intent.

remaining. (JA-I 1262-1263 [46:10-47:3], 1264-1269 [56:23-61:20]). From that day forward, Hawkins had no medical restrictions and did not need nor seek additional accommodations. (JA-I 684 [86:7-16], 1264-1270 [56:23-62:2]).

E. Hawkins failed to correct workplace performance issues after his return to work.

In August 2011, Dr. Soraya Rodriguez began working as a pathologist at the Hospital. (JA-I 769 [22:9-10]). On August 2, 2014, during the time Hawkins was on leave, Dr. Rodriguez became the medical director for the Lab. (JA-I 786 [39:6-10]; JA-III 335-336). Unlike previous Lab medical directors, Dr. Rodriguez was present on-site at the Hospital with her office inside the Lab. (JA-I 528 [156:7-23], 709-710 [177:17-178:7], 786 [39:11-16]).

After Hawkins returned from leave, he still failed to take "ownership" of the multiple issues at the Lab and refused to correct or discipline Lab staff. (JA-I 797 [50:3-20]). Dr. Rodriguez observed that the Lab under Hawkins's leadership was "dysfunctional." (JA-I 773-774 [26:17-27:24]). According to Dr. Rodriguez: "A dysfunctional

lab takes the—puts the patients at risk for laboratory errors." (JA-I 774 [27:11-12]). Multiple physicians complained to Dr. Rodriguez about the Lab and a lack of discipline in the Lab. (JA-I 841 [94:2-7]). Dr. Rodriguez opined that Hawkins lacked the ability to lead the Lab:

> It was very hard for him because that was his personality. He doesn't have it. So it was hard for him because he doesn't change that. His leadership style was not effective. It was not effective.

(JA-I 842-843 [95:25-96:4]).

At about the same time, the Hospital's human resources department investigated the Lab due to ongoing personnel issues raised by staff members. (JA-II 942-944). Dr. Rodriguez, Ness, and Nowachek met with Hawkins on January 28, 2015 to discuss concerns with Hawkins's leadership style and his difficulty in effectively running the Lab. (JA-II 942-944). Hawkins was asked to prepare an action plan to correct his deficiencies, which he submitted on February 4. (JA-II 945-947). Finding Hawkins's plan lacked specific details, the Hospital implemented a separate action plan. (JA-II 952). As part of the action plan, Hospital representatives had weekly

meetings with Hawkins to check in and help him improve. (JA-I 850 [103:8-12]).

On March 9, the Hospital issued Hawkins a written warning for disregarding several Lab policies. (JA-II 951). Dr. Rodriguez observed that by May 2015, Hawkins's leadership of the Lab had not improved and his pattern of unacceptable behavior persisted. (JA-I 862-864 [115:12-117:2]). Miles Southern, the Lab coordinator, described the condition of the Lab at that time as being in "survival mode." (JA-I 958 [27:21]). The Hospital decided to terminate Hawkins's employment and drafted a proposed severance agreement on May 11 to send to Hawkins's attorney, who he had involved by that point. (JA-III 428-435).

F. **Post-termination events.**

Two days later, on May 13, 2015, Hawkins's attorney filed an administrative discrimination and retaliation charge with the Iowa Civil Rights Commission. (JA-II 974-985). Although Hawkins knew his termination was imminent, his attorney asked that he be allowed

to continue working through an annual Iowa State Hygienic Laboratory survey, which occurred on May 20, 2015. (JA-III 308-328). Thus, Hawkins's last day did not occur until June 3, 2015. (JA-I 20). On June 5, 2015, the Iowa State Hygienic Laboratory issued its report covering the previous two years and noted thirteen deficiencies in the Lab, the most ever issued to the Hospital. (JA-III 308-328).

Although he contends his termination caused him emotional distress, Hawkins did not seek or receive medical treatment or take medication for the emotional distress. (JA-I 1509 [9:8-16]). In July 2015, one month after termination, Hawkins reported no psychiatric symptoms to his oncologist. (JA-I 1270-1272 [62:11-64:18], 1513-1514 [13:22-14:8]; JA-III 290-292). Similarly, in October 2016, over one year after the termination, Hawkins reported no psychiatric symptoms. (JA-I 1514 [14:9-16]; JA-III 293-296).

G. **Legal proceedings.**

1. **Motions in limine.**

Before trial, Defendants moved in limine to exclude improper closing argument, including any "golden-rule" argument, and any

direct appeals to jurors to "put themselves in the shoes of" Hawkins. (JA-I 107-135). Defendants also moved to exclude evidence of the Hospital's wealth. Id. The district court granted the motions. (JA-I 309-311 [14:23-16:7], 314 [19:15-19]).

2. **Trial.**

During trial, the district court admitted, over Defendants' objection, a nearly 50-page collection of color photographs depicting Hawkins before, during, and after his cancer treatment. (JA-II 992-1038). The photographs showed Hawkins receiving chemotherapy;[3] Hawkins suffering from chemotherapy-induced alopecia;[4] Hawkins with an infuser port in his shoulder;[5] and post-

Exhibit 171

[3] JA-II 1017, 1026, 1028, 1035.
[4] JA-II 1020-1021, 1025-1028, 1035.
[5] JA-II 1028, 1035.

mastectomy radiation burns on Hawkins's chest.[6] (JA-I 1238-1239 [221:7-222:7], 1240-1242 [223:23-225:9], 1299-1301 [29:10-31:8]).

Some photographs were taken in 2013 and 2014, while Hawkins received cancer treatment. (JA-I 1238-1239 [221:7-222:7], 1240-1242 [223:23-225:9], 1299-1301 [29:10-31:2]). For most, the date of each photograph is unknown, because the district court admitted the entire collection of photographs without requiring Hawkins to provide a date or any other contextual information about the photographs. (JA-I 1299 [29:10-17]).

The district court also admitted, over Defendants' objection, a forty-three page collection of letters, notes, and cards from nearly thirty different people "[r]eassur[ing]" Hawkins "that [he] had done a good job, and . . . they supported [him] and felt bad that [he] had been fired." (JA-I 1377 [107:3-14]; JA-II 1038-1081). Replete with sentiment, the messages express outrage, ire, and disgust toward the

[6] JA-II 1037-1038.

Hospital;[7] invoke divinity, faith, prayer, and Biblical verse;[8] rally Hawkins about the upcoming jury trial;[9] praise Hawkins as an incomparable supervisor;[10] console Hawkins about his battle with cancer;[11] and compliment Hawkins about his multifaceted, exemplary character.[12] (JA-II 1039-1081).

One writer, "appalled to hear" about Hawkins's termination, comforted Hawkins ("you did not deserve this"), while berating Defendants: "[t]hose responsible should be ashamed." (JA-II 1043). Another expressed "displeasure," reminiscing about "the many yrs of working with you in the lab & how good you were to us all!" (JA-II 1059). Yet another couple felt "sick" the Hospital no longer employed Hawkins, declaring: "[s]o disappointed to see and hear what is going on at GRMC!!" (JA-II 1061). In June 2017, two years after his

[7] JA-II 1043-1046, 1058-1061, 1080-1081.
[8] JA-II 1046-1052, 1063-1068, 1071-1073.
[9] JA-II 1067-1068, 1074-1081.
[10] JA-II 1039-1044, 1050-1054, 1058-1061, 1071-1079.
[11] JA-II 1050-1052, 1062-1063, 1067-1068.
[12] JA-II 1040-1044, 1050-1054, 1058-1061, 1067-1081.

termination, Hawkins received a greeting card focusing on the upcoming July 2017 trial: "GO GET 'EM! YOU GOT THIS," with a handwritten note: "So proud to hear about your [sic] holding GRMC to account for their treatment of staff." (JA-II 1080-1081).

The notes cover a span of time from November 2002 (thirteen years before termination), to June 15, 2017 (two years after termination and just a month before trial). (JA-II 1039-1081). Not one of the correspondents participated in the Hospital's termination decision. Aside from some Hospital employees who signed a "Boss's Day" card,[13] not one correspondent testified at trial.

3. Marshaling instructions and failure to give same-decision jury instructions.

In its marshaling instructions for each of Hawkins's three claims, the district court instructed the jury that Hawkins must prove, respectively, that his disability, age, or protected activity was a "motivating factor" in Defendants' decision to terminate his

[13] JA-II 1039.

employment. (JA-I 2114, 2116, 2118). The district court further instructed the jury that:

> Plaintiff's disability, his age, or his protected activity was a "motivating factor" if it played a part in Defendants' decision to fire him. Plaintiff's disability, age, and/or protected activity need not have been the only reason(s) for Defendants' actions.

(JA-I 2119).

Despite substantial evidence Hawkins's deficient job performance motivated Defendants' decision to terminate his employment, the district court refused to submit Defendants' proposed same-decision instructions, which stated:

> If you find in favor of Plaintiff under Instruction __, then you must answer the question of your verdict form:
>
> Has it been proved that the Hospital would have made the same decision to terminate Plaintiff's employment regardless [of his age] [of his disability] [of whether Plaintiff filed an Iowa Civil Rights Complaint]?

(JA-I 180, 185, 189).

4. **Accommodation jury instruction.**

Although the district court did not ask the jury to decide any liability issue regarding accommodations, the district court instructed the jury about an employer's accommodation obligations:

> When an individual becomes disabled, from any cause, during his employment, the employer must make every reasonable effort to continue the individual in the same position or to retain and reassign the employee and to assist in his rehabilitation.

(JA-I 2118).

5. **Damages jury instruction.**

The district court's damages instruction failed to specify the relevant date of harm or that the damages were limited to harm caused by the termination of Hawkins's employment. (JA-I 2120). The instruction stated in part:

> If you find in favor of Plaintiff Gregg Hawkins on one or more of his claims, then you must determine an amount that is fair compensation for his damages. You may award compensatory damages only for injuries that Plaintiff proves were caused by the wrongful conduct of Defendants . . . .
>
> Emotional Distress: You must determine the amount of damages for any emotional distress sustained by Plaintiff

> Gregg Hawkins. Award him the amount that will fairly and justly compensate him for emotional distress damages you find he sustained as a result of the illegal actions. . . . You must also consider the extent or duration, as any award you make must cover the damages endured by Plaintiff since the wrongdoing to the present time.
>
> You should also award damages for future emotional distress to an employee who has proven discrimination or retaliation, if his emotional distress and its consequences can reasonably be expected to continue in the future . . . .

(JA-I 2120) (emphasis added).

6. **Plaintiff counsel's closing argument.**

On July 24, 2017, the parties presented closing arguments. (JA-I 1968-2100). At the beginning of her summation, Hawkins's counsel argued:

> What if you work your whole life, almost 40 years, expecting that you left the world and your [workplace] a little bit better than how you found it? What if your entire identity depended on it? But then your employer decided that somehow you were no good merely because you had the misfortune to get cancer and you refused to give in to their demands to retire, when instead you stood up to them and said, I still have . . .

(JA-I 1968-1969 [35:12-36:1]) (emphasis added).

Defendants objected at that point, arguing counsel's summation violated the motion in limine on golden-rule arguments. (JA-I 1968-1969 [35:12-36:1], 2029-2030 [96:11-97:7]). The district court overruled the objection, took no curative measure, and offered no admonition to the jury. (JA-I 1968-1969 [35:22-36:1], 2029-2030 [96:11-97:7]).

Hawkins's counsel then repeatedly made additional direct appeals to jurors, asking them to put themselves in Hawkins's shoes:[14]

> What is it worth to have <u>your</u> pride and dignity stripped away, to have <u>your</u> lifelong career <u>snatched from you</u>, to be discarded because <u>you stood up for yourself</u> first by refusing to retire and go away, then <u>retaliated against with false information against you</u>?[15]
>
> * * *
>
> And then the very people <u>you</u> consider family for 40 years, who <u>you've spent</u> more time with than <u>your</u> own, think it's okay to tell <u>you</u> it's time to go?[16]
>
> * * *

[14] Emphasis added to all transcript citations.
[15] JA-I 2009 [76:20-25].
[16] JA-I 2011 [78:7-9].

What is a full measure of justice when employers cause someone's life to become fractured, when the measure of your self worth is stripped away, when your occupation and your relationships are damaged, when your name and reputation is questioned after 40 years?[17]

* * *

How much does it cost to stand up only to have the wrath of Ness and Nowachek come after you? . . . And then after you give them 39 years, they come in and label you as incompetent as a director, accuse you of failing to perform.[18]

* * *

Can you imagine how it felt to type those words? Let that sink in. . . . What are the emotions Gregg might have been feeling at that time. . . . Can you imagine how it felt walking up those stairs?[19]

* * *

And then those following days, can you imagine how it felt the next morning, . . . How much per week or month has it caused Gregg to question his worth and his usefulness to society, losing something that has been engrained in your [identity] for two-thirds of your life?[20]

* * *

[17] JA-I 2012-2013 [79:23-80:3].
[18] JA-I 2013-2014 [80:19-81:5].
[19] JA-I 2022 [89:6-13].
[20] JA-I 2023 [90:12-20].

> How do you square that away with the GRMC that you have known and loved for 38 years of your life . . . .[21]

In summation on damages, Hawkins's counsel encouraged the jury to "hold Defendants accountable," (JA-I 2027 [94:1-2]) and influence Defendants' future conduct:

> It is going to be up to you to decide how far employers like GRMC can go in violating our rules on age and disability discrimination and retaliation in the workplace before they have to pay full and fair compensation to someone. This just can't be.

(JA-I 2012 [79:9-14]; see also JA-I 2011 [78:23-25]). Although Defendants objected, the district court allowed Hawkins's counsel to continue the argument. (JA-I 2012 [79:1-8]).

Also in summation, Hawkins's attorney asked the jury to determine what "a lifetime commitment to your employer [is] worth." (JA-I 2028 [95:1-2]). She asked what is "compensation for giving your life to your employer?" (JA-I 2008 [75:5-6]). She suggested an appropriate amount would be $100,000 for each year of Hawkins's employment, including more than thirty-five years pre-

[21] JA-I 2024 [91:16-17].

termination, and the same amount going forward until his death, regardless of when Hawkins might actually have retired. (JA-I 2028 [95:1-6]). Hawkins's attorney told the jury they were "lucky enough" to "make a difference in a big way . . . to make the world a better place." (JA-I 2028 [95:6-9]). She encouraged the jury, as the "conscience of our community," to make Defendants "pay for the consequences of their behavior." (JA-I 2028-2029 [95:16-96:2]).

Before submission, Defendants moved for a mistrial based on improper summation. (JA-I 2029-2031 [96:11-98:20]). The district court overruled the motion, took no curative measure, and offered no admonition to the jury. Id.

After less than ninety minutes deliberating, the jury returned a verdict in Hawkins's favor against all Defendants on all claims: age discrimination, disability discrimination, and retaliation. The jury awarded $222,009.68 in backpay; $2,000,000 in past emotional distress, and $2,280,000 in future emotional distress. (JA-I 2132-2134). On July 25, 2017, the district court entered judgment in Hawkins's

favor and against all Defendants in the amount of $4,502,009.68. (JA-I 2146-2147).

Argument

I. The district court erred as matter of law by refusing to submit Defendants' requested "same-decision" jury instructions.

Error preservation. Defendants objected to the district court's failure to instruct the jury on Defendants' requested "same-decision" defense in Defendants' proposed jury instructions, and objected to the district court's failure to include questions in the verdict form relating to Defendants' same-decision defense. (JA-I 180, 185, 189, 1944-1952 [11:15-19:22], 1959 [26:18-24]). The district court ruled on Defendants' timely objections prior to closing summations. Iowa R. Civ. P. 1.924; Shams v. Hassan, 905 N.W.2d 158, 166-69 (Iowa 2017).

Standard of review. A district court's refusal to give a requested jury instruction is reviewed for errors at law. Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699, 707 (Iowa 2016). "Under Iowa law, a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and

when the concept is not otherwise embodied in other instructions." Herbst v. State, 616 N.W.2d 582, 585 (Iowa 2000). Parties to lawsuits are entitled to have their legal theories and defenses submitted to a jury "if they are supported by the pleadings and substantial evidence in the record." Id. (quotation omitted). Reversal is warranted where failure to give a jury instruction results in prejudice. DeBoom v. Raining Rose, Inc., 772 N.W.2d 1, 5 (Iowa 2009). Prejudice results where the district court's failure to give requested instructions "materially misstates the law." Id.

A. Under Iowa law, all mixed-motive cases require a same-decision instruction.

The Iowa Supreme Court long-ago adopted and has followed ever since, the mixed-motive/same-decision framework as first set forth in the United States Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). See, e.g., McQuistion v. City of Clinton, 872 N.W.2d 817, 828 n.4 (Iowa 2015); Boelman v. Manson State Bank, 522 N.W.2d 73, 78 (Iowa 1994); Landals v. George A. Rolfes Co., 454 N.W.2d 891, 893 (Iowa 1990). Under that

framework, once a plaintiff presents sufficient evidence to support an inference that a discriminatory factor was a "motivating factor" in the employment decision, an employer is entitled to prove that "the same decision would have been made without the discriminatory motive." See McQuistion, 872 N.W.2d at 828 n.4. Thus, the mixed-motive/same-decision framework is appropriate when evidence supports the employment decision was "the product of a mixture of legitimate and illegitimate motives." Boelman, 522 N.W.2d at 78 (internal quotation omitted). This is exactly where the parties in this case found themselves at trial.

While an employer ultimately bears the burden to prove it would have made the same decision in the absence of discriminatory motives under the mixed-motive/same-decision framework, this does not operate as an affirmative defense that must be pleaded.[22] Rather,

[22] Because some Iowa cases refer to same decision as a "defense," see Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 517 (Iowa 1990), Defendants asserted the same decision in their Amended Answer to Hawkins' Petition, but also proposed a jury instruction to address it. (JA-I 33-41).

it is part of the causation standard itself, to ensure that the plaintiff is in the same position, not a better position, than he would have been in had the protected conduct not occurred. Hasan v. U.S. Dep't of Labor, 400 F.3d 1001, 1006 (7th Cir. 2005) (citing Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977)).[23] An employer that proves it would have made the same decision regardless of other motivations, "is not liable despite his impure heart." Id. at 1005-06.

Two years after Price Waterhouse, Congress enacted the Civil Rights Act of 1991, which modified Title VII to codify the motivating-factor standard and same-decision defense set forth in Price Waterhouse.[24] 42 U.S.C. § 2000e-2(m). At the same time, however, Congress elected to allow a plaintiff some remedies (injunctive relief and attorney fees) even when the employer proved its same-decision

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[23] See also Haskenhoff, 897 N.W.2d at 601 (Cady, C.J., concurring).
[24] In so doing, Congress "plainly endorsed" the "motivating-factor" standard and "same-decision" framework as set forth in Price Waterhouse. See Haskenhoff, 897 N.W.2d at 628 (Appel, J., concurring in part and dissenting in part).

defense. See Haskenhoff, 897 N.W.2d at 628 (Appel, J., concurring in part and dissenting in part) (discussing 42 U.S.C. § 2000e-5(g)(2)(B)).

Although the Iowa legislature did not amend the ICRA to codify Price Waterhouse, Iowa courts have continued to recognize and apply the mixed-motive/same-decision framework as originally set forth in case law. See McQuistion, 872 N.W.2d at 828 n.4; Boelman, 522 N.W.2d at 78; Plato v. Anderson Erickson Dairy Co., No. 17-0222, 2017 WL 3283392, at *3 (Iowa Ct. App. Aug. 2, 2017); Wyngarden v. State, No. 13-0863, 2014 WL 4230192, at *10 (Iowa Ct. App. Aug. 27, 2014); Merritt v. Iowa Dep't Transp., No. 03-0858, 2004 WL 434143 at *2-4 (Iowa Ct. App. Mar. 10, 2004); Valline v. Murken, No. 02-0843, 2003 WL 21361344 at *2-3 (Iowa Ct. App. Jun. 13, 2003); Ritz v. Wapello Cty. Bd. Supervisors, No. 01-0765, 2002 WL 1841571 at *2-4 (Iowa Ct. App. Aug. 14, 2002); Miller v. Davenport Cmty. Sch. Dist., No. 99-0650, 2000 WL 210292 at *4-6 (Iowa Ct. App. Feb. 23, 2000); Goethals v. Mueller, No. 98-1556, 1999 WL 1020545 at *2-3 (Iowa Ct. App. Nov. 10, 1999). The continued application of the

mixed-motive/same-decision framework is consistent with the legislature's purpose in enacting the ICRA, to prohibit conduct that, were it not for the protected characteristic(s), "would not otherwise have occurred." DeBoom, 772 N.W.2d at 6 (quoting Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983)). In other words, as this Court noted correctly in DeBoom, the ICRA does not prohibit conduct that would have otherwise occurred in the absence of an improper motive.

Importantly, the Eighth Circuit Model Instructions, endorsed most recently in DeBoom, also include the same-decision instruction that is the second part of any mixed-motive case.[25] That instruction is

[25] When DeBoom adopted the "motivating-factor" standard of causation as set forth in the Eighth Circuit Model Instructions, it did not change or overturn existing Iowa law recognizing the mixed-motive/same-decision framework. DeBoom was not a mixed-motive case, and the Court had no occasion to address the appropriate jury instructions in such a case. Thus, Iowa still adheres to the principle that a plaintiff cannot recover if the evidence demonstrates the employer would have taken the same action in the absence of the improper motive in a mixed-motive case. See Gross v. FBL Fin. Servs., Inc., 588 F.3d 614, 619 (8th Cir. 2009) (noting that DeBoom

to be given if the jury finds in favor of the plaintiff on his discrimination claim(s), and is the same as the instructions requested by Defendants at the district court:

> If you find in favor of the plaintiff under Instruction ___, then you must answer the following question in the verdict form[s]: Has it been proved that the defendant [would have discharged] the plaintiff regardless of [(his) (her)] [protected characteristic]?

Eighth Circuit Model Civil Jury Instruction 5.10 (2014). This instruction, in combination with the other Model Instructions approved in DeBoom, is consistent both with the language of the Civil Rights Act of 1991, the purpose of the ICRA, and the motivating-factor/same-decision framework as set forth in Price Waterhouse and adopted by this Court, and is an accurate statement of Iowa law.

"did not disavow" Iowa cases holding that an employer is entitled to prove its same-decision defense in mixed-motive cases).

In Haskenhoff, the Court held that the causation standard is the same for retaliation claims under Iowa Code § 216.11(2)[26] as it is for discrimination claims under Iowa Code § 216.6(1)(a), and adopted a unified "motivating-factor" standard for both discrimination and retaliation claims under the ICRA. Haskenhoff, 897 N.W.2d at 628 (Cady, J., specially concurring for a majority of Court). Given this holding, the mixed-motive/same-decision framework logically must be applied to retaliation claims as well. To hold otherwise would run contrary to Haskenhoff's enunciation that the causation standard for retaliation and discrimination claims under the ICRA is the same.[27] Furthermore, in light of the motivating-factor standard that applies, the availability of the same-decision defense to an employer in a retaliation case is consistent with the legislature's purpose in enacting the ICRA. DeBoom, 772 N.W.2d at 6 (purpose is to prohibit conduct

[26] Unless otherwise stated, we cite the Iowa Code (2017), which is not materially different than the Iowa Code (2013).

[27] Like DeBoom, the issue of whether the employer was entitled to a same-decision instruction was not raised in Haskenhoff.

that, were it not for the employee's protected characteristic(s), "would not have otherwise occurred.") (quotation omitted).

Thus, given this Court's long-standing recognition of the Price Waterhouse mixed-motive/same-decision framework and its adoption in DeBoom and Haskenhoff of the motivating-factor standards set forth in the Eighth Circuit Model Instructions, all claims for discrimination and retaliation under the ICRA, where the employer presents evidence that legitimate reasons motivated the employment decision at issue, must be presented to the jury under the mixed-motive/same-decision framework.[28]

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[28] As a practical matter, following this Court's adoption of the "motivating factor" standard of causation in discrimination and retaliation cases in DeBoom and Haskenhoff, every such case became a "mixed-motive" case as employers can always allege a non-discriminatory legitimate reason for termination. The effect of not giving the same-decision instruction would be to subject employers to liability for discrimination and retaliation under the ICRA if an impermissible criteria played any part, no matter how small, in the employer's decision regardless of whether the employer can prove it would have made the same employment decision notwithstanding such criteria. Not only is this contrary to long-standing Iowa law recognizing the mixed-motive/same-decision framework, it also runs contrary to the legislative purpose that the ICRA prohibits conduct

B. **This case was a mixed-motive case and Defendants were entitled to their requested same-decision instructions.**

Before the district court, Hawkins incorrectly suggested that it is the plaintiff's prerogative to decide whether his discrimination or retaliation claims should be submitted to the jury under a mixed-motive/same-decision framework. (JA-I 1949 [16:18-20]). It is not. To the contrary, the issue of how a case is submitted to the jury has always been "a question for the court once all of the evidence is received." See Miller, 2000 WL 210292, at *5 (citation omitted). See also, e.g., Kull v. Kutztown Univ. of Penn., 543 F. App'x 244, 248 (3d Cir. 2013); Gross v. FBL Fin. Group, Inc., 489 F. App'x 971, 973 (8th Cir. 2012); Remlinger v. Nevada, No. 98-17079, 2000 WL 285426, at *2 (9th Cir. Mar. 15, 2000); Holmes v. Marriott Corp., 831 F. Supp. 691, 697 (S.D. Iowa 1993).

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that, were it not for the employee's protected characteristic(s), "would not have otherwise occurred." DeBoom, 772 N.W.2d at 6 (quoting Sommers, 337 N.W.2d at 474).

Defendants did more than merely articulate non-discriminatory reasons to terminate Hawkins, an at-will employee. At trial, Defendants presented the testimony of multiple physicians who had serious complaints about Hawkins and the Lab before Hawkins was diagnosed with cancer. (JA-I 1729 [229:13-14], 1778-1782 [41:23-45:5], 1783-1800 [46:21-63:24], 1868 [131:10-14], 1879-1904 [142:17-167:19]; JA-III 337-425). Prior to the diagnosis, Hawkins's supervisor requested an action plan to deal with the "frustration" regarding the Lab. (JA-III 426-427). After Hawkins returned to work full time from medical leave, Dr. Rodriguez, the on-site medical director, testified the Lab was "dysfunctional" based on Hawkins's inability to lead. (JA-I 773-774 [26:17-27:24], 797 [50:3-20], 841 [94:2-7], 842-843 [95:25-96:4]). Only after an action plan to correct Hawkins's issues failed, did the Hospital make the decision to terminate Hawkins's employment. (JA-I 850 [103:8-12], 862-864 [115:12-117:2]; JA-II 942-947, 951-952). At trial, Defendants presented evidence that the State Hygienic Laboratory found thirteen deficiencies in the Lab over the

previous two-year period, which objectively justified the decision to change lab directors. (JA-III 308-328).

Because evidence was presented showing that the employment decision at issue was motivated by legitimate motives, Defendants were entitled to the same-decision instructions requested. See Boelman, 522 N.W.2d at 78. To hold otherwise would result in liability if an impermissible criteria played any part, no matter how small, in the employer's decision regardless of whether the employer can prove it would have made the same employment decision notwithstanding such criteria.

For example, it is not difficult to imagine a situation where an employee is terminated based on overwhelming evidence of misconduct in the workplace, such as embezzlement of funds. However, the employee may present evidence that the decision-maker also considered the employee's age in making the termination decision. The jury may conclude that the employee's termination was based almost entirely on misconduct, but that consideration of the

employee's age did play a very small part in "motivating" the employer's decision. Under this scenario, without the same-decision defense, the employee would prevail, and be entitled to full damages, under the motivating-factor instructions endorsed by the Court in DeBoom, even if the employee's age was only a very small part of the reason for the termination. Iowa courts have never held that an employer may be held liable under such circumstances.

But the district court's failure to instruct the jury on Defendants' same-decision defense allowed Hawkins to proceed in exactly this manner. Hawkins's counsel argued to the district court that this was a "pretext" case in an intentional attempt to avoid a same-decision instruction, (JA-I 1949 [16:18-20]), but then argued to the jury that Hawkins must prevail if he proved that "it's more likely than not that Gregg's age, disability and/or protected activity was in the mixture of the reasons Defendants used to fire him." (JA-I 1997 [64:6-8]) (emphasis added). Hawkins's counsel went on to state:

> And the reason for the standard is simple. And employment cases, decisions, are based on the mix of all

> sorts of different motivations. The analogy I like to use is baking cookies. You mix together sugar, butter, flour, you bake the cookies. I take them out, I hand it to you and say, Please give the sugar back. You can't do it, and it all blends together. Motives work that way.

(JA-I 1997 [64:9-16]) (emphasis added). Consistent with the district court's instructions, the jury was required to find that Defendants were liable for discrimination and retaliation under the ICRA if an impermissible criteria played any part, no matter how small, in the Hospital's decision.

Regardless of how a plaintiff characterizes his case, where evidence has been presented that legitimate considerations were a motivating factor in an employment decision, the employer is entitled to prove that it would have made the same employment decision in the absence of any consideration of impermissible criteria. See, e.g., McQuistion, 872 N.W.2d at 828 n.4; Boelman, 522 N.W.2d at 78; Landals, 454 N.W.2d at 893. To hold otherwise would be contrary to long-standing Iowa law.

C. **The district court's failure to give the same-decision instructions requested by Defendants was contrary to Iowa law and resulted in unfair prejudice to Defendants.**

The district court characterized Defendants' evidence of legitimate reasons to terminate Hawkins as "substantial." (JA-I 1951-1952 [18:16-19:1]). Nevertheless, the district court refused to instruct the jury on the same-decision defense. Id. Because Defendants presented "substantial evidence" that their decision to terminate Hawkins's employment was motivated by legitimate motives, their requested same-decision instructions were a correct statement of the law. See Herbst, 616 N.W.2d at 585 ("a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions."). The district court erred when it refused to give these instructions.

D. **The remedy is a new trial.**

Defendants were unfairly prejudiced by the district court's refusal to give requested jury instructions 15, 19, and 22. To refuse to

submit Defendants' same-decision defense in the verdict form materially misstated the law, and did not permit Defendants the opportunity to prove that they would have made the same decision to terminate Hawkins's employment regardless of the consideration of any impermissible criteria. The remedy is a new trial on all Hawkins's claims.

II. The jury instructions improperly permitted the jury to award emotional-distress damages for any perceived "wrongdoing," including harm associated with practices barred by the statute of limitations.

Error preservation. Defendants preserved error by specifying their objections to the district court's jury instructions and proposing their own. (JA-I 193-194, 1952-1957 [19:23-24:8], 1959 [26:7-13], 1959-1960 [26:25-27:11], 2118, 2120). Shams, 905 N.W.2d at 166-69; Iowa R. Civ. P. 1.924. To preserve instructional error, a motion for new trial is unnecessary. Bellach v. IMT Ins. Co., 573 N.W.2d 903, 906 (Iowa 1998) (citing Scurlock v. City of Boone, 120 N.W. 313, 315 (Iowa 1909)).

Standard of review. For jury-instruction challenges, this Court reviews to correct errors of law. Shams, 905 N.W.2d at 162. "Jury

instructions must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide." Rivera v. Woodward Res. Ctr., 865 N.W.2d 887, 892 (Iowa 2015) (citation omitted). A "material misstatement of law warrants reversal," as does instructions that have misled the jury. Waits v. United Fire & Cas. Co., 572 N.W.2d 565, 575 (Iowa 1997); DeBoom, 772 N.W.2d at 5 (noting "[p]rejudicial error occurs when the district court materially misstates the law"). "[R]eversal is required when instructions are conflicting and confusing." Waits, 572 N.W.2d at 575; see also McElroy v. State, 637 N.W.2d 488, 500 (Iowa 2001). An instruction "is misleading or confusing if it is 'very possible' the jury could reasonably have interpreted the instruction incorrectly." Rivera, 865 N.W.2d at 901-02 (citing McElroy, 637 N.W.2d at 500).

A. Without a date of harm, the damages instruction prodded the jury to compensate for harm caused by employment practices the statute of limitations barred.

Hawkins's administrative charge, filed May 13, 2015, included within its scope only actions occurring in the prior three hundred

days. (JA-II 974-985). See Iowa Code § 216.15(13); Dindinger v. Allsteel, Inc., 860 N.W.2d 557, 567 (Iowa 2015). Hawkins and the district court agreed the ICRA's statute of limitations precluded Hawkins from recovering damages for actions and conduct preceding July 17, 2014. (JA-I 94-95, 151-152).

Because Hawkins pursued only a discrete-action claim (termination) at trial, he could not recover damages for a "continuing violation," involving a pattern of conduct, a series of acts, or the cumulative impact of separate acts. See Dindinger, 860 N.W.2d at 571-72; Farmland Foods, Inc. v. Dubuque Human Rights Comm'n, 672 N.W.2d 733, 740-43 (Iowa 2003). Yet the damages instruction repeatedly failed to identify Hawkins's termination date as the commencement date for damages. (JA-I 2120). Unencumbered by a specific date of harm, the instruction prodded the jury to award damages for conduct that occurred before the June 3, 2015 termination, including conduct outside the statute of limitations period. McElroy v. State, 703 N.W.2d 385, 392 n.3 (Iowa 2005) (courts

should avoid jury instructions that "prod the jury to make an award contrary to the legislative intent").

Repeatedly, when discussing damages, Hawkins's counsel asked the jury to award damages for harm not caused by the termination, including: giving his life to his employer;[29] standing up for himself by refusing to retire;[30] the Defendants' use of false information against him;[31] and seeing (in litigation) "the emails of what was going on behind his back."[32] Hawkins's counsel unambiguously asked the jury to award Hawkins damages for all injuries, rather than injury caused by termination:

> The foundation of our justice system is that people who break our civil law, like the defendants in this case, have to reimburse the person they hurt for the dollar value of everything he has lost.[33]
>
> * * *
>
> And your job as a jury is to do everything within your power to put Gregg Hawkins back in the position he

[29] JA-I 2008 [75:5-6], 2028 [95:1-2].
[30] JA-I 2009 [76:20-25], 2013 [80:19-20].
[31] JA-I 2009 [76:20-25].
[32] JA-I 2018 [85:6-9].
[33] JA-I 2017 [84:2-6] (emphasis added).

would have been and would be in as if none of this had ever happened.[34]

The district court's failure to specify temporal constraints in the damages instruction prodded the jury to award damages for legally non-compensable harm.

B. By failing to specify the relevant employment practice, the damages instruction directed the jury to compensate for harm caused by employment practices other than termination.

Considering the evidence presented, the instructions, and Hawkins's counsel's summation, a reasonable juror likely could have awarded damages for harm caused by employment practices other than termination, such as failure to accommodate, failure to assist in Hawkins's rehabilitation, harassment, or general perceptions Defendants treated Hawkins unfairly. The damages instruction did not distinguish between harm caused by the termination and harm caused by non-compensable and non-exhausted claims of general wrongdoing.

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[34] JA-I 2017 [84:7-10] (emphasis added).

The ICRA is a comprehensive and exclusive statutory liability scheme. Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 197 (Iowa 1985). Under the ICRA, if a complainant establishes a discriminatory or unfair employment practice, the commission may award a compensatory-damages remedy: "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 actual damages . . . ." Iowa Code § 216.15(9)(a)(8); see also Iowa Code § 216.16(6) (district court may grant same relief as commission). Because the General Assembly only authorized specified statutory remedies, courts should avoid jury instructions that would "prod the jury to make an award contrary to the legislative intent." McElroy, 703 N.W.2d at 392-93 n.5.

The statute requires a causal relationship between the discrete employment practice at issue and a compensatory-damages award. Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n, 895 N.W.2d 446, 471-72 (Iowa 2017). "Only those damages 'caused by the

discriminatory or unfair practice' are compensable." Dutcher v. Randall Foods, 546 N.W.2d 889, 894 (Iowa 1996). The ICRA neither authorizes punitive damages, nor allows "punitive damages disguised as an award for emotional distress." Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678, 689 (Iowa 2013); Simon Seeding & Sod, 895 N.W.2d at 473 (citing City of Hampton v. Iowa Civil Rights Comm'n, 554 N.W.2d 532, 537 (Iowa 1996)).

Defendants' proposed damages instruction, based on the Eighth Circuit's Model Jury Instructions,[35] aligned with the ICRA's statutory text and precedent.[36] (JA-I 1952-1957 [19:23-24:8], 1959-1960 [26:25-27:11]). Starting with the first sentence, it confined damages by requiring a causal relationship between the monetary award and the harm caused by the termination:

> If you find in favor of the plaintiff, then you must award [ ] Gregg Hawkins such sum as you find by the

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[35] Eighth Circuit Model Civil Jury Instruction 6.70 (2017).
[36] See Iowa Code § 216.15(9)(a)(8); Simon Seeding & Sod, Inc., 895 N.W.2d at 471-72; Ackelson, 832 N.W.2d at 680; McElroy, 703 N.W.2d at 392-93; City of Hampton, 554 N.W.2d at 537; Dutcher, 546 N.W.2d at 894.

> preponderance of the evidence will fairly and justly compensate him for any damages you find he sustained as a direct result of his termination.

(JA-I 193-194) (emphasis added).

The district court adopted Hawkins's proposed damages instruction. (JA-I 242-243, 2120). Replete with imprecise and indeterminate phrases, the final instruction allowed the jury to award damages for harm caused by employment practices other than termination. (JA-I 2120). The instruction directed the jury to award damages "caused by the wrongful conduct of Defendants." Id. (emphasis added). The instruction told the jury to award damages for "any emotional distress sustained by Plaintiff." Id. (emphasis added). The instruction told the jury to award damages for emotional distress that Hawkins "sustained as a result of the illegal actions." Id. (emphasis added). The instruction reiterated that the jury must award damages "endured by Plaintiff since the wrongdoing." Id. (emphasis added). The instruction told the jury to "award damages

for future emotional distress to an employee who has proven discrimination or retaliation." Id.

These phrases, "wrongful conduct," "wrongdoing," "illegal actions," and "discrimination or retaliation,"[37] lacked specificity to direct the jury to only award "damages for an injury caused by" the termination. The instruction encouraged the jury to speculate about the harm for which it could award damages. Consequently, the jury could reasonably have believed that it should award damages for any conduct it considered "wrongful" by Defendants over Hawkins's entire tenure at the Hospital. See Quillen v. Lessenger, 181 N.W. 8, 10 (Iowa 1921) (damages instruction misstated law and prejudiced defendant, stating: "jury was justified in believing that the defendant

[37] In three instructions, the district court used open-ended phrases rather than concrete definitions, inviting the jury to speculate about what might constitute "discrimination or retaliation." (JA-I 2113-2114). The district court also told the jury that it did not matter if "discrimination or retaliation" satisfied a legal definition. (JA-I 2113). These instructions cued the jury to unilaterally decide what constituted "discrimination or retaliation."

could be punished for any wrongful conduct that the evidence showed he had been guilty").

Additionally, the district court instructed the jury about other employment practices, including accommodation. (JA-I 2118). The damages instruction, coupled with the accommodation instruction, misled and confused the jury to award damages for employment practices other than termination. (JA-I 2118, 2120).

Hawkins intertwined emotional distress related to June and July 2014 events with emotional distress related to termination. Hawkins's wife, Diane, testified that Hawkins's emotional distress was caused by both the June 2, 2014 meeting when Hawkins was asked to resign and the June 3, 2015 termination. (JA-I 1625-1626 [125:5-126:2], 1636-1637 [136:25-137:10]). Diane observed the June 2014 event "was a shock to him" and "was taking a toll on him." (JA-I 1615 [115:3-13]).

In summation, Hawkins's counsel highlighted these June 2014 events, and based on the accommodation instruction, declared that the "law requires" accommodation:

> The law requires employers not demand an employee retire when they need a little extra time to recover from cancer. The law requires the employer to decide if they can reasonably accommodate that request.

(JA-I 2003 [70:20-24]; see also JA-I 1980 [47:19-25], 2001-2002 [68:23-69:6]).

Having instructed the jury regarding other employment practices—accommodation and assisting in an employee's rehabilitation—the district court should have clarified that the jury could not award damages for an injury caused by those other practices. The jury was not only precluded by the ICRA's plain text from considering them, but without a complete factual record or thorough instructions on the governing law, the jury was incapable of making a fair and impartial determination about them.

Even Hawkins conceded the jury awarded damages for employment practices other than termination. When he resisted

Defendants' post-trial motion, Hawkins defended the award's size by arguing the jury awarded damages based on the cumulative impact of employment practices that began in June 2014. Hawkins explained: "Gregg's pain stemmed not just from the loss of his job, but from the preceding year of threats and harassment." (JA-I 2199) (emphasis added). Hawkins implicitly acknowledged the damages instruction directed the jury to make an award contrary to the ICRA's statutory text and legislative intent.

C. **The remedy is a new trial on damages.**

Defendants were prejudiced by the damages and accommodation instructions because they materially misstated the governing law, which confused and misled the jury, and resulted in awards based on non-compensable harm. If the jury had been properly instructed, it probably would have returned a different award. See Quillen, 181 N.W. at 10. The remedy is a new trial on all elements of damages, including the mitigation defense. See Brant v. Bockholt, 532 N.W.2d 801, 805 (Iowa 1995) ("Jury determinations of

various elements of damages are apt to be influenced by the recovery allowed for other elements of damage").

III. The $4.28 million emotional-distress award is excessive.

Error Preservation. Defendants preserved error regarding excessive damages in a timely motion for new trial. (JA-I 2148-2186).

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

prejudice resulted or a different result would have been probable." Id. at 907.

A. The emotional-distress award is flagrantly excessive and shocks the conscience.

The Court may grant a new trial on damages if the verdict is flagrantly excessive; is so out of reason as to shock the conscience or sense of justice; raises a presumption it is the result of passion, prejudice, or other ulterior motive; or lacks evidentiary support. Rees v. O'Malley, 461 N.W.2d 833, 839 (Iowa 1990). A verdict is flagrantly excessive when "it goes beyond the limits of fair compensation . . . and fails to do substantial justice between the parties." Rees, 461 N.W.2d at 839. See also Sallis v. Lamansky, 420 N.W.2d 795, 800 (Iowa 1988); Ferris v. Riley, 101 N.W.2d 176, 184 (Iowa 1960) (excessive verdict is one "so large that it appears to be beyond the limits of fair compensation for the injuries shown").

Emotional-distress awards are "not without boundaries." Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 772 (Iowa 2009). Under the ICRA, a verdict is excessive "when uncontroverted facts show that it

bears no reasonable relationship to the loss suffered." Simon Seeding & Sod, 895 N.W.2d at 472. When a verdict is flagrantly excessive, remittitur or a new trial on damages is required. Rees, 461 N.W.2d at 839-40.

In Jasper, this Court concluded the jury's $100,000 emotional-distress award in an employment discrimination case was excessive. 764 N.W.2d at 772-73. Recognizing that "awards are noticeably less in cases involving a single incident of wrongful discharge that gives rise to the common consequences of any involuntary loss of employment, such as anger, confusion, loss of esteem, financial worry, and the effect on marital relationships," this Court ordered a remittitur or new trial. Jasper, 764 N.W.2d at 772-73.

Here, the $4.28 million emotional-distress award is flagrantly excessive and shocks the conscience. This is a single-incident case. The evidence reflected common garden-variety symptoms from job loss. Immediately after the termination, Hawkins went home and cried with his wife. (JA-I 1372-1373 [102:25-103:1], 1615-1616 [115:22-

116:15]). Hawkins reported self-doubt. (JA-I 1374 [104:11-17]). His wife and daughters reported he gained weight. (JA-I 1581 [81:13-18], 1621 [121:3-7], 1648 [148:11-12]). His wife thinks he doesn't get "restful sleep." (JA-I 1621 [121:3-9]). Nevertheless, Hawkins neither sought, nor received medical treatment for any symptoms of emotional distress. (JA-I 1509 [9:8-16], 1513-1514 [13:22-14:16]). To the contrary, one month after termination, he reported no emotional-distress symptoms to his oncologist. (JA-I 1270-1272 [62:11-64:18], 1509-1510 [13:22-14:8]).

Comparing the award to others—with similar or more egregious facts—demonstrates the flagrantly excessive size of the award in this case. As noneconomic damages are subjective, a comparative analysis of other verdicts may be the only way to ensure meaningful review for excessiveness. Jasper, 764 N.W.2d at 772-73 (citing Kucia v. Southeast Arkansas Cmty. Action Corp., 284 F.3d 944, 948 (8th Cir. 2002) ($50,000 "close" question of excessiveness); see also City of Hampton, 554 N.W.2d at 537 (concluding $50,000 was

excessive for emotional-distress damages and reducing award to $20,000 due to "the relatively small amount of evidence supporting the award and the total lack of any medical or psychiatric evidence to support it."); Mathieu v. Gopher News Co., 273 F.3d 769, 783 (8th Cir. 2001) ($165,000 not excessive); Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1196 (8th Cir. 2001) ($75,000 award not excessive); Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190, 1193 (8th Cir. 2000) ($40,000 "generous" but not excessive where plaintiff suffered common condition of involuntary loss of employment)). See also Vetter v. State, No. 16-0208, 2017 WL 2181191 (Iowa Ct. App. May 17, 2017) (in combined accommodation and termination case, $435,000 emotional-distress award not excessive where defendant "failed to show the award was influenced by passion or prejudice"); Kim v. Nash Finch Co., 123 F.3d 1046, 1067 (8th Cir. 1997) (finding the jury's $1,750,000 emotional-distress award "grossly excessive" and affirming the district court's decision to remit the award to $100,000 where employee suffered from anxiety, sleeplessness, stress,

depression, high blood pressure, headaches, and humiliation); Shepard v. Wapello Cnty., Iowa, 303 F. Supp. 2d 1004, 1023-24 (S.D. Iowa 2003) (remitting $250,000 emotional-distress award to $130,000 and noting the prior award is only sustainable upon a showing of severe emotional distress). These awards are a far cry from the $4.28 million in this case. The size of the verdict reveals it is the product of passion or prejudice and the jury's improper desire to punish Defendants.

B. Hearsay, irrelevant evidence, and improper closing argument provoked the jury to award damages based on passion and prejudice.

A new trial should be granted when a verdict is a result of passion and prejudice. Goettelman v. Stoen, 182 N.W.2d 415, 421 (Iowa 1970). A verdict may be the result of passion and prejudice due to the admission of irrelevant evidence. Id. A verdict may also be the result of passion and prejudice due to counsel misconduct during summation. Russell v. Chicago, Rock Island & Pac. R.R. Co., 86 N.W.2d 843, 848 (Iowa 1957). As discussed, in Sections IV and V, the

district court admitted hearsay, irrelevant evidence, and permitted improper summation. Individually and cumulatively, the improperly admitted evidence incited the jury to award damages on an improper basis. The damages award was the product of a runaway jury, fueled by passion and prejudice.

C. The award is unsupported by the evidence and the remedy is a new trial.

An emotional-distress award is limited to a reasonable range derived from the evidence. Simon Seeding & Sod, 895 N.W.2d at 472; Jasper, 764 N.W.2d at 772. Here, the emotional-distress damages award is out of proportion to the evidence presented at trial regarding emotional distress. When the damages awarded are substantially beyond what is supported by the evidence, the award is punitive, rather than compensatory. See City of Hampton, 554 N.W.2d at 537. On this record, the evidence did not support a $4.28 million emotional-distress award.

IV. The district court's evidentiary errors deprived Defendants of a fair trial.

Error preservation. Defendants preserved error regarding evidentiary rulings by moving in limine to exclude evidence and by timely objecting to its admission at the time the evidence was offered. See Iowa R. Evid. 5.103(a). (JA-I 555-556 [183:25-184:6], 706 [173:5-11], 963-964 [113:12-114:5]; 1086-1089 [69:25-72:2], 1197 [180:19-22], 1238 [221:17-21], 1241 [224:5-10], 1241 [224:20-23], 1249 [232:16-25], 1299 [29:10-17], 1376 [106:8-11], 1377 [107:7-14]). Defendants preserved error on their arguments regarding evidentiary error in a timely motion for new trial. (JA-I 2148-2186).

Standard of review. The standard of review depends on the ground argued in a motion for new trial. Winger v. CM Holdings, L.L.C., 881 N.W.2d 433, 445 (Iowa 2016). The appellate court reviews a ruling admitting hearsay to correct errors of law. Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 181 (Iowa 2004). A district court's erroneous admission of hearsay is "prejudicial to the nonoffering

party" unless otherwise affirmatively established. State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2003).

The appellate court reviews for an abuse of discretion the denial of a motion for new trial based on the admission of irrelevant evidence. Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000). An abuse of discretion occurs when a district court rules "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id.

A. Admission of the hearsay notes from Hawkins's friends were unfairly prejudicial.

Hawkins offered sixteen notes—from non-testifying witnesses (JA-II 1039-1081)—to prove the truth of the matters asserted in such notes; all which are hearsay. See Iowa R. Evid. 5.801(c); Dullard, 668 N.W.2d at 591-97 (handwritten note was hearsay) (citing Wright v. Tatham, 112 Eng. Rep. 488 (Ex. Ch. 1837) (statements in letters inadmissible hearsay)). One note contained double hearsay, purporting to describe a physician's reaction to Hawkins's termination: "He was irate!" (JA-II 1046).

When evaluating whether a document is offered to prove the truth of its assertion, "the court must determine whether the statement is truly relevant to the purpose for which it is being offered, or whether the statement is merely an attempt to put before the fact finder inadmissible evidence." State v. Mitchell, 450 N.W.2d 828, 832 (Iowa 1990).

The record reveals only one possible purpose for the notes—to persuade the jury to believe the statements' impassioned content, such as:

- "[Hawkins] did not deserve this;"
- Hawkins's termination "was an injustice;"
- Hawkins represented "[i]ntegrity, compassion, work ethic & so much more;" and
- Hawkins "dealt with not only cancer but also age discrimination at work."

(JA-II 1043, 1046, 1059, 1068).

The district court erred in admitting the collection because no hearsay exemption or exception applied. Iowa R. Evid. 5.802. Admitting hearsay evidence "is presumed to be prejudicial error

unless the contrary is affirmatively established." Gacke, 684 N.W.2d at 183. Because Defendants had no opportunity to cross-examine the declarants, admitting the hearsay prejudiced Defendants. See Dullard, 668 N.W.2d at 592. Replete with sentiment, these out-of-court statements provoked the jury to inflate the award.

The sentiments—favorable to Hawkins and unfavorable to Defendants—provoked a comparable emotional response in the jury and prejudiced Defendants and adversely impacted their substantial rights. See McClure v. Walgreen Co., 613 N.W.2d 225, 236 (Iowa 2000); Goettelman, 182 N.W.2d at 421.

B. Other evidence lacking probative value appealed to the jury's sympathy and incited the jury to punish Defendants.

The district court allowed Hawkins to enter a great deal of irrelevant and inflammatory evidence. "Relevancy relates to the tendency of evidence to make a consequential fact more or less probable." State v. Cromer, 765 N.W.2d 1, 8 (Iowa 2009). Irrelevant evidence is not admissible, but the converse proposition—that

relevant evidence is admissible—is not assured. Graber, 616 N.W.2d at 637; see also Iowa R. Evid. 5.402.

Inflammatory evidence may provoke a jury to return a verdict that is the result of passion and prejudice. Goettelman, 182 N.W.2d at 421 (new trial ordered because district court erroneously admitted inflammatory and irrelevant evidence, resulting in excessive verdict due to passion and prejudice). "[P]rejudice is presumed," mandating a new trial, "when evidence is erroneously admitted," unless Hawkins makes an affirmative showing the evidence did not prejudice Defendants. See Graber, 616 N.W.2d at 641.

1. **Photographs showing chemotherapy-induced alopecia, radiation burns, and chemotherapy infusion lacked relevance but fueled the jury's emotional response.**

Hawkins's fragile appearance while on medical leave and receiving cancer-related treatment in 2013 and 2014 offered no probative value regarding Defendants' motive in terminating Hawkins's employment in 2015. (JA-II 992-1038). From December 1, 2014 until June 3, 2015, when Hawkins had returned to work, he had

no work restrictions and was cancer-free. (JA-I 1264-1272 [56:16-64:18]; JA-II 913). None of the decision-makers ever observed Hawkins's post-operative appearance reflected in the photographs nor did they see the photographs until the eve of trial. The photographs had no evidentiary purpose and were used only to inflame the jury. See Blake v. Clein, 903 So.2d 710, 728 (Miss. 2005) ("[P]hotographs which are gruesome or inflammatory and lack an evidentiary purpose are always inadmissible as evidence."); Gomaco Corp. v. Faith, 550 So.2d 482, 483 (Fl. Dist. Ct. App. 1989) ("Photographs that are gruesome, offensive and/or inflammatory must be relevant to an issue required to be proved in the case").

Worse yet, the irrelevant photographs appealed to the jury's sympathy and prejudiced Defendants by provoking the jury's instinct to punish. See Estate of Long v. Broadlawns Med. Ctr., 656 N.W.2d 71, 89 (Iowa 2002)[38] (district court abused discretion in admitting

[38] Abrogated on other grounds by Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009).

photographs showing crime scene and decedent's autopsy; damages for pre-death pain and suffering were not warranted, thus the photographs were not relevant to any issue properly before the jury and there was no just reason for their admission); Kelly v. Al–Qulali, No. 05-2143, 2007 WL 108462, at *2-3 (Iowa Ct. App. Jan. 18, 2007) (affirming ruling excluding photographs showing stillborn fetus offered as evidence on loss of consortium claim); see also Campbell v. Keystone Aerial Surveys, Inc., 138 F.3d 996, 1004 (5th Cir. 1998) (affirming exclusion of accident-scene photographs of decedent's remains as unfairly prejudicial); Escobar v. Airbus Helicopters SAS, No. 13-00598 HG-RLP, 2016 WL 6080612 at *1 (D. Haw. Oct. 5, 2016) (in negligence case, excluding photos depicting graphic images of dead bodies and burned remains due to "minimal probative value that is outweighed by the emotional reaction that the evidence would provoke in the jurors"); Beane v. Utility Trailer Mfg. Co., No. 2:10 CV 0781, 2013 WL 12183533, at *2-3 (W.D. La. Mar. 6, 2013) (in wrongful death case, excluding graphic and gruesome post-accident

photographs of decedent at accident scene due to inflammatory nature of photographs); Gomaco Corp., 550 So.2d at 483 (remanding for new trial because district court erroneously admitted prejudicial photographs of the plaintiff's nearly severed foot immediately after accident).

Hawkins used the photographs to provoke the jury and increase the damages award. In summation, Hawkins's counsel recounted the cancer photos: "you recall the photos when he lost his hair, the radiation burns." (JA-I 1998 [65:19-20]). This is not a medical malpractice case or negligence case. It is an employment case without any rational reason to focus on a medical condition not caused by Defendants. The verdict's size confirms that admission of these inflammatory photographs adversely affected Defendants' substantial rights. See McClure, 613 N.W.2d at 236; Goettelman, 182 N.W.2d at 421.

2. The Hospital's newsletters dating back to the 1970s stirred the jury's emotions by emphasizing June 2014 accommodation issues rather than termination.

The district court admitted a 233-page collection of Hospital newsletters dating back to the 1970s. (JA-III 6-238). In June 2014, the same month that Linden, Ness, and Nowachek spoke with Hawkins about returning to work full time, the Hospital newsletter included a story and photographs chronicling Hawkins's cancer diagnosis, cancer surgery, and chemotherapy. (JA-I 556-557 [184:16-185:3], 1612 [112:6-23]; JA-III 7-11).

After the district court admitted the collection, Hawkins's attorney asked Hawkins just two or three questions about his feelings, such as: "How does it feel to see yourself highlighted in their material promoting themselves?" (JA-I 1377-1378 [107:23-108:1]). These questions were unrelated to Hawkins's termination, which did not occur for another year.

As discussed, the ICRA's statute of limitations precluded Hawkins from recovering damages for actions and conduct

preceding July 17, 2014. (JA-I 94-95, 151-152). Yet the June 2014 newsletter was a cornerstone of Hawkins's summation. (JA-I 2010 [77:5-24], 2014-2015 [81:25-82:12], 2016 [83:8-14]). Hawkins's counsel repeatedly used it as fodder to incite the jury: "This article came out on June 19, the same day of the second meeting . . . where they call him . . . and . . . say, 'You're going to retire. You're done here.'" (JA-I 2010 [77:14-17]). Hawkins used these materials to generate sympathy for Hawkins and provoke anger toward Defendants, resulting in an inflated damages award.

3. Notes from friends and family—expressing fury toward the Hospital—influenced the jury's emotions

The hearsay notes expressing affection, prayers, and support for Hawkins lacked relevance. (JA-II 1039-1081). These notes contain no information that would make a consequential fact more or less probable. One letter is from 2002. (JA-II 1053-1054). Most were sent in 2015, after Hawkins's employment ended. (JA-II 1040-1041, 1043-1044, 1047-1052, 1060-1063, 1071-1073). Two were sent only weeks

before trial, in May and June 2017. (JA-II 1074-1081). The scant testimony Hawkins provided about these notes confirms the notes lacked relevance. (JA-I 1377 [107:3-6]).

4. **Evidence of the Hospital CEO's annual salary—presented through a comparison of wealth—was unfairly prejudicial.**

The jury was supposed to consider only compensatory damages. Iowa Code § 216.15(9)(a)(8). Instead, Hawkins's counsel introduced evidence of comparative wealth and financial condition, which was "entirely improper." Burke v. Reiter, 42 N.W.2d 907, 912 (Iowa 1950).

Under Iowa law, it is "prejudicial for a plaintiff to improperly introduce the question of wealth" during a trial involving only compensatory damages. Burke v. Deere & Co., 6 F.3d 497, 513 (8th Cir. 1993); see also Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa 1977) (evidence regarding wealth poses risk jury will decide case on impermissible basis). Defendants requested an order in limine to exclude such evidence, which the district court granted.

During trial, however, after asking Linden to confirm Hawkins's salary in 2015, Hawkins's counsel asked Linden how much he is paid by the Hospital. (JA-I 1086-1089 [69:20-72:2]). The district court overruled Defendants' objection, and Linden was forced to answer. Id. Linden's compensation had no tendency to make the existence of any fact related to Hawkins's termination more or less probable. Moreover, Linden's total compensation ($432,000), more than five times Hawkins's salary, was likely larger than most or all jurors. This evidence served no purpose other than to inflame the jury and trigger resentment toward Defendants. When evidence regarding a defendant's wealth is improperly admitted, the evidence is inherently prejudicial, requiring a new trial. See Cvitanovich v. Bromberg, 151 N.W. 1073, 1075 (Iowa 1915).

V. Improper closing argument provoked the jury to award damages on an emotional basis.

Error preservation. Defendants preserved error regarding counsel misconduct during summation by objecting before submission to the jury. (JA-I 1968-1969 [35:22-36:1], 2012 [79:1-8],

2029-2031 [96:11-98:19]). Andrews v. Struble, 178 N.W.2d 391, 402 (Iowa 1970); Rosenberger Enters., Inc., 541 N.W.2d at 907. Although a motion for mistrial is not required to preserve error,[39] Defendants moved for a mistrial before the district court submitted the case to the jury. (JA-I 1968-1969 [35:22-36:1], 2012 [79:1-8], 2029-2031 [96:11-98:19]).

Standard of review. The appellate court reviews the denial of a motion for new trial based on counsel misconduct to correct errors of law or for an abuse of discretion. Iowa R. Civ. P. 1.1004; Fry, 818 N.W.2d at 132.

A. Counsel repeatedly implored jurors to place themselves in Hawkins's shoes and "imagine how it felt." (Golden Rule violation)

"Direct appeals to jurors to place themselves in the situation of one of the parties" are improper and condemned by courts. Russell, 86 N.W.2d at 848. Such arguments encourage a jury to "depart from neutrality and to decide the case on the basis of personal interest and

[39] State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975).

bias[es] rather than on the evidence." Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982), aff'd, 456 U.S. 752 (1984). Disallowing such appeals "ensure[s] the case is decided solely on the evidence." State v. Musser, 721 N.W.2d 734, 755 (Iowa 2006). It "discourage[s] improper arguments that play on jurors' emotions and sympathies." Conn v. Alfstad, No. 10-1171, 2011 WL 1566005, *4 (Iowa Ct. App. Apr. 27, 2011). Prior to trial, Hawkins's counsel acknowledged such argument is inappropriate. (JA-I 266-267).

Yet, in summation, Hawkins's counsel repeatedly encouraged the jurors to place themselves in Hawkins's position and award damages based on their own personal interests and biases, rather than the evidence. (JA-I 2008 [75:5-6], 2009 [76:20-25], 2013 [80:19-22], 2022 [89:6-7], 2022 [89:12-13], 2023 [90:12-20], 2028 [95:1-2]). This impermissible conduct substantially prejudiced Defendants' rights. See Russell, 86 N.W.2d at 848; Cardamon v. Iowa Lutheran Hosp., 128 N.W.2d 226, 229-30 (Iowa 1964).

In Cardamon, during damages summation, the plaintiff's counsel argued: "It's easy to speak of pain and say how much would you stand for $2? Would you take $2 for an hour of pain?" Id. at 230. After objection, the plaintiff's attorney withdrew the statement—with an apology—and the court mentioned a previous admonition that the jurors should not place themselves in that position. Cardamon, 128 N.W.2d at 229-30. This Court found the withdrawal and admonishment cured the error. Id.

Hawkins's counsel repeatedly asked comparable questions. (JA-I 2008 [75:5-6], 2009 [76:20-25], 2013 [80:19-22], 2022 [89:6-7], 2022 [89-12-13], 2023 [90:12-20], 2028 [95:1-2]). Unlike Cardamon, however, no withdrawal and no admonition occurred. Instead, the district court overruled Defendants' objection and took no curative action. Rather than refrain from further argument in that vein, Hawkins's counsel repeated it.

"The single purpose of closing argument is to assist the jury in analyzing, evaluating, and applying the evidence." State v. Melk, 543

N.W.2d 297, 301 (Iowa Ct. App. 1995). Rather than providing the jury one perspective to analyze and apply the relevant evidence, Hawkins's counsel's summation did the opposite, urging the jury to award damages based on personal interests and biases.

The absence of any curative measure, coupled with counsel's pervasive golden-rule arguments that the jury place themselves in Hawkins's position, prejudiced Defendants. See Andrews, 178 N.W.2d at 402. Hawkins's counsel's summation profoundly impacted the jury's deliberations, resulting in the flagrantly excessive $4.28 million emotional-distress damages award. A lower damages award would have been probable but for the misconduct. See Conn, 2011 WL 1566005, *4-5 (finding a single misstep violated the golden rule, resulted in prejudice, and required a new trial, despite a curative instruction and apology from the attorney responsible for the improper argument). Hawkins's counsel's improper golden-rule argument requires a new trial on damages. Russell, 86 N.W.2d at 848.

B. **Counsel called upon the jury to hold Defendants accountable and punish them.**

The ICRA only authorizes compensatory damages to "place the injured party in the position he or she would have been in had there been no injury." Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 171 (Iowa 1982). Hawkins could recover only "actual" damages caused by the termination. Iowa Code § 216.15(9)(a)(8). He could not recover damages for harassment, failure to accommodate, or any events occurring before July 17, 2014. Id.; Dindinger, 860 N.W.2d at 571. He could not recover punitive damages. Ackelson, 832 N.W.2d at 689. Yet in summation, Hawkins's counsel encouraged the jury to make a broad public statement in awarding damages, imploring the jury to render a verdict that would impact the Hospital's future operations and effectively punish Defendants.

This classic "send a message" argument inappropriately urged the jury to punish through a compensatory-damages award. See, e.g., R.J. Reynolds Tobacco Co. v. Gafney, 188 So.3d 53, 57 (Fla. Dist. Ct. App. 2016); Jackowitz v. Lang, 975 A.2d 531, 539 (N.J. Super. Ct. App.

Div. 2009); Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 836-38 (N.D. Okla. 2007).

The cumulative effect of several improper statements gives rise to prejudice. State v. Greene, 592 N.W.2d 24, 32 (Iowa 1999). The cumulative effects of counsel's comments in summation inflamed the jury's passion and prejudice, impacted the jury's deliberations, improperly influenced the jury's decision-making process and prejudiced Defendants. These arguments distracted the jury from fulfilling its duty to render a fair verdict and a "different result would have been probable but for [Hawkins's counsel's] misconduct." Andrews, 178 N.W.2d at 402. "[W]hen a lawyer departs from the path of legitimate argument, [s]he does so at [her] own peril and that of [her] client." Gilster v. Primebank, 747 F.3d 1007, 1013 (8th Cir. 2014).

C. **The remedy is a new trial on damages.**

Any one of these grounds constitutes reversible error to support a new trial on damages in its own right. The cumulative

effects of these errors tainted the entire trial and warrants a new trial on damages. Wilson v. IBP, Inc., 558 N.W.2d 132, 144 (Iowa 1996).

Conclusion

Defendants-Appellants Grinnell Regional Medical Center, David Ness, and Debra Nowachek respectfully request that the Court reverse the judgment of the district court; reverse the district court's rulings awarding equitable relief, attorneys' fees, and costs; and remand this case for a new trial.

Request for oral submission

Defendants-Appellants Grinnell Regional Medical Center, David Ness, and Debra Nowachek respectfully request oral argument regarding the issues presented in this appeal.

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I hereby certify that on September 12, 2018, 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:

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