IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-1892
POWESHIEK COUNTY NO. LALA002281

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

# PLAINTIFF-APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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## ROUTING STATEMENT

The Supreme Court should retain this appeal because it presents substantial questions of changing legal principles. *See* IOWA R. APP. P. 6.1101(2)(f).

## STATEMENT OF THE CASE

After devoting a lifetime of service to Defendants as hospital Laboratory Manager, Plaintiff Gregg Hawkins was fired at the age of 61 after fighting cancer. The jury found that age discrimination, disability discrimination, and retaliation were all motivating factors in Gregg's termination. Defendants appeal, alleging the jury should also have been asked to decide whether Defendants would have made the same decision despite impure motives.

The record is rife with evidence about the nature and extent of the severe emotional distress Gregg suffered as a result of his termination. The jury determined the value of Gregg's pain in the past and future is $4,280,000. The trial court concluded: "the jury got it right." (App. I 2918).

Defendants claim no verdict this large should ever be allowed to stand or, alternatively, that it must have been the result of Plaintiff's closing argument. While Plaintiff's lawyer used the pronoun "you" during her closing, the context demonstrates the substance of the argument was proper and did not provoke unwarranted passion or prejudice.

## STATEMENT OF FACTS

### GREGG'S LONG AND SUCCESSFUL CAREER

In September 1976, at age 22, Gregg started working for Grinnell Regional Medical Center ("GRMC") as a medical technologist. (Vol. II 364, 422, 428-429). In 1985, GRMC promoted Gregg to Laboratory Director. (App. I 1280:3-7) (App. II 978). Gregg reported to VP of Operations David Ness. (App. I 438:6-11).

Gregg managed all laboratory employees. (App. I 635:22-24, 697:2-22). He fostered healthy relationships and found ways to positively counsel employees. (App. I 698:16-24).

In Gregg's last performance review, Defendants rated him as "high performing," stating he "takes responsibility for his own actions and never tries to blame others or take credit for other people's work." (App. II 33).

The lab was part of Gregg's identity. (App. I 1622:2-7). He looked forward to retiring from GRMC. (App. I 1309:19-25, 1310:1-2).

**GREGG GETS CANCER**

In November 2013, Gregg was diagnosed with breast cancer. (App. III 241-296). He had a mastectomy and started chemotherapy in January 2014. *Id.* Gregg worked part-time until he ran out of FMLA, then GRMC granted him an additional 30 days of leave, consistent with normal hospital policy. (App. III 306) (App. I 1306:6-14). Gregg's part-time schedule caused no problems and he had no performance issues. (App. I 452:5-12).

**DEFENDANTS DEMAND THAT GREGG RETIRE**

On June 2, 2014, Gregg met with CEO Todd Linden, HR Director Deb Nowachek, and Ness. (App. I 458:6-21). Linden told Gregg he had to resign because GRMC needed someone in the laboratory full-time. (App. I 1306:6-25, 1307:1-5). Linden said Gregg could decide when to retire, but it had to be in the next 90 days. (App. I 1308:22-25, 1309:1-13).

Gregg was shocked; he had never expressed a desire to retire. (App. I 1307:20-25, 1309:14-25, 1310:1-2). Gregg planned to return as the full-time Laboratory

Director once he completed cancer treatment. (App. I 1301:14-1032:25, 1309:4-22). Defendants acknowledged that at that time, Gregg did not have any performance issues that warranted termination. (App. I 479:9-16).

After the June 2 meeting, Gregg learned he would finish treatments and likely be totally recovered by December 2014. (App. I 1311:20-22) (App. II 894). On June 11, Gregg emailed Ness:

> Ever since our meeting on June 2, I have not been able to think about anything else. I have worked here for 38 years and been a dedicated and loyal employee. I realize that dealing with my cancer has not been easy but I just need a little more time and my doctors think I will be fully recovered within 6 months. Honestly, I don't think I'd be doing as well as I am without having a job to keep my mind off the cancer.
>
> I'm not ready to retire and I don't think I should have to. Can we discuss a solution that includes allowing me to return and see how I'm doing in 6 months? As you know, I'm still able to work part-time while I'm in radiation and plan to continue to do so until I work back up to full-time.
>
> I'm just asking for a little compassion as I deal with this cancer.

(App. II 894). Ness forwarded Gregg's email to Nowachek and Linden, writing, "We have a problem." *Id.* Nowachek replied, "He's going to make us term[inate] him." *Id.*

On June 19, GRMC featured Gregg in a public advertisement for its chemotherapy services. (App. I 977:1-978:7) (App. III 7-11). In September, Defendants again used Gregg's photo to promote the hospital. (App. I 555:10-14, 558:23-25, 559:1-4) (App. II 915).

On June 19, Ness and Linden told Gregg he had only 30 days left to resign, retire, or be fired. (App. I 699:20-25, 700:1-3, 989:7-22). On June 22, Gregg sent another email:

> I have continued to think about my 38 years with GRMC and that I'm not ready to retire. This cancer was a surprise to all of us - and you continue to say you don't want to start a "precedent" by allowing me some extra time. But isn't that required by the law? I thought you had to look at my situation and figure out if we could make it work. I don't understand how in the meeting on Thursday you kept talking about how I could stay connected and even reapply after I fully recover in six months. If that's the case, then why not just allow me to stay on now? Like I told you, I plan to continue working while I receive treatment. According to my doctor, I should be able to return to work, full time, in six months. I'm not asking you to hold my position open forever or for some unknown amount of time.
>
> If you insist I have to retire, then you can decide when you no longer have any use for me. I am not willing to say this is ok by giving you a date.
>
> I just can't believe you think it's ok to treat someone like this - after I gave you 38 years.

(App. II 898-903).

After receiving Gregg's email, Linden went to the GRMC Board. (App. I 485:24-25, 486:1-5). Recognizing the potential public relations problem GRMC would face by firing a 38-year employee in the throes of cancer, the Board refused to go along with Defendants' plan. (App. II 905) (App I 486).

On June 27, Gregg met with Ness, who insisted GRMC did not have to make any "special accommodations" or allow Gregg any leave time beyond that mandated

by GRMC's normal policies. (App. I. 542:6-9). Although the Board already decided to give Gregg additional time to recover, Ness told Gregg he probably would *not* get any extra time. (App. I 1324:14-1325:3).

On July 9, Ness and Nowachek began plotting to end Gregg's career when he returned from leave, manufacturing previously undocumented "performance issues." (App. II 907). The next day they refused to allow Gregg to keep working part-time and forced him on an unwanted leave of absence. (App. II 910).

Defendants then appointed Betsy Cranston as Interim Laboratory Director. (App. I 548:13-15). Cranston had worked closely with Gregg and had no concerns about his supervision of the lab. (App. I 701:15-702:7).

During Gregg's involuntary leave, the Laboratory Medical Director, Dr. Soraya Rodriguez, told Cranston, "people don't come back from that," referring to cancer. (App. I 703:22-704:6). Dr. Rodriguez made it clear she did not want Gregg to return to work. (App. I. 704:21-705:1).

## GREGG RETURNS TO THE JOB HE LOVES

On September 16, 2014, earlier than expected, Gregg was ready to return to work. He emailed Defendants, asking they "confirm that you really do have faith in my abilities and truly want me to be your lab director." (App. II 916-918):

> Since you asked me to retire on June 2nd because I wasn't yet able to work FT due to my ongoing cancer treatment, it caused me to believe that you no longer wanted me to be a part of the GRMC organization due to my disability.

> Can I be assured that I will have your full support and will be allowed to manage the business of the department as I see fit? I am ready to come back fully prepared to fulfill my duties as laboratory director. Can I have your assurance that there will be no retaliation due to my leave of absence?

*Id.* Ness and Nowachek were frustrated with Gregg's request. (App. I 553: 6-7).

On October 6, Gregg's oncologist released Gregg to full-time hours and he returned to work. (App. II 916-918) (Vol. I 560:4-15).

**RETALIATION AGAINST GREGG**

On December 17, 2014, an employee complained that Cranston was harassing him, an allegation Gregg immediately reported to Nowachek and Ness. (App. II 938-940). In response, Nowachek interviewed staff. *Id.* Defendants tried to blame Gregg for employees' issues with Cranston. (App. II 942) (App. I 578:13-17).

On January 21, 2015, Ness and Nowachek falsely accused Gregg of delaying a report that an employee may have had alcohol on his breath at work. (App. II 943) (App. I 585:11-586:23).

Despite harshly criticizing Gregg for how he managed Cranston's alleged performance problems, Ness gave Cranston a glowing performance evaluation. (App. I 571:18-574:5) (App. III 297). Cranston's review—dated the same day as the

January 21 meeting—made no reference to Cranston's alleged failures as Interim Director. *Id.*

On January 30 Gregg had another meeting with Ness, Nowachek, and Cranston. (App. II 944). Gregg told Ness he felt harassed in June 2014 when Defendants demanded he retire. *Id.* He also said he talked with an attorney and was told it was illegal to force someone to retire. *Id.* Although Ness admitted it was "definitely illegal for us to ask someone to retire," he expressed irritation that Gregg initially agreed to retire then had a change of heart. *Id.* Ness also expressed frustration at Gregg's requests for reasonable accommodations, characterizing them as demands "to be treated differently than other employees." *Id.*

At the end of the meeting Defendants told Gregg to prepare an "Action Plan," which he promptly accomplished. (App. I 579:3-5) (App. II 945). Defendants ignored it until March 9, when Gregg was disciplined in writing. (App. II 951-952). Other than a minor issue in 2006, the March 9 warning was the first discipline Gregg received throughout his nearly 40-year career. (App. I 1352:23-1353:3). The discipline included false and misleading information and focused on issues out of Gregg's control. (App. I 583:19-596:3) (App. II 920-937, 941, 948-951).

In mid-April, Nowachek interrogated laboratory staff about morale. (App. II 957-965). Despite Defendants' best efforts to dig up dirt on Gregg, staff overwhelmingly agreed that morale was better, Gregg was doing great work, and the

lab was moving in the right direction. *Id.* Nonetheless, Defendants gave Gregg a new Action Plan on May 1, then ignored Gregg's written dispute of their accusations. (App. II 966-973). After a nearly spotless 40-year career, Gregg could do nothing right. *See* App. II 951, 953-956, 966.

On May 13, Gregg filed a complaint with the Iowa Civil Rights Commission, reporting Defendants' age and disability discrimination and retaliation. (App. II 974-985). A week later, Gregg led the laboratory through the bi-annual CLIA survey and inspection. (App. II 986). Gregg worked around the clock to ensure the lab was ready. (App. I 962:14-19). The survey was a success and GRMC's laboratory retained its accreditation. (App. II 986).

On May 22, Ness emailed the Board to discuss firing Gregg. (App. III 436). On June 3, just three weeks after Gregg filed his ICRC complaint, Defendants fired him. (App. II 987). Vicky Norrish replaced Gregg. Norrish is in her 40s with no known disabilities. (App. I 635:8-11) (App. II 989-971).

## STRONG EVIDENCE OF PRETEXT

In her opening statement, Defendants' attorney claimed they had to fire Gregg to safeguard "patient care." (App. I 426:15, 427:20, 428:5, 428:17, 429:8, 430:13, 430:20). In closing, she told the jury that everything Defendants did was "to try and improve the lab and prevent a negative outcome." (App. I 2032:1-25, 2075:19-25, 2076:17-22).

Yet, Ness took the stand as the first witness and directly contradicted his lawyer, *repeatedly* admitting that "patient care" was not a reason for firing Gregg. (App. I 431:8-20, 433:11-25, 434:1-12, 435:2-4, 606:7-18). Ness made several key admissions, including:

- He never disciplined Gregg in the almost 30 pre-cancerous years he was Gregg's supervisor;
- He would not have placed Gregg on an involuntary leave of absence if he had not gotten cancer;
- He had never asked a 20-year-old to retire;
- He was frustrated with Gregg for refusing to retire and requesting an accommodation;
- Everything was going well with Gregg and he was appropriately responding to concerns when he worked part-time;
- He did not agree with the Board's decision to provide Gregg with reasonable accommodations;
- Gregg engaged in protected activity when he opposed discrimination and asked Defendants not to retaliate against him;
- The accusations in the March 9, 2015 disciplinary action against Gregg were false;
- None of the reasons for which he claimed Gregg was fired jeopardized patient care; and
- He was offended and hurt by Gregg's complaints of discrimination and retaliation.

(App. I 436:10-18, 452:2-12, 460:18-461:14, 487:1-8, 488:1-3, 553:4-7, 583:19-584:9, 585:11-586:17, 587:18-588:18, 591:17-24, 592:17-18, 593:4-10, 595:22-596:3, 606:10-18, 693:19-694:20, 695:10-24).

**EVIDENCE REGARDING GREGG'S EMOTIONAL DISTRESS**

Plaintiff has set forth facts regarding his emotional distress in the body of the Brief.

**PLAINTIFF'S ZEALOUS AND APPROPRIATE SUMMATION**

Plaintiff's counsel began her closing argument by talking about her newborn nephew and asking a series of rhetorical questions regarding general aspirations for his professional contributions and legacy. (App. II 1968:3-21).

The vast majority of Plaintiff's closing argument was spent walking the jury through evidence and jury instructions, using the exhibits and testimony elicited during trial. (App. II 1973:1-2011:25).

Counsel also highlighted Defendants' inconsistent reasons for disciplining and ultimately firing Gregg:

- Defendants claimed Gregg's leadership style was ineffective, yet employees did not indicate a lack of accountability;
- Defendants provided no evidence that patient safety was at risk;
- Dr. Rodriguez claimed Gregg allowed laboratory employees to be rude to doctors, but none of the employees had a clue about what she meant;

- Defendants argued Gregg never told them a worker may have had alcohol on his breath, but contemporaneous evidence proved otherwise; and

- Defendants failed to provide any evidence of doctor complaints or issues in 2015.

(App. II 1970:3-11, 1970:18-1971:3, 1984:23-1985:8, 2018:15-24).

Counsel reminded the jury of testimony from Gregg's daughters. (App. II 2013:16-19). She asked the jury what it was worth for Gregg to be labeled incompetent and a failure by people with whom he had worked for 39 years. (App. II 2013:23-2014:5). Counsel discussed how Gregg's years of service and memories are now tainted by Defendants' illegal actions. (App. I 2015:22-2016:7). She talked about what it was worth for Gregg to be denied the opportunity to retire on his own terms. (App. II 2017:7-24). She explained that Gregg's damages began the day he was fired. (App. II 2005:8-9, 2021:24-2022:1).

Throughout closing arguments, Plaintiff's counsel made it clear that this case was about holding Defendants accountable for the *actual harm Defendants caused*. (App. II 1972:2-8, 2017:2-13, 2027:1-3, 2098:21-25, 2099:1-5). Plaintiff's counsel emphasized during both closing argument and rebuttal that the jurors should not punish Defendants; rather, their job was to make Gregg whole for the harm Defendants caused. *Id.*

## ARGUMENT

### I. THE COURT PROPERLY REFUSED TO GIVE A "SAME DECISION" JURY INSTRUCTION

**Error preservation.** Plaintiff agrees Defendants argued the jury should have been instructed on the same decision defense. However, Defendants have consistently insisted this was not a mixed motive case and that the record contained no evidence of any illegal motive. That is the opposite of what Defendants say now. A party cannot take a position on appeal inconsistent with the one it took in the trial court. *State v. Beckwith*, 53 N.W.2d 867, 869 (Iowa 1952). Whether viewed in terms of preservation of error or judicial estoppel, this glaring inconsistency should disqualify Defendants from making the opposite argument here.

#### A. DEFENDANTS HAVE ALWAYS DENIED THIS WAS A MIXED MOTIVE CASE

There are two ways in which federal courts have interpreted Title VII's prohibition of discrimination that occurs "because of" a protected status. Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 ABA J. LAB. & EMP. L. 461, 462 (2011). The single motive framework has been recognized by federal courts to apply when the defendant denies discrimination of any kind and asserts its decisions were based on a legitimate reason, which the plaintiff then must show is pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 805 (1973).

The mixed motive framework is applied in federal court when the defendant's decision resulted from a mixture of legitimate and illegitimate motives. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989). In *Price Waterhouse*, the Supreme Court established the "same decision" affirmative defense in mixed motive cases only. *Id.* at 246, 248. "[O]nce a plaintiff in a Title VII case shows that [a protected status] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [a protected status] to play a role." *Id.* at 245.

Throughout this case, Defendants have insisted their motive was 100% pure and that Gregg had to prove his claims under the *McDonnell Douglas* framework. *See, e.g.* App. I 47-48, 53, 59.

None of Defendants' witnesses testified they would have made the same decision absent Gregg's age, disability, or protected activity, and they disavowed reliance on *any* impermissible factors. *See* App. I 1952:3-6. Defendants have sworn that the only reason they fired Gregg is because his job performance compromised patient safety. Defendants have always asserted a single motive.

At trial, Gregg demonstrated that Defendants' asserted reason was pretextual. Approximately the first 34 pages of Plaintiff's closing argument were devoted to liability. *See* App. I 1969-2003. Over half of those pages included arguments pointing out that pretext was proven time and time again. (App. I. 1969-1971, 1982-

1995, 2000-2001, 2003). Defendants allege that "Hawkins's counsel argued to the district court that this was a 'pretext' case in an intentional attempt to avoid a same decision instruction." Def. Brief, 58. Plaintiff is unsure what that means. His lawyers argued pretext because the record overflowed with it.

In this appeal, Defendants assert the evidence at trial showed the decision to fire Gregg was the product of legitimate *and* illegitimate motives. Def. Brief, 48. However, that was certainly not Defendants' position in the district court.

In their summary judgment brief, Defendants argued that Gregg had to prove his case under the framework set forth in *McDonnell Douglas* for single motive cases. Likewise, in closing argument, Defendants persisted in claiming Gregg did not have a lick of evidence that he was fired for any illegal reason:

- "*No evidence* of discrimination." (App. I 2066:4-5).
- "*No evidence* of disability discrimination." (App. I 2067:10-11).
- "*No evidence* of retaliation." (App. I 2069:3-5).

At the end of their closing, Defendants again acknowledged this was a single motive pretext case, arguing: "He needed to come with proof that all of the serious problems that existed in the lab when he was the director were *not the real reason for termination*." (App. I 2075:13-18).

Defendants' repeated insistence at the district court that the record contained zero evidence of mixed motives is irreconcilable with their current argument that

legitimate *and* illegitimate motives drove their employment decision. Even if this Court considers adopting the federal same decision defense, it would be inappropriate in a case like this where the employer has always denied having any illegitimate motive whatsoever.

## B. THE IOWA CIVIL RIGHTS ACT DOES NOT CONTAIN A "SAME DECISION" DEFENSE

### 1. The causation standard is "a motivating factor"

The words "same decision" do not appear in the Iowa Civil Rights Act ("ICRA"). Chapter 216 contains nothing to suggest that once a worker proves he was discriminated against, the employer gets another bite at the apple to try and escape responsibility for discrimination.

Iowa Code Section 216.6(1)(a) makes it illegal to discriminate in employment "because" of age or disability. Section 216.11(2) makes it illegal to retaliate "because" someone engaged in protected activity. This Court has repeatedly held that "because" means the worker's protected class or protected activity was "a motivating factor" in the employer's actions, i.e., it "played a part." *Haskenhoff v. Homeland Energy Solutions, L.L.C.*, 897 N.W.2d 553, 637, 602 (Iowa 2017); *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009). Not a single word in the ICRA suggests an employer might escape responsibility despite the plaintiff proving liability under this standard.

This Court has occasionally, in *dicta*, indicated theoretical approval of the "same decision" defense. *See McQuistion v. City of Clinton*, 872 N.W.2d 817, 828 n.4 (Iowa 2015) (footnote saying mixed motive/same decision is one way to prove discrimination); *Boelman v. Manson State Bank*, 522 N.W.2d 73 (Iowa 1994) (declining to allow same decision defense because defendant admitted disability was the only reason for plaintiff's discharge, so its motives were not "mixed"); *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 893-94 (Iowa 1990) (mentioning but not applying same decision defense because plaintiff had no direct evidence); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 517 (Iowa 1990) (acknowledging *Price Waterhouse*). However, in none of those cases did the Court apply the defense to the facts before it.[1]

Mere recognition of the potential availability of a same decision defense in certain circumstances does not mean this Court has endorsed it for ICRA claims. If the parties did not argue otherwise, the Court would have no reason to critically examine whether the defense exists in Iowa. "If one looks through our ICRA cases, federal cases are often simply cited for the propositions of law without substantive discussion. Often times in this setting, we were simply restating legal principles that the parties were not contesting in the case." *Haskenhoff*, 897 N.W.2d at 614 (Appel,

[1] In *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538-39 (Iowa 1996), the Court applied the same decision defense; however, that case was brought solely under the *federal* Age Discrimination in Employment Act. *Id.* at 536, 538.

J., concurring); *see also State v. Wickes*, 910 N.W.2d 554, 576 (Iowa 2018) (Appel, J. concurring) (assumption that federal standard applies is not equivalent to adoption of that standard). "An uncontested statement of law is not entitled to stare decisis." *Haskenhoff*, 897 N.W.2d at 615 (Appel, J., concurring).

This Court's most recent discussion of the causation standard of the ICRA was unusually long and thorough. *Id.* at 553-653. Yet none of the three separate *Haskenhoff* opinions said a word about Iowa law entitling an employer to escape liability or limit damages even if a jury finds the employer illegally allowed protected class or activity to influence an employment decision. *See id.* at 633-37 (Appel, J., plurality opinion); 602 (Cady, J., concurring); 581-86 (Waterman, J, dissenting).

Justice Appel's opinion discussed the same decision defense, but only under the heading "Federal Caselaw on Causation Standard for Civil Rights Claims." *See id.* at 627-31. Under the heading "Iowa Caselaw on Causation Under ICRA," the Court noted that per *DeBoom*, it is "sufficient to show that status-based discrimination 'played a part in the Defendant's later actions toward Plaintiff.'" *Id.* at 633 (quoting *DeBoom*, 772 N.W.2d at 13).

*DeBoom* did not mention a same decision defense either. *See DeBoom*, 772 N.W.2d at 1-14. Defendants stretch to make the argument that because the source of the *DeBoom* proposed motivating factor instruction was the Eighth Circuit model, the Court impliedly approved **all** Eighth Circuit instructions. Def. Brief, 51. That

exaggerates and distorts the opinion. The Court simply recognized that DeBoom's requested causation instruction "was derived from the Eighth Circuit's Model Civil Instruction 5.96" and that the district court should have used it. *DeBoom*, 772 N.W.2d at 14-15.

Defendants also claim the reason same decision is not mentioned in the *DeBoom* opinion is because it "was not a mixed-motive case," so "the Court had no occasion to address the appropriate jury instructions in such a case." Def. Brief, 51 n.25. But just a few pages later, Defendants argue that because "a motivating factor" is the causation standard under the ICRA, *every single* ICRA case is a "mixed-motive case." Def. Brief, 54 n.28. These arguments cannot be reconciled.

Defendants seem to contend that every case is a mixed motive case so long as the plaintiff claims defendants acted because of an illegal reason and defendants claim their reason was legal. *See* Def. Brief, 54, 56. That was certainly the situation in *DeBoom*. The plaintiff contended she was fired because of her pregnancy, while the defendants argued "her position was being eliminated and she was no longer a good fit for the company." *DeBoom*, 772 N.W.2d at 4.

If *DeBoom* was a mixed motive case, then under Defendants' theory the employer was entitled to a same decision instruction. Yet same decision was not mentioned in *DeBoom*. The Court's conspicuous silence in both *DeBoom* and *Haskenhoff* provides support for Plaintiff's understanding that where an employee

asserts a discriminatory reason and the employer asserts a non-discriminatory reason, the causation standard is motivating factor and defendants are not entitled to a same decision instruction. This is because once the jury has decided the employer allowed illegal discrimination or retaliation to infect its decision-making, the process is irredeemably tainted, and Iowa law does not give the employer a second chance to avoid liability or limit damages.

### 2. Unlike Title VII, the ICRA does not set forth a defense

In response to *Price Waterhouse*, Congress amended Title VII to contain explicit provisions entitling employers to a same decision affirmative defense. 42 U.S.C.A. § 2000e-2(m).

The ICRA has not been similarly amended, and "[c]ongressional reaction to a specific case decided by the United States Supreme Court does not shed light on the meaning of state law when there has been no comparable narrow state court precedent to stimulate a legislative override." *Pippen v. State*, 854 N.W.2d 1, 18 (Iowa 2014).

Title VII "differs from the ICRA in several key respects." *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999). "There is no requirement that we follow federal precedent, either because we find the logic and reasoning unpersuasive or because of differences between the Iowa and federal statutes in language or structure." *Mormann v. Iowa Workforce Dev.*, 2018 WL 2999604, at *11 (Iowa June 15, 2018).

There is a crucial difference between utilizing the analytical framework of Title VII to interpret ICRA claims and substituting the language in Title VII for the words chosen by Iowa's Legislature. *Hulme v. Barrett*, 449 N.W.2d 629, 631 (Iowa 1989).

Commentators have recognized that employment discrimination litigation in federal court is a hot mess. *See* Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545 (2013). By inventing procedurally confusing legal doctrines driven by untested (or demonstrably false) assumptions, federal courts have fostered "chaos" and "disarray." *Id.* at 588-90. Indeed, it often seems the unnecessarily complex paradigms were chosen for the specific purpose of thwarting plaintiffs from being able to prove discrimination. *Id.* at 589. "Given this chaos, continuing to interpret state law in tandem with federal law is not sound." *Id.* at 590.

*Price Waterhouse* was among the federal decisions the *Haskenhoff* opinion criticized as embracing a narrow construction of Title VII in the face of more generous plausible alternatives. *Id.* at 608-09. *Price Waterhouse* was also cited as an example of the legal structures that lack textual support yet were fashioned based on policy preferences. *Id.* at 611-12.

> These judicially developed constructs are not textually guided, but instead reflect the views of a majority of the United States Supreme Court on the subject of discrimination. If one believes, for example, that discrimination in the workplace is a relatively rare occurrence, the

> development of demanding judicial standards through interpretation or construction may seem to make sense.

*Id.* at 612.

In contrast, this Court has recognized that the persistent cancer of discrimination continues to plague our state. *Pippen*, 854 N.W.2d at 8-9 (attributing its intractable nature to institutional barriers, cognitive bias, structures of decision-making, and patterns of interaction). "In making choices regarding ambiguous phrases and determining whether and how to fill legislative gaps, Iowa courts are free to depart from what are often very narrow and cramped approaches of federal law." *Haskenhoff*, 897 N.W.2d at 612 (Appel, J., concurring).

While it is true the United States Supreme Court concocted the same decision defense prior to its codification by Congress, this Court has historically declined to legislate from the bench. On more than one occasion, the Court has examined whether the text of Title VII should be grafted upon the text of the ICRA. Time and time again, the answer has been **no**.[2]

[2] Missouri appellate courts have followed a similar path of staying true to the words of the Missouri Human Rights Act ("MHRA") even when that resulted in different rules than would apply under Title VII. *See, e.g. Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819 (Mo. 2007) (abrogated by statute). In *McBryde v. Rittenour Sch. Dist.*, 207 S.W.3d 162, 172 (Mo. Ct. App. 2006) (abrogated by statute), the court upheld a trial court's refusal to give a same decision instruction because the defense did not exist in the MHRA. The employer was liable if the worker's protected class was a "contributing factor" in the employer's decision (defined as contributing a share or playing a part in producing the effect). *Id.* at 170, 172.

In *Goodpaster v. Schwan's Home Services, Inc.*, 849 N.W.2d 1, 9 (Iowa 2014), the Court rejected the idea that an amendment to the ADA automatically amended the ICRA.

In *Ackelson v. Manley Toy Direct, LLC*, 832 N.W.2d 678 (Iowa 2013), the Court decided punitive damages are not available under the ICRA, even though Congress amended Title VII in 1991 to add punitive damages. While the Iowa Legislature had amended the ICRA several times, none of those amendments expanded the remedies to include punitive damages. *Id.* at 681 n.2.

Likewise, none of those amendments mentioned a same decision defense. The *Ackelson* Court rejected the plaintiff's argument that our legislature implicitly intended the possibility of punitive damages, relying on the principle that "'the legislature makes the law and the courts interpret the law.'" *Id.* at 687-88 (quoting *Andover Volunteer Fire Dep't v. Grinnell Mut. Reins. Co.*, 787 N.W.2d 75, 81 (Iowa 2010)). To judicially adopt a same decision defense under the ICRA would require the Court to find the Legislature secretly intended to provide employers with a "get out of jail free" card, even after a jury has found they violated the ICRA. Separation of powers does not allow such judicial activism.

In *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Commission*, 895 N.W.2d 446 (Iowa 2017), this Court addressed how to establish the numerosity threshold of the ICRA. The defendant urged the Court to follow the words of Title VII: "'each

employee 'must have been employed for twenty weeks in order to have been 'regularly employed.'" *Id.* at 459. The twenty-week requirement is codified in Title VII, while the ICRA contains no similar language. *Id.* The Court explored what the Legislature meant when it said the ICRA does not apply to an employer who "regularly employs less than four individuals." *See* IOWA CODE § 216.6(6)(a). To inform its judgment, the Court looked "'to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.'" *Id.* at 461 (quoting *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 15 (Iowa 2010)).

The Court showed respect for the language our Legislature selected, rejecting the idea that a codification found only in Title VII but not in the ICRA should nonetheless be utilized:

> Title VII was enacted with the twenty-calendar week requirement in 1964. The Iowa legislature declined to include a twenty-week term when it enacted the ICRA a year later. **We will not add a requirement to a statute that the legislature chose to omit.** Legislative intent is expressed by what the legislature has said, not what it could or might have said. Intent may be expressed by the omission, as well as the inclusion, of statutory terms. The ICRA's requirement that an employer 'regularly employ' four or more employees does not include a requirement the employer must do so for twenty weeks.

*Id.* at 464 (emphasis added) (internal citations omitted); *see also Jahnke v. Deere & Co.*, 2018 WL 2271338, at *5 (Iowa May 18, 2018) ("we may not read language into the statute that is not evident from the language the legislature has chosen").

The analysis regarding the same decision defense can be no different. Title VII was amended to include the same decision defense in 1991, two years after *Price Waterhouse*. Our Legislature amended the ICRA seven times since then, but never added the same decision defense. To amend the ICRA by judicial fiat would be to "add a [defense] to a statute that the legislature chose to omit." *Simon Seeding*, 895 N.W.2d at 464. This Court has consistently and correctly rejected that path.

### 3. Reading a same decision defense into the ICRA is inconsistent with the broad interpretation mandated by the Legislature

"The ICRA was enacted to ***eliminate*** unfair and discriminatory practices in ... employment" *Cote v. Derby Ins. Agency, Inc.*, 908 N.W.2d 861, 865 (Iowa 2018) (internal quotations omitted) (emphasis added). It explicitly mandates that it be "construed broadly to effectuate its purposes." IOWA CODE § 216.18(1). Title VII contains no similar language. *Pippen*, 854 N.W.2d at 28. In determining whether the same decision defense is available under the ICRA, the Court must seek to effectuate the purposes of the ICRA. This mandate is clear:

> An Iowa court faced with competing legal interpretations of the Iowa Civil Rights Act must keep in mind legislative direction of broadly interpreting the Act when choosing among plausible legal alternatives. **Any state court decision that adopts a narrow construction of Title VII by the United States Supreme Court without confronting the requirement in Iowa law that the Iowa Civil Rights Act be interpreted broadly misses an essential difference in state and federal civil rights laws**.

*Pippen*, 854 N.W.2d at 28 (emphasis added); *see also Goodpaster*, 849 N.W.2d at 10 (the United States Supreme Court has often failed to interpret federal antidiscrimination laws broadly). Where appropriate, this Court will not hesitate to break with federal precedent. *See, e.g., Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 572-73 n.8 (Iowa 2015) (declining to follow *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) as inconsistent with the ICRA). The present case exemplifies the same sort of situation in which blindly following the lead of federal courts would betray both the language and the spirit of the ICRA.

The same decision defense[3] allows employers to have a second bite at the apple even after the plaintiff has convinced the jury that the defendant acted with discriminatory animus. During that second apple bite, "[t]he employee becomes the defendant, having to justify his or her employment record in a vacuum, denying that there was just cause for the employer's action." Alfred W. Blumrosen, *Society in Transition II:* Price Waterhouse *and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1052 (1990).

[3] Defendants incorrectly state that same decision is not an affirmative defense but is instead part of the causation standard itself. At trial, defense counsel admitted that same decision is an affirmative defense. (App. I 1951:17-1952:1). Many courts have confirmed this. *See, e.g. Haskenhoff*, 897 N.W.2d at 628 (Appel, J., concurring) ("In cases of mixed motive, the *Price Waterhouse* Court concluded that an employer was entitled to a 'same decision' affirmative defense."); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003).

The district court refused to read into the ICRA a same decision defense that does not appear in the pages of the Iowa Code because:

> it is not consistent with Iowa law prohibiting a violation of civil rights of an individual. How can a district court judge instruct a jury to ignore a violation of an individual's civil rights prohibited by statute simply because it would have happened anyway? Without the federal amendment allowing the same decision affirmative defense, this Court finds the same decision instruction is not consistent with Iowa statute.

(App. I 2919-2020).

Even if the Court were keen to rewrite Chapter 216 on its own, the same decision defense seems "jarringly out of place under a statute designed to eliminate patterns of discrimination . . . . The only way the 'same decision' proposition can be provided is by assuming away the fundamental finding that discrimination *did* influence the decision." Blumrosen, 42 Rutgers L. Rev. at 1039 (emphasis added). In addition, "[d]iscrimination has both economic and dignitary aspects." *Id.* at 1040. **The same decision defense reflects a value judgment that it is more important to protect corporations from having to pay more in lost wages than they may have proximately caused than it is to provide any compensation at all to workers who have *proven* a loss of dignity due to illegal discrimination.** *Id.*

The ICRA does not outlaw discrimination only if discriminatory motive can be cleanly extracted from a decision and nothing else motivated the employer. The Act does not prohibit discrimination only when the employer cannot come up with

a backup excuse. The Act outlaws discrimination and retaliation. Full stop. Nothing in the ICRA suggests defendants are entitled to a same decision defense, and to allow it under the ICRA would excuse the very discrimination and retaliation the Act is meant to fully eradicate.

#### 4. A "same decision" defense is inconsistent with behavioral realism

Behavioral realism argues that "to the extent that legal doctrines rely on stated or unstated theories about the nature of real world phenomena, those theories should remain consistent with advances in relevant fields of empirical inquiry." Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1001 (July 2006). In other words: "Antidiscrimination law . . . should be based on a realistic understanding of human behavior." Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 995 (July 2006).

This Court has properly relied on scientific developments to inform its doctrinal developments. *See, e.g. State v. Sweet*, 879 N.W.2d 811, 837-38 (Iowa 2016) (using new scientific findings to alter interpretation of "cruel and unusual punishment" under Iowa Constitution). In addition, members of this Court have explicitly recognized that "our law should be based on a realistic understanding of human behavior." *State v. Plain*, 898 N.W.2d 801, 834 (Iowa 2017) (Appel, J., concurring) (citing Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Cal.

L. Rev. 969, 995 (2006). "[W]hen social science is *the basis* for a jury instruction, . . . some degree of social science *support* for the instruction is required." *Id.* at 839 (Waterman, J., concurring); *see also Pippen,* 854 N.W.2d at 33-34 n.9 (Waterman, J., concurring) (acknowledging developments in social science to explain stereotypes and biases); *State v. Jonas*, 904 N.W.2d 566, 571-72 (Iowa 2017).

Defendants criticize the cookie example used by Gregg's attorney in closing argument, but the analogy accurately describes the way the human mind works. Def. Brief, 58. Motives work like recipe ingredients. Just as one cannot remove the sugar from a cookie that has been baked, one cannot excise an illegal motive that played a part in an employment decision that has been made.

"Motive" is an internal mental state that, by definition, prompts an actor to act. Krieger & Fiske, 94 CAL. L. REV. at 1056. Plaintiff knows of no peer-reviewed research to suggest that either decisionmakers or third parties can accurately predict whether a particular decision would have been the same absent discriminatory motive.[4] This Court should refuse to adopt a new legal construct in the absence of empirical support that it makes any sense.

[4] The same decision defense "is always hypothetical. We can never know what any given employer would have done if it were free of discriminatory considerations." *Blumrosen*, 42 Rutgers L. Rev. at 1039-40.

### 5. To the extent any "same decision" defense is judicially incorporated into Iowa law, it should limit only the plaintiff's remedy

Defendants argue the same decision defense absolves otherwise guilty defendants from liability. Def. Brief, 49. Since Congress amended Title VII to codify the same decision defense, that is no longer true. The defense operates as a limitation on *damages*, not a bar to liability. 42 U.S.C. § 2000e-5(g). If a defendant proves it would have made the same decision, the court may still order declaratory relief, injunctive relief, and attorney fees. *Id.*

Defendants' contention that the ICRA should be interpreted in a manner *more hostile* to civil rights than federal law contradicts the mandate that the Act be "construed broadly to effectuate its purposes." *See* IOWA CODE § 216.18(1). If this Court agrees to judicially amend the ICRA to add a same decision defense, Plaintiff requests that it be construed only as a defense to damages.

## II. JURY INSTRUCTION 24 ON DAMAGES WAS ACCURATE

Defendants claim the district court erred by not including a date in the damage instruction to ensure the jury awarded damages only for conduct that incurred within the limitations period. They also express worry that the jury might have awarded damages for legal claims Plaintiff did not make or for incidents that were not illegal. However, **Defendants did not preserve error** on any of these supposed concerns.

Defendants' only objection to the damage Instruction stated:

> We believe it contains some inaccurate statements and unfairly characterizes evidence in the case by using terms such as 'wrongful conduct' and 'illegal actions.' We had proposed the Eighth Circuit model on damages which we believe should be given in lieu of this instruction.

(App. I 1959:25-27). Defendants said nothing about the failure to include a date or specific incidents. Their objections were far too vague. *State v. Taylor*, 310 N.W.2d 174, 177 (Iowa 1981) and *V.P. by Patel v. Calderwood*, 2017 WL 4570362, at *4 (Iowa Ct. App. Oct. 11, 2017).

### A. THERE IS NO EVIDENCE THE JURY AWARDED DAMAGES FOR CLAIMS NOT BEFORE THEM

Even if the Court excuses Defendants' failure to preserve error, Defendants have no evidence to suggest the jury completely misunderstood the nature of a civil lawsuit and awarded Gregg damages for incidents not at issue in the case.

Instruction 24 stated: "Award [Plaintiff] the amount that will fairly and justly compensate him for emotional distress damages you find he sustained *as a result of the illegal actions*." (emphasis added). Instruction 1 explained that "Plaintiff alleges he was discriminated against by Defendants on the basis of disability and age *when defendants terminated his employment.* The plaintiff additionally claims that he was terminated from his employment in retaliation for engaging in protected activity." (emphasis added). *See also* Instructions 16 (App. I 2114), 19 (App. I 2116-2117), 21 (App. I 2118).

Closing arguments also made clear that compensable damages began incurring on the day of termination. With respect to back pay, Gregg's counsel

explained, "you're being asked to order defendant to pay from June 3, 2015 up until today." (App. I 2005:8-9). Regarding emotional distress, Gregg's counsel suggested, "some juries find it helpful to divide the harm into particular points of time. So you could start with the firing." (App. I 2021:24-2022:1).

Defendants argue that Gregg's attorneys asked the jury to award damages for harm unrelated to the termination. Def. Brief, 64. They did no such thing. Immediately after the two statements Defendants quote on page 64 of their Brief, Gregg's counsel referred to his termination, saying: "Your job as a jury is to do everything possible to compensate Gregg *for not being allowed to end his career with GRMC the way it should have ended*." (App. I 2017:10-13). Context makes plain that the damages requested were incurred as a result of the firing.

### B. IF THE COURT FINDS ERROR, THEN A NEW TRIAL WOULD BE APPROPRIATE ONLY ON EMOTIONAL DISTRESS

Defendants argue that the remedy is a new trial on damages. However, even if the Court excuses Defendants' failure to preserve error and the utter absence of evidence to support the claim that the jury was confused about the damages it could award, the jury's back pay verdict is unassailable. Therefore, in the unlikely event the Court finds error, a new trial would be appropriate only on damages for emotional distress.

## III. THE JURORS' ASSESSMENT OF DAMAGES MUST BE RESPECTED

Plaintiff agrees the **standard of review** is abuse of discretion. *See* Def. Brief, 73; *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 702 (Iowa 1994). "[A]n appellate court must pay some deference to a trial judge's 'feel of the case.'" *Cuevas v. Wentworth Group*, 144 A.3d 890, 903 (N.J. 2016) (internal citations omitted). "That is so because it is the judge who sees the jurors wince, weep, snicker, avert their eyes, or shake their heads in disbelief, and who may know whether the jury's verdict was motivated by improper influences." *Id.* (internal citations omitted). Thus, the question is whether Judge DeGeest abused his discretion in finding "the jury got it right." *See* App. I 2918.

### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING THE VALUE THE JURY PLACED ON PLAINTIFF'S PAIN WAS NOT EXCESSIVE

Although the trial court's only job with respect to damages is to make sure they fall within a broad range of what is supported by the evidence, Judge DeGeest went further and expressed agreement with the sizeable verdict for emotional distress damages. The trial court's personal observations supported the jury's conclusions:

> The Plaintiff and his family members' testimony established tremendous grief and emotional distress. The emotional distress was clearly established in the testimony at trial, and the jury obviously saw and heard it.
>
> . . . .

> The jury unmistakably found overwhelming evidence of the Plaintiff's emotional distress, past and future, and this Court finds there was substantial evidence to support the jury award. The Plaintiff's expert testified that Gregg suffered from depression, anxiety, distressing thoughts, negative self-evaluation and fears that his career has been inadequate. The Defendants offered no expert evidence to the contrary other than the Plaintiff's cancer doctor who checked a box that the Plaintiff did not report depression. **This Court believes the jury got it right.**

(App. I 2917-2918) (emphasis added).

There is nothing to suggest the district court abused its discretion. It followed the law that verdicts are not to be tampered with absent the most unusual circumstances. "[T]he amount of an award is primarily a jury question, and courts should not interfere with an award when it is within a reasonable range of evidence." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 772 (Iowa 2009); *see also Riniker v. Wilson*, 623 N.W.2d 220, 230 (Iowa Ct. App. 2000) (citing *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999)) ("The amount of damages awarded is peculiarly a jury, not a court, function."). "The preeminent role that the jury plays in our civil justice system calls for judicial restraint in exercising the power to reduce a jury's damage award." *Cuevas*, 144 A.3d at 893. Generally, a court should "not disturb jury verdicts pertaining to damages unless they are flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support." *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799 (Iowa 1984).

"In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict." *Clarey v. K-Prods., Inc.*, 514 N.W.2d 900, 903 (Iowa 1994). The evidence must be considered in the light most favorable to the plaintiff. *Fry v. Blauvelt*, 818 N.W.2d 123, 132 (Iowa 2012). The court must uphold an award of damages "so long as the record discloses a reasonable basis from which the award can be inferred or approximated." *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982). "If the verdict has support in the evidence the [other factors, including prejudice,] will hardly arise." *Miller v. Young*, 168 N.W.2d 45, 53 (Iowa 1969).

No amount of money can make up for enduring a degrading campaign of discrimination and retaliation that destroys a career which was the central pillar of one's identity. Damage awards for these kinds of injuries should be large enough to be as life changing as the injuries themselves. Ascribing monetary value to pain and suffering is not a scientific matter of determining some absolute truth; it is a matter of weighing moral values and determining the consensus of the community, as represented by the jury. Judges must be especially wary of interfering with a jury's verdict on intangible damages. Where a verdict is a matter of determining an objectively correct answer, an educated and sophisticated judge can credibly claim to be better at weighing the evidence than an average juror. But where the job of the jury is to determine and apply the conscience of the community on a matter for

which there is no exact "right" answer, a judge is inherently less qualified, because the jury has eight diverse members whose combined interactions within the community are necessarily richer. *See Webner v. Titan Dist., Inc.*, 101 F. Supp. 2d 1215, 1226 (N.D. Iowa 2000).

Defendants request a new trial on the verdicts for $2,000,000 in past emotional distress damages and $2,280,000 in future emotional distress damages. To evaluate whether the district court abused its discretion in holding these were appropriate measures of what Gregg endured, the Court must consider the facts.

### 1. The verdict for compensatory damages reflects the seriousness of the emotional harm inflicted

The jury heard exhaustive evidence about Gregg's emotional harm. Gregg and people closest to him testified he was devastated after being fired from the job he loved for his entire adult life. Gregg gave Defendants 39 years of service. Gregg's daughter Julie Dressler told of how proud and excited he was to introduce his biological family to his GRMC family. (App. I 1578:23-1579:6). She explained how Gregg's identity came from helping people and how he saw himself as an ambassador of the hospital. (App. I 1581:2-12, 1622:2-7). Gregg's daughter Jennifer Stubbs shared that Gregg missed many school activities because he was busy working. (App. I 1639:6-22). Both daughters testified their father was often at work before they woke up and returned late into the evening, sometimes after dinner. (App. I 1639:23-1640:7).

Gregg testified that he felt like his many years in the lab were a lie. (App. I 1374:5-10). After the way Defendants lied to him over the last few years of his employment and then fired him, Gregg was left to question whether this precious time away from his family was wasted. (App. I 1374:7-17, 1513:13-23).

The jury heard employees testify about how GRMC was Gregg's hospital and the laboratory was "his" lab. (App. I 1372:1-6). His entire identity was tied up in GRMC. (App. I 1581:2-12, 1622: 2-7). Having that identity suddenly stripped away "broke him." (App. I 1588:13-21). Family members described how the man they once knew is now gone. (App. I 1581:15-1582:1, 1601:11-13, 1621:5-9, 1647:22-24).

Gregg told the jury about how guilty he felt leaving his employees on the day he was fired—as if he had let them down. (App. I 1369:24-1371:24, 1372:1-6) (App. II 988). Gregg suffered shame as Defendants walked him out the back door. (App. I 1371:10-1372:24). He explained how he waited to gather his personal belongings until later that night so as not to humiliate himself further. *Id.* Gregg broke down as he read to the jury text messages he exchanged that night. (App. I 1374:18-1375:16) (App. II 988).

"Although essentially subjective, genuine [emotional distress] injury . . . may be evidenced by one's conduct and observed by others." *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978). Gregg's wife Diane described learning of Gregg's firing: the

45-minute "hugfest" they had in the moments after Gregg came home; Gregg feeling confused, lost, and shell-shocked. (App. I 1616:11-22). Gregg was forced to pack almost 40 years of memories into cardboard boxes and leave his lab without closure. (App. I 1618: 8-11).

The pain has persisted. It was obvious throughout the trial that Gregg continues to struggle to reconcile the years he gave to GRMC with how cruelly Defendants treated him. (App. I 1402:10-17, 1408:11-25, 1409:1, 1416:1-17, 1581:15-1582:12, 1601:11-13, 1621:5-9). There was testimony that Gregg has pulled away from family. (App. I 1581:23-1582:1). Gregg cancelled a family trip in August 2015 because he was so consumed by the pain of his termination. (App. I 1582:1-12). Julie feels she has to shield her boys from their grandfather's sadness. One of the most poignant moments of trial was when Julie testified that being fired upset Gregg more than having cancer. (App. I 1588:13-21).

Gregg suffers from crying outbursts, insomnia, loss of energy, loss of self-confidence, and weight gain. (App. I 1402:10-17, 1408:11-25, 1409:1, 1416:1-17, 1581:15-18, 1621:5-9). Expert psychologist Kelly Champion testified that Gregg suffers from symptoms of depression and anxiety. (App. I 1416:1-17). He experiences distressing thoughts, negative self-evaluation, and persistent fears that his career was inadequate. (App. I 1416:1-12, 1458:24-1459:9). Being fired

threatened Gregg's sense of identity, integrity, and self-worth. *Id.* Gregg no longer views himself as a steady and effective leader. *Id.*

When Dr. Champion examined Gregg a year after his termination, he was still suffering from a severe acute stress reaction. (App. I 1415:14-25). She explained that if Gregg was still suffering from the same symptoms by the time of trial, his diagnosis would become post-traumatic stress disorder (which cannot be diagnosed until two years after the triggering event). (App. I 1416:21-1417:8). Gregg's wife and daughters confirmed his symptoms had not improved. (App. I 1581:15-18 1621:5-9, 1625:9-1626:2). The jury could reasonably find that Gregg is now suffering from full-blown PTSD.

Defendants contend Gregg's emotional distress must not have been important because he did not undergo medical treatment; however, the jury rejected this argument. This was reasonable in light of jurors' personal experiences with losses that counseling or medication cannot fix. In addition, Dr. Champion explained that treatment only works one-third of the time. (App. I 1418:13-1419:12). Defendants did not call an expert witness to question any of Dr. Champion's conclusions.

"The verdict was within the evidence. The jury has spoken. The parties had a fair trial. The court may not arbitrarily substitute its opinion for the conclusion of the jury." *Lantz v. Cook*, 127 N.W.2d 675, 677 (Iowa 1964).

### 2. The gravity of Plaintiff's emotional distress is directly related to Defendants' particularly cruel conduct

In addition to detailed evidence about Gregg's emotional distress, the depth of his pain was also apparent from the nature of the wrongs themselves. *See Carey*, 435 U.S. at 264-65. Defendants fired Gregg because of characteristics over which he had no control (his age and cancer), and because he stood up for himself. Defendants began their campaign of discrimination and retaliation when Gregg was literally fighting for his life. They lied to him and to everyone else about why they did it. Such scheming and betrayal by people one trusts leaves permanent scars.

Gregg's emotional distress can be understood only in the context of the civil rights violations from which it arose. Gregg would not have been nearly as damaged if he had lost his job because, for instance, the hospital closed its lab. Much of his damages come from the fact that managers whom he trusted turned on him and brazenly violated his rights, falsely claiming his performance had declined, and causing him to doubt himself, lose confidence, and work even harder. *See* App. II 951-956, 966.

Civil rights violations cause a special kind of anguish:

> The right which is violated by an employer which discriminates on the basis of a protected characteristic is not the employee's right to the job, but the employee's right to equal, fair, and impartial treatment, the violation of which frequently results in a significant injury to the victim's dignity and a demoralizing impairment to his or her self-esteem.

*Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1232-33 (3d Cir. 1994) (vacated in part on other grounds, 65 F.3d 1072 (3d Cir. 1995)). "A victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." *Id.; see also U.S. v. Burke*, 504 U.S. 229, 238 (1992) (illegal discrimination in employment is "an invidious practice that causes grave harm to its victims.").

Gregg's exceptionally long tenure with GRMC also drove the damage award. In her closing argument, Gregg's attorney spoke about Gregg's legacy with GRMC and how he cherished his memories from working at the hospital. "But now those memories are tainted by the way in which things ended. You heard the gifts he would painstakingly give each year for his employees, the friendships he cherished, the significance of his contributions of both time and money—diminished and reduced in value because of their actions." (App. I 2016:2-7). "What is it worth now to look upon these memories with sadness?" (App. I 2016:15-16).

When Gregg lost his job, he did not lose four additional years of productivity before he retired. He retroactively lost something he thought he had earned over the previous 39 years—a fulfilling career with an ethical employer who cared about him and treated him with dignity. Gregg lost the deep, abiding satisfaction of having devoted his life to a cause that was worthy of all his sacrifices.

Defendants inexplicably refer to this as a "single-incident case." Def. Brief, 75. That ignores the 39-year history between the parties, as well as the overwhelming "evidence of retaliatory actions taken against the Plaintiff by the Defendants over an extended period of time in an effort to fire the Plaintiff for justifiable reasons." Ruling New Trial, 4. During the year before Gregg was actually fired, Defendants "set him up." They manufactured and exaggerated performance problems and repeatedly lied to Gregg and about Gregg. *See, e.g.* App. II 951-956, 966-973.

### 3. Attempting comparisons to other verdicts is not particularly valuable

This Court has "pointed out many times that comparison of verdicts in different cases is not helpful in determining the propriety of an award in a given case—each must be determined upon the evidence therein." *Wagaman v. Ryan*, 142 N.W.2d 413, 420 (Iowa 1966). After all, even if it was possible to find a factually identical case, it would be impossible to know which jury pinpointed the "right" amount of damages. *Cuevas*, 144 A.3d at 905.

Defendants list various cases to support their argument that the jury's verdict was excessive. The diversity of facts in each of those cases underscores that the facts of each unique case must drive evaluation of the jury's award. While any exact comparisons to other cases are impossible, multi-million-dollar results are not terribly unusual in civil rights cases. Not surprisingly, the most egregious cases are

more likely to settle before trial—let alone before an appellate decision is reported. Nevertheless, there are a few comparable cases in the public record that the Court may consider:

- The jury in *Anderson v. State*, No. LACL131321 (Polk County 2017) valued a woman's emotional distress suffered on account of sexual harassment and retaliation at $2,195,000.

- After a jury verdict that included $1,056,000 in emotional distress damages for one plaintiff, the University of Iowa paid $6.5 million to settle *Greisbaum & Meyer v. State*, Nos. LACL134713 and LACL133931 (Polk County 2017) for claims of gender and sexual orientation discrimination, as well as retaliation.

- A local police department paid $1,900,000 to settle a case involving gender discrimination, harassment, and retaliation against a female sergeant in *Zaglauer v. City of West Des Moines*, LACL 132694 (Polk County 2016).

- A central Iowa jury decided a woman who was sexually harassed endured past and future emotional distress valued at $1,800,000. *Renneger v. Manley Toy Direct, LLC*, 4:10-cv-00400, (S.D. Iowa 2015).

- A nursing home paid $4 million to settle the sex discrimination, harassment, and retaliation case of a West Des Moines woman who had been its Chief Operating Officer. *See Iowa Supreme Court Attorney Disciplinary Bd. v. Stowers*, 823 N.W.2d 1, 5 (Iowa 2012).

- A Polk County jury found an Ames woman sustained over $2.5 million in emotional distress damages as a result of sexual harassment, discrimination and retaliation. *McElroy v. State*, CL 74459 (Polk County 2003).

In the end, comparison of verdicts is of limited value. "Our legal system has not attempted to set schedules of presumptive awards for various types of injuries, and a court cannot and should not do that under the guise of determining

'comparability.'" *Zurba v. United States*, 247 F. Supp. 2d 951, 962 (N.D. Ill. 2001).[5] The trial court was required to judge this verdict on its own merits—on the evidence presented in the courtroom—and not by comparing it to fact patterns in other cases where it did not see the witnesses and hear the evidence. There is no indication the trial court abused its considerable discretion.

Even as this Court reads the facts of this case on paper, it must keep in mind that that is not the way the jury learned what happened. The Court is necessarily missing key aspects of the evidentiary presentation that cannot be captured in words:

> Summaries cannot compare to what a jury hears from a witness on the stand; to the timbre of a voice that recalls the emotional cuts and slashes felt from . . . discrimination; to in-depth descriptions of daily workplace humiliations that mentally beat down an employee; and to first-hand accounts of mental anguish—anguish that leads to depression and frays personal relationships.

*Cuevas*, 144 A.3d at 905.

Relying on all the evidence cited above, a properly instructed, rational group of eight ordinary Iowans[6] from Poweshiek County determined it will take $4,280,000

[5] "[D]ifferent plaintiffs can experience different levels of pain and suffering from similar incidents. A defendant in a tort case 'must take his plaintiff as he finds him,' even if [ ]he is more susceptible to injury than the average person." *Id.*

[6] The jury was composed of five men and three women, aged 23 to 79, and included a retired business owner-carpenter, funeral director, farmer truck driver, DHS supervisor, retired electrician, salesperson, assistant underwriter, and retired insurance product analyst. (App I 2916). The trial court said they were "attentive and engaged in the trial process." *Id.*

to fully compensate Gregg for his past and future emotional harm. Without hesitation, the trial judge agreed. The fact that this verdict may be higher than previous awards may simply mean that Gregg was hurt more than those other plaintiffs. It may also mean that the consensus of the community as to the monetary worth of human anguish is evolving. It may be that we better understand mental health issues like depression and anxiety than we did 20 or 30 years ago. Or it may be that society values civil rights more preciously than it used to.

Because there is substantial evidence to support the jury's decision, the Court should respect and uphold it.

### B. DEFENDANTS HAVE NO EVIDENCE OF PASSION OR PREJUDICE

Defendants argue "[t]he size of the verdict [alone] reveals it is the product of passion or prejudice and the jury's improper desire to punish Defendants." Def. Brief, 78. However, "the fact that a damage award is large does not in itself . . . indicate that the jury was motivated by improper considerations in arriving at the award." 58 AM. JUR. 2D *New Trial* § 313, at 313 (2002). "In considering the contention the verdict is so excessive as to . . . show it is the result of passion and prejudice we must take the evidence in the aspect most favorable to plaintiff which it will reasonably bear." *Townsend v. Mid-Am. Pipeline Co.*, 168 N.W.2d 30, 33 (Iowa 1969).

Gregg was the victim of traumatic events that will affect him for the rest of his life. This case is also exceptional in that Defendants' actions led Gregg to question hundreds of decisions he made for the last 39 years—to the point where he believed his life's work was worthless. A jury of the parties' peers understood that and compensated Gregg accordingly. As discussed above, the jury heard ***extensive*** evidence about Gregg's emotional pain and the reasons why that pain is so intense and persistent. There is simply no indication that the jury was motivated by anything except their duty to find the truth and do justice.

## IV. THE TRIAL COURT'S EVIDENTIARY DECISIONS WERE SOUND

### A. NOTES REGARDING PLAINTIFF'S EMPLOYMENT WERE PROPERLY ADMITTED

Defendants challenge the admission of cards and notes that coworkers and members of the community sent to Gregg both during and after his employment. Defendants **failed to preserve error** on their unfair prejudice argument because they objected only on grounds of hearsay and relevance. (App. I 1376:8-13).

Defendants based their entire defense on a claim that performance failures plagued Gregg's tenure. Defendants attempted to show Gregg was an incompetent, unresponsive, unmotivated manager, and that the laboratory suffered because he failed to properly supervise employees. The notes and cards in Exhibit 173 rebutted

Defendants' attempts and supplemented the testimony of many witnesses who described Gregg as a skilled, dedicated, and responsive manager.

Defendants also make a broad hearsay objection. However, Defendants fail to identify which portions of Exhibit 173[7] should have been excluded. Without more, Plaintiff cannot respond.

The notes also demonstrated that people throughout the community recognized the lab was integral to Gregg's identity. The fact that he received such an outpouring of support is itself relevant, showing that Exhibit 173 was admissible even without reference to the truth of matters asserted therein, and Defendants failed to ask for any limiting instruction.

### B. PHOTOGRAPHS OF PLAINTIFF WERE PROPERLY ADMITTED

Defendants argue the photographs of Gregg in Exhibit 171, particularly when he was undergoing cancer treatment, inflamed the jury. Defendants **failed to preserve error**, objecting only as to relevance—not under Rule 5.403. *See* App I. 706:5-13, 963:12-964:7, 1197:19-24, 1241:5-13, 1241:20-25, 1249:16-1250:2, 1299:11-19.

[7] Defendants claimed that describing a physician's emotional state as "irate" constituted double hearsay; however, that description was not even an assertion by the physician. *See* IOWA R. EVID. 5.801(a)(1).

In addition, Defendants disputed that Gregg was disabled, so the photographs were relevant to help prove Gregg had an impairment that substantially interfered with his major life activities. *See* Instruction 19 (App. I 2116-2117). This was the context in which Plaintiff's counsel referenced the photos in closing argument. *See* 1998:4-20.

Iowa courts have repeatedly allowed photos to explain or depict facts, regardless of their potentially shocking nature. *See, e.g., State v. Fuhrmann*, 257 N.W.2d 619, 625 (Iowa 1977) (grisly photographs unavoidable given nature of the killing); *Cardamon v. Iowa Lutheran Hosp.*, 128 N.W.2d 226, 231 (Iowa 1964) (photos of decedent throughout his lifetime). "The fact photographs and slides may be gruesome or tend to create sympathy does not render them inadmissible if there is just reason for their admission." *Twyford v. Weber*, 220 N.W.2d 919, 924 (Iowa 1974).

Moreover, this is unlike cases in which the defendant caused the injuries depicted in the photos. No one suggested these Defendants were responsible for Gregg's cancer. It makes no sense for Defendants to argue that the photographs would make the jury want to punish them for Gregg's cancer.

### C. HOSPITAL NEWSLETTERS WERE PROPERLY ADMITTED

Defendants **failed to preserve error**, objecting only as to relevance—not under Rule 5.403. *See* App. I 555:25-556:8, 1377:12-16.

Defendants argue that showing hospital newsletters inflamed the jury. Exhibit 179 consists of Defendants' *own publications* highlighting Gregg as an employee and a financial donor to the hospital. The fact that Defendants highlighted Gregg in their own marketing materials gives credence to the contention that Defendants viewed him as an exemplary employee before he got cancer, grew older, and protested unfair treatment. The newsletters also illustrate Defendants' gross hypocrisy—using Gregg as a poster child to show their concern for cancer patients while at the same time trying to get rid of him. The jury could reasonably find that duplicity emotionally devastated Gregg. Finally, the exhibits show the tremendous contributions Gregg made to GRMC, which in turn helps demonstrate the enormity of Defendants' betrayal and the depth of Gregg's feelings of regret.[8]

### D. EVIDENCE OF THE CEO'S SALARY BECAME RELEVANT BECAUSE DEFENDANTS OPENED THE DOOR

Defendants contend evidence of CEO Todd Linden's salary was irrelevant and should have been excluded as unfairly prejudicial. However, Defendants **failed**

[8] Defendants complain that Plaintiff's counsel asked Gregg how looking at the newsletters made him feel (in 2017)—implying this showed he was seeking damages he suffered at the time the newsletters were released. Def. Brief, 88. It is obvious from the context that this testimony concerned emotional pain related to his termination and the way it caused him to second guess everything he had done for Defendants over the years. *See* App. I, 1377:23-1378:3.

**to preserve error** because they objected only on grounds of relevancy. (App. I 1086:25-1087).

Evidence about Linden's annual compensation of $432,000 was admitted only after defense counsel had him repeatedly testify about the "nonprofit" status of GRMC and the purportedly difficult financial choices Defendants faced. *See* App. I 1051:7-9, 1051:20-24, 1052:14-20, 1086:25-1089:2.

The testimony elicited by Defendants' attorneys, which ran afoul of their own Motion in Limine,[9] suggested GRMC was in a precarious financial situation. The only reason Gregg's attorneys raised the topic of Linden's salary was to rebut Defendants' inaccurate implication of poverty. The evidence was relevant, and any prejudice Defendants may have suffered was certainly not "unfair."

## V. PLAINTIFF'S CLOSING ARGUMENT WAS ZEALOUS AND APPROPRIATE

### A. THERE WAS NO DIRECT GOLDEN RULE VIOLATION

Defendants' allegation that Plaintiff's attorney encouraged the jurors to place themselves in Gregg's position and award damages based on their own interests is unequivocally false. *See* Def. Brief 93. In the cases Defendants cite, attorneys explicitly asked jurors to place themselves in the plaintiffs' shoes and think about how much money they would deserve. *See Russell v. Chicago R.I. and P.R. Co.*, 86 N.W.2d

[9] *See* Def. Mot. Limine ¶ 6 (App. I 108).

843, 848 (Iowa 1957); *Cardamon v. Iowa Lutheran Hosp.*, 128 N.W.2d 226, 229-30 (Iowa 1964).

Turning to *American Jurisprudence*, the boundaries of the modern prohibition are far more limited than Defendants suggest:

> A typically improper "Golden Rule" argument occurs when an attorney . . . asks the jury what would compensate them for a similar injury, or asks the jurors to award damages in the amount that they would want for their own pain and suffering. Other remarks that are considered to be examples of "Golden Rule" arguments, and therefore improper, include posing the question to the members of the jury whether they would go through life in the condition of the injured plaintiff, or would want members of their family to go through life crippled [sic].
>
> To be impermissible, a "Golden Rule" argument in a civil matter *must strike at the sensitive area of financial responsibility* and *must hypothetically request the jury to consider how much they would wish to receive in a similar situation*. In other words, the "Golden Rule" argument is prohibited *only where it is used to inflame the jury and encourage and increase a damages award*. Remarks not directed at damages are not impermissible. Thus a "Golden Rule" argument is appropriate when used to ask the jury to assess the reasonableness of a party's actions by relying upon their own common sense and life experiences.

75A Am. Jur. 2d *Trial* § 547 (Aug. 2017) (emphasis added). The argument found improper in *Russell* comports with the Am. Jur. definition. There, the final argument was, "in effect 'how much money would you jurors take to go through life injured as this man is[?]'" *Russell*, 86 N.W.2d at 848.

This Court reiterated the limited applicability of the golden rule in *State v. McPherson*, 171 N.W.2d 870, 873-74 (Iowa 1969), wherein the prosecutor "invited

the jury to put themselves in the position of the witnesses at the time of the events about which they were testifying." *Id.* at 873. The Court rejected the defendant's golden rule objection, noting that "[t]he reasons for the prohibition *in discussing damages* are not present" in a criminal case. *Id.* at 873-74. Finding no prejudice, the Court held that "[c]ounsel on both sides are permitted reasonable latitude in final argument." *Id.* at 874.[10]

By objecting every time Plaintiff's counsel uttered the pronoun "you" in her closing argument, Defendants exhibited a fundamental misunderstanding of the golden rule. In the first instance, Plaintiff's counsel was not using "you" or "your" in reference to *the jurors*. *See* Def. Brief, 41. As part of an anecdote highlighting the importance of one's career in one's identity, self-worth, and legacy, Ms. Timmer

[10] The two unpublished cases cited by Defendants further demonstrate the boundaries of the golden rule. *State v. May*, 2005 WL 3477983, at *1 (Iowa Ct. App. Dec. 21, 2005) was a sex abuse case. The defendant alleged misconduct when the prosecutor asked the jury to consider "what's important in the life of a nine-year-old girl" to evaluate the victim's testimony. *Id.* at *7. The comments were fine because he "was not asking jurors to identify with the victim in order to arouse sympathy and suggest the jurors decide the case on some other basis other than the evidence." *Id.* at *8. The other case, *Conn v. Alfstad*, 2011 WL 1566005, at *4 (Iowa Ct. App. Apr. 27, 2011), found a golden rule violation when the defense lawyer said, "It would change the lives of you or me or anybody in this courtroom to receive [the] kind of money" the plaintiff requested. The appeals court agreed, holding the "suggestion to the jurors that *their* lives would be changed by receiving an award of more than $600,000 was an impermissible argument because it encouraged them to decide damages based on their personal interest rather than on the evidence." *Id.* at *5 (emphasis added). Thus, the golden rule applies when (1) the argument involves damages and (2) encourages jurors to decide the case based on how that kind of money would impact *their own* lives.

described a hypothetical discussion with her brand-new nephew, who was born during the trial:

> But as I looked at him, I thought, what will you become?
>
> . . . What if you work your whole life, almost 40 years, expecting that you left the world and your work place a little bit better than 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, . . .

(App. I 1968:3-1969:1). The Court recognized that the pronoun did not refer to the jury and properly overruled Defendants' objection.

Defendants also complain about counsel's other variations of the word "you." The meaning of counsel's words would not have changed one iota had she substituted the word "one," "he," or "him." English is not always a precise language, but the context around these statements makes clear that counsel never asked the jury to consider how much money *they* would expect to receive if *they* were treated the same as Gregg. Counsel never asked the jury what it would be worth to *them* or how much *they* would accept.

Plaintiff's counsel did ask the jury to think about the heartbreak Gregg experienced and to imagine those feelings in light of their own common sense and life experiences. *See, e.g.* App. I 2022:6-13. There is nothing wrong with asking the

jury to imagine how Gregg felt. It is unclear how jurors are supposed to value distressing events if they are not allowed to picture them.[11]

Courts have recognized that use of the word "you" during closing argument does not automatically amount to improper personalization that violates the golden rule. *Charles v. Thaler*, 629 F.3d 494, 504 (5th Cir. 2011); *Gibbs v. Koster*, 2012 WL 3143910 (E.D. Mo. Aug. 1, 2012); *State v. Tramble*, 383 S.W.3d 34 (Mo. Ct. App. 2012); *State v. Chambers*, 330 S.W.3d 539 (Mo. Ct. App. 2010); *Grushoff v. Denny's, Inc.*, 693 So. 2d 1068 (D. Ct. App. Fla. 1997); *Linder v. State*, 828 S.W.2d 290 (Tex. Ct. App. 1992).

For instance, in *Gibbs*, the prosecutor told the jury to "[t]hink about what it must have been like to be a 5-foot-two petite woman having a gun put in your face and being robbed" and "think about having to flag down a stranger while you're half naked because you can't find your clothes where you were left." *Id.* at *11-12. That is far more personal and sensational than anything Plaintiff's counsel said here. Yet the court found, in context, that those statements were really a request for "jurors to consider what the victim went through." *Id.* at *12. The same is true here.

The lawyer's summation in *Linder* was a 35-line horror story about a woman being sexually assaulted in her bed, all phrased as if the juror was the victim. *Linder*,

[11] *See, e.g.* Civil Instruction No. 100.9 ("Consider the evidence using your observations, common sense and experience.") (emphasis added).

828 S.W.2d at 301-02. It was infinitely longer and more incendiary than anything Plaintiff's counsel said here. The court stated: "We find that the argument, although somewhat ambiguous in the use of the second person pronoun, was a summation of the evidence before the jury and, as such, was not improper." *Id.* at 303.

Here, the trial court correctly found no evidence to support Defendants' contention that Plaintiff violated the golden rule. (App. I 2919).

### B. DEFENDANTS CANNOT PROVE PREJUDICE

Even if the Court holds that Plaintiff's counsel violated the "golden rule," Defendants cannot show they suffered prejudice or that a different outcome probably would have resulted but for counsel's comments. "The scope of closing arguments is not strictly confined, but rests largely with the sound discretion of the trial court." *Lane v. Coe Coll.*, 581 N.W.2d 214, 218 (Iowa Ct. App. 1998). A trial court has broad discretion in deciding on the propriety of closing arguments to the jury." *Id.*

> The fact that misconduct "may be indulged in in a particular case does not mean that the judgment therein must be set aside. Regardless of the misconduct, prejudice to the complaining party must be made affirmatively to appear before a reversal is justified. *Much necessarily must be left to the good sense and the broad legal discretion of the trial judge.* He occupies a position of vantage and his conclusion is entitled to much weight. His discretion is, of course, a sound, legal discretion, but *unless it appears probable that a different result would have been reached but for such misconduct* this court is not warranted in interfering.

*Connelly v. Nolte*, 21 N.W.2d 311, 319 (Iowa 1946) (emphasis added).

In *Lovett v. Union Pacific Railroad Co.*, 201 F.3d 1074, 1083 (8th Cir. 2000), the court faced an unambiguous "golden rule" violation. Defense counsel asked jurors to imagine a hypothetical in which they were the defendant in an accident just like the one in the case they were being asked to decide. *Id.* at 1082-83. The Eighth Circuit called out the violation, but found the plaintiff failed to demonstrate prejudice. *Id.* at 1083. Several factors weighed heavy: (1) counsel never returned to the hypothetical after its first discussion; (2) the trial court correctly instructed the jury; (3) jurors were warned not to allow sympathy or prejudice to sway their decision; and (4) the court cautioned that closing arguments were not evidence. *Id.*

The same four factors weigh against granting a new trial here. Plaintiff's counsel did not dwell on the statements cited by Defendants. She finished the introductory statements just minutes into her closing argument, which lasted for over another hour. The discussion on damages was tempered and dignified:

> And please remember this case is not about vengeance. Your job ultimately is to fully compensate Gregg Hawkins for the economic and emotional harm Defendants caused. This is your chance to hold Defendants accountable. Do not let any prejudice or sympathy influence your award. And I want to emphasize that, for both sides, do not let sympathy for GRMC cloud your decision, and in the same vein, do not let sympathy for Gregg influence that number.

(App. I 2026:23-2027:6). The same warning was revisited in Defendants' closing argument and again in rebuttal. (App. I 2074:17-20, 2098:21-2099:5).

After reading the instructions and immediately before Plaintiff's closing argument, the Court reiterated the non-evidentiary nature of closing arguments. (App. I 1967:19-24).

Defendants' Brief is glaringly missing any evidence—or even any argument—about how the trial might have ended differently if Plaintiff's counsel had used slightly different verbiage.

### C. THE PURPOSE OF COMPENSATORY DAMAGES IS TO HOLD LAWBREAKERS ACCOUNTABLE FOR HARM

Defendants imply it is wrong to suggest that a civil jury should hold an employer accountable for the harm caused by its illegal violations of a worker's civil rights. Def. Brief, 95-96. The whole point of a trial and of compensatory damages is to make the lawbreaking party bear the consequences of its conduct. *See Lara v. Thomas*, 512 N.W.2d 777, 786 (Iowa 1994).

This case is unlike *Kinseth v. Weil-McLain*, 2018 WL 2455300, at *9 (Iowa June 1, 2018), in which the lawyer repeatedly and blatantly violated an order in limine and specifically urged the jury to send a message to the wrongdoer by awarding damages *unrelated to the damages her client's family actually incurred*. She stated: "It is not about what the family needs, it is about sending a message to a company . . . what message they need in order to value this appropriately." *Id.* In contrast, Gregg's lawyer specifically tied her arguments to fair compensatory damages: "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." (App. I 2012:9-14).

Defendants' additional arguments on this point are so vague and untethered to the record that Plaintiff cannot identify the other statements about which Defendants complain. Plaintiff's counsel did say: "By telling them they have to pay for the consequences of their behavior, you enforce civil rights law. You the jury are the conscience of our community. You have the power to give Gregg his good name back, to allow him to hold his head high." This is perfectly proper argument and has nothing to do with punitive damages or punishment.

The jury *does* "represent the conscience of the community." *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003). This Court's website features an educational video explaining that "when you serve on a jury, you are acting as *the conscience of your community*." https://www.iowacourts.gov/for-the-public/videos-and-brochures/we-the-jury/ (accessed June 19, 2018) (emphasis added). There was nothing improper about counsel's focus on the purpose of compensatory damages.

## CONCLUSION

Plaintiff respectfully requests that the Court affirm the trial court's decisions and remand the case solely for consideration of the attorney fees and costs incurred since the last order.

## REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiff-Appellee request to be heard in oral argument.

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## ATTORNEY'S COST CERTIFICATE

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

Certified by: */s/ Katie Ervin Carlson*

## CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[_X_] this brief contains 13,973 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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## CERTIFICATE OF SERVICE AND FILING

I, Summer Heeren, hereby certify that on the 12th day of September, 2018, I electronically filed the foregoing Final 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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