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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KIRSTEN ANDERSON, Plaintiff, vs. THE STATE OF IOWA, THE IOWA SENATE, and THE IOWA SENATE REPUBLICAN CAUCUS, Defendants.	Case No. LACL131321 **DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL AND ALTERNATE MOTION FOR REMITTITUR**

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Defendants hereby submit this brief in support of their Iowa Rule of Civil Procedure 1.1004 Motion for a New Trial, and alternate Rule 1.1010 Motion for Remittitur.

INTRODUCTION

In this litigation, Plaintiff claimed that she was subjected to sexual harassment, and that her employment was terminated because of sex discrimination and/or retaliation. She asserted three claims, all pursuant to the Iowa Civil Rights Act (ICRA): (1) sex discrimination; (2) sexual harassment; and (3) retaliation. *See* Am. and Substituted Pet. at Law at ¶¶ 73 – 80. After a six-day jury trial, on July 18, 2017, the jury returned a verdict in favor of Plaintiff on all three claims. The jury awarded Plaintiff $1,400,000 in past emotional distress damages and $795,000 in future emotional distress damages, for a total of $2,195,000 in damages.

FACTS

Plaintiff did not seek compensatory damages in this case. She did not seek lost wages or lost benefits, only emotional distress damages. In response to Defendants' interrogatory seeking information about the damages claimed, Plaintiff supplemented discovery on June 15, 2017, with the following answer:

> d. Plaintiff will seek damages as emotional distress in the following amounts: $150,000 (past emotional distress damages for experiencing harassment and discrimination for the period leading up to Plaintiff's discharge); $150,000 (emotional distress damages for retaliatory conduct from the time of Plaintiff's first complaint of harassment and discrimination up to and including her termination); $150,000 (future emotional distress damages for the harassment, discrimination, and retaliation). $450,000 total damages for emotional distress.

Pl.'s Supp. Answers to Defs.' First Set of Interrogs., No. 19 (emphasis added) (Ex. A). No further supplement was made.

Plaintiff and her husband, Jeff Anderson, both testified at trial regarding Plaintiff's emotional distress. Mr. Anderson testified that while the job had its ups and downs, Plaintiff was generally happy at work until January 2013. Plaintiff's testimony supported his assessment, as Plaintiff testified she began to feel emotionally down and anxious about work in January 2013. She acknowledged that was also when her supervisors began talking with her about problems with her work performance. Plaintiff agreed that she was not feeling emotionally down and anxious about work in 2010, 2011, or 2012. Plaintiff obtained another job at BusinessSolver within months after the termination of her Senate employment, then a subsequent job, followed by her current job. She testified that she loves her current job. Plaintiff called no medical provider or therapist to testify at trial. She called no other family members to support the testimony of herself and her husband.

Plaintiff's counsel initiated a discussion during voir dire about how the Iowa legislature should be held to a higher standard. During his closing argument, Plaintiff's counsel put specific calculations before the jury nearly tripling the $450,000 amount given in the answer to Interrogatory No. 19. This was the first time Defendants had seen these calculations, and thus they did not have an opportunity to do any discovery on the basis for the calculations. No such document was produced to Defendants in discovery. Plaintiff's counsel suggested that the jury award approximately $1,200,000 in emotional distress damages. Then, near the end of his rebuttal argument, he used the words "send a message" in requesting relief in Plaintiff's favor.

ARGUMENT

Iowa Rule of Civil Procedure 1.1004 states, in relevant part:

> On motion, the aggrieved party may have an adverse verdict, decision, or report or some portion thereof vacated and a new trial granted if any of the following causes materially affected movant's substantial rights:
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> * * *
>
> 1.1004(2) Misconduct of the jury or prevailing party.
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> 1.1004(3) Accident or surprise which ordinary prudence could not have guarded against.
>
> 1.1004(4) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.
>
> * * *
>
> 1.1004(6) That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.
>
> * * *
>
> 1.1004(8) Errors of law occurring in the proceedings, or mistakes of fact by the court.

In addition, "[t]he grounds for new trial listed in our rules are not exclusive. In ruling upon motions for new trial, the court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." *Cowan v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990) (citation omitted).

I. Plaintiff's Closing and Rebuttal Arguments Included Improper Statements.

A. Plaintiff's Rule 1.503(4) Violation Warrants a New Trial.

Defendants are entitled to a new trial due to actions in Plaintiff's closing argument that constitute misconduct of the prevailing party and materially affected their substantial rights, and "[a]ccident or surprise which ordinary prudence could not have guarded against." *See* Iowa R. Civ. P. 1.1004(2), (3). During his closing argument, Plaintiff's counsel put specific calculations before the jury nearly tripling the $450,000 amount given in the answer to

Interrogatory No. 19. This was the first time Defendants had seen these calculations, and thus they did not have an opportunity to do any discovery on the basis for the calculations. No such document was produced to Defendants in discovery. Plaintiff's counsel then suggested that the jury award approximately $1,200,000 in emotional distress damages.

Before trial, Defendants filed a Motion in Limine. Point IV of that motion argued that the Court should limit the evidence presented at trial to that disclosed by Plaintiff in her responses to the interrogatories provided to date, and that the trial court has the power to exclude evidence for failure to supplement discovery. *Lawson v. Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010) (citation omitted); Iowa R. Civ. P. 1.517(2). Under Iowa Rule of Civil Procedure 1.503(4)(a)(3), Plaintiff is under a duty to supplement or amend responses to discovery regarding "[a]ny matter that bears materially upon a claim." Allowing Plaintiff to present evidence that was undisclosed that is crucial to Plaintiff's claim and/or her damages, without giving Defendants adequate time to prepare to meet that evidence, would unfairly prejudice Defendants by requiring them to respond to a moving target. *See* Iowa R. Evid. 5.403. Defendants could not be more specific at that time regarding excluding evidence that they did not know about.

A party defending a claim is entitled, upon appropriate request, to be informed of the amount of the claim. Iowa R. Civ. P. 1.503; *Gordon v. Noel*, 356 N.W.2d 559, 564 (Iowa 1984). This includes discovery of amounts claimed for separate elements of damages. *Gordon*, 356 N.W.2d at 564 (citations omitted); *see also* Iowa R. Civ. P. 1.509(2)(a) ("Interrogatories may relate to any matters which can be inquired into under rule 1.503, including a statement of the specific dollar amount of money damages claimed, the amounts claimed for separate items of damage . . . ."). It is Plaintiff's burden to timely provide this information, and Defendants are entitled to such information. *See Wade v. Grunden*, 743 N.W.2d 872 (Table), 2007 WL

4322226, at *4 (Iowa Ct. App. 2007) (unpublished) (citing *Gordon*, 356 N.W.2d at 564). In *T.D. II v. Des Moines Independent Community School District*, the defendant filed a pretrial motion in limine seeking to exclude all evidence of T.D.'s damages except that which had been disclosed during discovery. 881 N.W.2d 469 (Table), 2016 WL 351516, at *2 (Iowa Ct. App. 2016) (unpublished). The trial court later granted the motion (excluding evidence of noneconomic damages), and the Iowa Court of Appeals affirmed. *Id.* at *2-3. The Court of Appeals dismissed plaintiff's response that "[t]he amount of noneconomic damages lies within the province of the jury's sole discretion" by stating: "This response had no basis in Iowa law[.]" *Id.* at *3.

Although *Gordon v. Noel* issues often arise when a party refuses to provide a damage amount, providing a vastly different number and failing to supplement is also a violation, and accordingly, the Court should grant a new trial. *See* Iowa R. Civ. P. 1.517(3)(a) (allowing "other appropriate sanctions" if a party fails to provide information as required by Rule 1.503(4)); Iowa R. Civ. P. 1.1004(2), (3); *see also Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 385 (Iowa 2012) (stating that plaintiff moved for a new trial on the grounds that defendant failed to comply with Rule 1.503(4)(a)(3) by not supplementing its interrogatory answer prior to trial with its newly acquired information). Plaintiff provided a number in discovery, but it was $450,000. Plaintiff should not be permitted to provide a number in an interrogatory response less than a month before trial – required by Rule 1.509(1)(c) to be under oath – and then lie in the weeds and ambush Defendants by nearly tripling it during closing argument.

B. Plaintiff's Rebuttal Argument to "Send a Message" Warrants a New Trial.

Defendants are also entitled to a new trial due to a statement in Plaintiff's rebuttal argument that constitutes misconduct of the prevailing party, and materially affected their substantial rights. *See* Iowa R. Civ. P. 1.1004(2). When faced with a motion for new trial

premised on alleged misconduct by counsel, courts must undertake a two-step inquiry. *Delaney v. Bogs*, 873 N.W.2d 301 (Table), 2015 WL 7075815, at n.4 (Iowa Ct. App. 2015) (unpublished) (citing *Mays v. C. Mac Chambers Co*., 490 N.W.2d 800, 802-03 (Iowa 1992)). First, the court must determine whether counsel made improper statements to the jury. *Id.* (citation omitted). If the court finds that counsel engaged in misconduct, the general rule is that a new trial will be granted only if the objectionable conduct resulted in prejudice to the complaining party. *Id.* (citation omitted). "[U]nless it appears probable a different result would have been reached but for the claimed misconduct of counsel for the prevailing party, the court is not warranted in granting a new trial." *Id.* (quotation and internal quotation omitted).

Near the end of his rebuttal, counsel for the Plaintiff used the words "send a message" in requesting relief in Plaintiff's favor. The use of such a phrase "may invite some passion and should be avoided[.]" *Id.* at *12. These words ask the jury to punish, even though punitive damages are not allowed by the ICRA. *See McCabe v. Mais*, 580 F. Supp. 2d 815, 834 n.13 (N.D. Iowa 2008), *affirmed in part and reversed in part on other grounds by McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010). In *McCabe v. Mais*, the court stated: "It is axiomatic that 'send a message' arguments, which urge the jury to base its findings on compensatory damages on alleged facts outside of the record and for the purposes of punishment, are improper." *Id.* (citing *Harris v. Steelweld Equip. Co.*, 869 F.2d 396, 406 n.13 (8th Cir. 1989)). "Without pleading punitive damages and proof thereof, the courts have held that it is reversible error for the complaining party's attorney to utilize a 'send a message' argument because the evidence will not support the argument for an award of punitive damages." *Harris*, 869 F.2d at 406 n.13.

Although defense counsel did not object at the time, the Iowa Supreme Court has long recognized that "misconduct in argument may be so flagrantly improper and evidently

prejudicial" that it may be a ground for a new trial even though counsel did not take exception when the argument was made. *Delaney*, 2015 WL 7075815, at *11 (citing *Connelly v. Nolte*, 21 N.W.2d 311, 317 (Iowa 1946)).[1] In *Delaney*, the trial court and the Court of Appeals did not find that the statements rose to a level of impropriety to warrant a new trial. *Id.* at *1, 11. That result is distinguishable, however, because counsel argued that the defendants were attempting to send a message that the verdict be in the range of $25,000 to $30,000. *Id.* at *12. Here, there was no such background, but instead solely plaintiff's counsel's invitation to the jury to "send a message" through the jury's verdict. The jury clearly did so with the $2,195,000 in emotional distress damages awarded the next day. The "send a message" theme was echoed in a statement by Plaintiff to the media after the verdict: "The verdict sends a message to the Statehouse that this kind of behavior is not acceptable, that it's ongoing and [that] it needs to stop and change." http://www.desmoinesregister.com/story/news/crime-and-courts/2017/07/18/iowa-senate-republican-staffer-awarded-2-2-million-sex-harassment-trial/487997001/ (last visited August 1, 2017). Arguing "send a message" to the jury, particularly in one of the last statements that the jury heard before deliberations, is misconduct that raised the passions of the jury. It also resulted in prejudice to Defendants, warranting a new trial. It is probable that a different result would have been reached – the damages awarded would have been less – if the "send a message" comment had not been made. *See Delaney*, 2015 WL 7075815, at n.4.

II. Defendants are Entitled to a New Trial or Remittitur on Damages.

Defendants are also entitled to a new trial due to excessive damages appearing to have been influenced by passion or prejudice, and because the damages are not sustained by sufficient

[1]Defendants acknowledge that in *State v. Romeo*, the Iowa Supreme Court stated: "Unless objection is made at the time of the argument, the defendant has waived his right to complain." 542 N.W.2d 543, 552 (Iowa 1996) (citation omitted). *Romeo* is a criminal case, not a civil case. The *Delaney* Iowa Court of Appeals decision post-dates *Romeo* and does not discuss it.

evidence and/or are contrary to law. *See* Iowa R. Civ. P. 1.1004(4), (6). These materially affected Defendants' substantial rights, and the damage awards also fail to administer substantial justice. Alternatively, Defendants are entitled to remittitur. In remittitur, the court "may permit a party to avoid a new trial under rule 1.1003 or 1.1004 by agreeing to such terms or conditions as it may impose, which shall then be shown of record and a judgment entered accordingly." Iowa R. Civ. P. 1.1010(1).

In Iowa, the plaintiff bears the burden of establishing a claim for damages with some reasonable certainty and for demonstrating a rational basis for determining their amount. *Delaney*, 2015 WL 7075815, at *4 (citations omitted). In *Rees v. O'Malley*, the Iowa Supreme Court explained:

> We will reduce or set aside a jury award only if it (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support….
>
> The most important of the above enumerated tests is support in the evidence. If the verdict has support in the evidence the others will hardly arise, if it lacks support they all may arise.

461 N.W.2d 833, 839 (Iowa 1990) (finding the damages excessive and ordering a new trial on damages (quotation omitted)); *see also id.* at 839-40 (stating when "a verdict is so flagrantly excessive that it goes beyond the limits of fair compensation . . . and fails to do substantial justice between the parties, it is our duty to correct the error by granting a new trial or requiring a remittitur on pain of the grant of a new trial." (quotation and citation omitted)).

The Iowa Supreme Court later further explained the interplay between these factors. A clearly excessive verdict gives rise to a presumption that it was the product of passion or prejudice. *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 771 (Iowa 2009) (citation omitted). "An excessive award of damages that was influenced by passion or prejudice is necessarily based on

insufficient evidence, but a verdict based on excessive damages can occur in the absence of passion or prejudice." *Id*. (citation omitted). When raised, both Rule 1.1004(4) and (6) arguments must be addressed, because an excessive award of damages due to passion or prejudice may not be remitted on appeal as a condition of avoiding a new trial. *Id.* (citation omitted). When a damage verdict is excessive because it is not supported by sufficient evidence, however, the court may order a remittitur pursuant to Rule 1.1010 as a condition to avoiding a new trial. *Id.* at 777 (citations omitted). Generally, this standard means the award should be reduced "to the maximum amount proved" under the record. *Id*. (quotation omitted).

A. Rule 1.1004(4)

While an argument could be made that factor (2) above is met, Defendants contend that factors (1), (3), and (4) are met in this case. *See Rees*, 461 N.W.2d at 839. The damages awarded by the jury are clearly and flagrantly excessive, giving rise to a presumption that they were the product of passion or prejudice. *See Jasper*, 764 N.W.2d at 771; Iowa R. Civ. P. 1.1004(4) ("Excessive . . . damages appearing to have been influenced by passion or prejudice."). ICRA emotional distress damage awards cannot be punitive in nature. *See City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 537 (Iowa 1996) (reducing $50,000 emotional distress damage award to $20,000).

Plaintiff's counsel initiated a discussion during voir dire about how the Iowa legislature should be held to a higher standard, and the fact that elected Iowa senators were alleged to have made harassing comments likely angered the jury. Under the case law cited above, Plaintiff's counsel's rebuttal comment to "send a message" likely further inflamed the passions of the jury and caused them to impose what in essence are punitive damages. Plaintiff, less than a month

before trial, placed her claimed damages amount at $450,000. *See* Ex. A. That is strong evidence of the upper range of the damages in this case.

B. Rule 1.1004(6) and Substantial Justice

Regardless of whether passion affected the damages awarded here, the amounts decided by the jury are not sustained by sufficient evidence, and are contrary to law. *See Jasper*, 764 N.W.2d at 771; Iowa R. Civ. P. 1.1004(6) ("That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law."). Rule 1.1004(6) "authorizes the trial court to grant a new trial when the verdict 'is not sustained by sufficient evidence' and the movant's substantial rights have been materially affected." *Estate of Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004). The damage awards also fail to administer substantial justice. "In addition to the grounds for granting a new trial set out in rule 1.1004(6), the trial court has inherent power to set aside a verdict when the court concludes 'the verdict fails to administer substantial justice.'" *Id.* (quotation omitted).

In *Jasper*, a wrongful termination action, the plaintiff's employment at a day care center was terminated and she was briefly denied access to her children and confronted by police. 764 N.W.2d at 759, 773. The plaintiff's damages for emotional distress were supported by her testimony, as well as the testimony of her husband and sister. *Id.* at 759. The plaintiff testified that she "was a wreck" during the days immediately following the termination, and "cried a lot." *Id.* During the following weeks, she did not sleep a lot, worried about money, at times did not want to get out of bed, and began to experience anxiety attacks. *Id.* She went to a hospital emergency room because she believed she was experiencing a heart attack, and was prescribed antidepressant and antianxiety medication. *Id.* The plaintiff's husband testified that his wife was crying and sobbing on the day of the termination and later became somewhat distant, "short"

with the children, generally depressed, and started to gain weight. *Id*. at 760. The plaintiff's sister testified that the plaintiff was withdrawn and lacked the confidence that she had prior to the termination. *Id.* The district court determined that the $100,000 in damages awarded by the jury for past emotional distress were excessive, and reduced the award to $20,000. *Id.*

"[A]n award for emotional-distress damages is not without boundaries, but is limited to a reasonable range derived from the evidence." *Id.* at 772 (citation omitted). The *Jasper* court explained that it is helpful in considering a claim of excessive damages to consider the rough parameters of a range from other like cases. *Id.* (citation omitted). "Of course, we have said that precedent is of little value when determining the excessiveness of a verdict. Yet, this approach does not mean other cases should not be used to establish broad ranges from which to examine particular awards of emotional-distress damages." *Id.* (internal citation omitted). Emotional distress damages tend to range higher in employment cases involving sexual harassment and discrimination and other cases involving egregious, sometimes prolonged, conduct. *Id*. The upper range of emotional distress damages increases as the nature of the wrongful conduct becomes more egregious, and the emotional distress suffered becomes more severe and persistent. *Id*. at 773. A broad range of emotional distress damages in all employment termination cases may support awards of $200,000 and beyond. *Id*.

Some of the factors supporting a lower-range award in *Jasper* were that the plaintiff was relatively young at the time of her termination and was able to become reemployed within five months, the evidence of emotional distress was not supported by medical testimony and was largely nonspecific, and there was no evidence the emotional distress continued for a prolonged period of time. *Id.* On appeal, the Iowa Supreme Court concluded that the district court did not abuse its discretion in finding the emotional distress award of $100,000 was excessive. *Id.* The

court stated that under the record presented, the maximum award is $50,000. *Id*. at 777. The plaintiff was permitted to accept this reduced amount of damages to avoid a new trial. *Id*. at 777 & n.4.

In contrast, in *Smith v. Iowa State University of Science and Technology*, 851 N.W.2d 1, 4 (Iowa 2014), the court upheld an award of $500,000 for intentional infliction of emotional distress. The plaintiff was subjected to wrongful conduct for an extended period of time in a job he had held for nearly a decade. *Smith*, 851 N.W.2d at 32. He "sought treatment from a psychologist and was diagnosed as suffering from extreme stress and anxiety that the doctor indicated was significantly impacting his life." *Id.* at 32-33. A juror could easily conclude, at a minimum, that he was "despondent" and his life was "miserable." *Id.* at 33. That could not easily be said for the Plaintiff here. Yet in comparison, the jury awarded Plaintiff more than four times the amount awarded in *Smith*.

Plaintiff's evidence showed that over the years, few harassing comments were directed specifically at her. Others were said in her presence (e.g., the "black dick" comment), and still others occurred when she was not present at all (e.g., the "areola" comment to Pam Dugdale). Long stretches of time occurred where the evidence of harassment was nonspecific. It also did not involve physical touching. Of course words may be harassment and Defendants do not suggest otherwise, but the nature of the wrongful conduct affects the range of damages. The evidence also demonstrated that Plaintiff participated in many of the jokes and emails that went around the office, including those of a sexual and racial nature. Plaintiff admitted that she was friends with the primary alleged harasser, Jim Friedrich, before, during, and after these events, including having coffee, lunch, or drinks after work "maybe once a month," and inviting him to

her home for dinner. The high emotional distress damages are simply not warranted in the face of Plaintiff's undisputed, continued voluntary association with "Freddy" outside of the office.

Although losing her job was undoubtedly distressing, some of the same factors supporting a lower-range award in *Jasper* are present here. Plaintiff was relatively young at the time of her termination and became reemployed (at BusinessSolver) within months, the evidence of emotional distress was not supported by medical testimony and was largely nonspecific, and there was little evidence that the emotional distress continued for a prolonged period of time. *See Jasper,* 764 N.W.2d at 773. Plaintiff had been at the job for a little more than five years, not as long as in *Smith* and other cases. She then obtained a subsequent job, followed by her current job. She testified that she loves her current job.

Most significantly, there was scant testimony of any emotional distress prior to January 2013. Plaintiff agreed that she was not feeling emotionally down and anxious about work in 2010, 2011, or 2012. Plaintiff and her husband testified that she was unhappy at work between January 2013 and May 2013 – approximately five months. Plaintiff called no medical provider or therapist to testify at trial, and no other family members to support the testimony of herself and her husband. Her claim may fairly be characterized as one for "garden variety" emotional distress damages beginning in January 2013, and nothing more. Plaintiff did not seek compensatory damages in this case. She did not seek lost wages or lost benefits. Based on the record presented at trial, there is insufficient evidence to support the high amounts awarded by the jury of $1,400,000 in past emotional distress damages and $795,000 in future emotional distress damages, for a total of $2,195,000 in damages.[2]

[2]The jury was instructed: "You may award damages only for injuries that the plaintiff has proven were caused by the defendants' wrongful conduct." Instr. No. 23. In the same instruction, the

In his closing argument, Plaintiff's counsel presented specific calculations to the jury and suggested that they award approximately $1,200,000 in emotional distress damages. That amount (unfairly to Defendants) nearly tripled the $450,000 amount given in discovery. There is an insufficient evidentiary basis to support emotional distress damages of nearly a million dollars beyond what Plaintiff's counsel argued to the jury in his closing. While a jury is entitled to award damages in excess of a party's request, a grossly upward departure can support an inference that an award is excessive. *Tedder v. Am. Railcar Indus., Inc*, 739 F.3d 1104, 1112 (8th Cir. 2014) (observing that total amount of award ($2,284,88.20) far exceeded what plaintiff's counsel proposed ($1,146,326) during closing arguments (citations omitted)). As explained by another federal appellate court:

> Nevertheless, viewing the evidence in the light most favorable to [plaintiff], we conclude that the award of $4 million was grossly disproportionate to the evidence of [plaintiff's] injuries. In closing argument before the jury, [plaintiff's] attorney stated that "the kind of pain and suffering that this young man is going through, and will go through, is worth at least $2 million." Although this statement was an attempt to set a floor, not a ceiling, it acknowledged that an award of $2 million would, at a minimum, sufficiently compensate [plaintiff] for his pain and suffering. We can accept that the jury might award a higher amount, but we cannot divine the basis for an award that doubles the amount that the plaintiff had conceded would be sufficient compensation.

Whitfield v. Melendez-Rivera, 431 F.3d 1, 17 (1st Cir. 2005) (emphasis added); *see also Denhof v. City of Grand Rapids*, 494 F.3d 534, 547 (6th Cir. 2007) ("Presumably, the plaintiffs' attorneys requested the amount of damages they believed were supported by the evidence. That being so, it is difficult to see how remitting an award of two times the amount suggested by plaintiffs' own counsel could constitute an abuse of discretion.").

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jury was told: "The amount you assess for any item of damage must not exceed the amount caused by a party as proved by the evidence." *Id.*

Although the Iowa Supreme Court is hesitant to disturb a jury award, "there must be some reasonable limit on the awards that we will uphold. This award exceeds that limit." *Rees*, 461 N.W.2d at 840. The amounts decided by the jury are not sustained by sufficient evidence, are contrary to law, and fail to administer substantial justice. *See Jasper*, 764 N.W.2d at 771; *Estate of Hagedorn*, 690 N.W.2d at 87. Defendants contend that the evidence does not support emotional distress damages in excess of $450,000 in total, and that they are entitled to a new trial. Alternatively, if the Court decides that remittitur applies, the Court should conclude that the maximum award is a total of $450,000 (including both past and future emotional distress damages).

III. Defendants are Entitled to a New Trial Due to Errors in the Jury Instructions.

Defendants are also entitled to a new trial due to errors of law in the jury instructions that materially affected their substantial rights. *See* Iowa R. Civ. P. 1.1004(8) ("Errors of law occurring in the proceedings, or mistakes of fact by the court."). "When an instruction is confusing or conflicting," the district court will generally be reversed. *McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001) (citation omitted). "Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000) (citation omitted).

A. Instruction Applicable to Multiple Claims

Instruction No. 8

> A governmental entity acts only through its agents or employees, and any agent or employee of such an entity may bind that entity by acts and statements made while acting within the scope of the authority delegated to the agent by that entity, or within the scope of his or her duties as an employee of that entity.

Defendants objected to this instruction on the grounds that it is an incorrect statement of law, because not every employee may bind the entity. In place of "any agent or employee,"

Defendants requested the phrase "certain agents or employees," and also suggested the more descriptive phrase "(including but not limited to Ed Failor, Jr. and Eric Johansen)." The Court overruled the objection and gave the instruction as worded above. From this instruction, the jury may have believed that Jim Friedrich could bind the State of Iowa. His actions as a co-employee could create liability for sexual harassment, but he did not have the authority to bind the State in matters that would constitute adverse employment actions, for purposes of the sex discrimination and retaliation claims.

B. Instructions Applicable to Sexual Harassment Claim

Instruction No. 13

> In determining whether conduct was sufficiently severe or pervasive to create a hostile environment, you may consider conduct toward others in the workplace so long as the plaintiff was aware of that conduct and her own well-being was affected by that conduct. You may consider harassment of which the plaintiff was unaware in determining whether the harassment was part of a pattern or practice, whether the defendants had notice of the conduct and whether the defendants exercised reasonable care.

Defendants objected, inter alia, to the inclusion of the phrase "whether the defendants exercised reasonable care." Defendants argued that this statement was not supported by the case authorities cited by Plaintiff. The jury was not called upon to decide whether or not Defendants exercised reasonable care. That concept applies in an affirmative defense to liability for supervisor harassment, *see Haskenhoff v. Homeland Energy Solutions, LLC*, 2017 WL 2705389, at *9-10 (Iowa 2017) (quotation omitted), which was not at issue here. Instead, the seventh element in Instruction No. 10 required that Plaintiff prove Defendants "failed to take prompt remedial action." Including "whether the defendants exercised reasonable care" in Instruction No. 13 may have confused the jury and made it easier for Plaintiff to establish that the conduct was sufficiently severe or pervasive to create a hostile work environment.

Instruction No. 14

> Conduct creates a hostile work environment when it is sufficiently severe or pervasive as to alter the conditions of employment and create an abusive working environment. Hostile environment claims by their nature involve ongoing and repeated conduct, not isolated events. In determining whether or not harassment was sufficiently severe or pervasive to be hostile or abusive, you may consider factors such as the following:
>
> 1. The frequency and severity of the conduct;
> 2. Whether the conduct was physically threatening or humiliating;
> 3. Whether the conduct unreasonably interfered with or detracted from the plaintiff's work performance;
> 4. Whether the conduct affected the plaintiff's psychological well-being; or
> 5. Whether the conduct discouraged the plaintiff from remaining on the job.
>
> The plaintiff need not prove each one of the factors listed above. The more severe the individual incidents of harassment, the fewer incidents are needed to prove the conduct was sufficiently severe or pervasive to find in favor of the plaintiff. A single harassing incident may create a hostile environment if it is sufficiently intense.

Defendants objected to this instruction to the extent it differs from Iowa Model Civil Jury Instruction 3120.3, and requested Defendants' Proposed Instruction No. 12, which more closely tracked the model. Although the Court agreed to add the second sentence in the above instruction, the Court omitted a key part of element No. 2 supporting Defendants' argument that much of the conduct was offensive, but not sufficiently severe or pervasive: "Whether the conduct was physically threatening or humiliating or whether it was merely offensive[.]" Iowa Model Civil Jury Instruction 3120.3 (emphasis added). The instruction also added more favorable language to Plaintiff in element No. 3, "Whether the conduct unreasonably interfered with 'or detracted from' the plaintiff's work performance[.]" *Compare* Instr. No. 14 (emphasis added) *with* Iowa Model Civil Jury Instruction 3120.3. It added two elements that are not even in the model: "Whether the conduct affected the plaintiff's psychological well-being" and "Whether the conduct discouraged the plaintiff from remaining on the job." *Id.*

Coupled with the sentence stating that "The plaintiff need not prove each one of the factors listed above," the jury was instructed that it could find a hostile work environment based on a factor or factors that do not exist in Iowa Model Civil Jury Instruction 3120.3, or in the case it cites, *Farmland Foods, Inc. v. Dubuque Human Rights Commission*, 672 N.W.2d 733, 744-45 (Iowa 2003). Overall, the departures from the model instruction made it easier for Plaintiff to establish the fourth element of Instruction No. 10, whether the conduct was sufficiently severe or pervasive to create a hostile work environment.

C. Instruction Applicable to Retaliation Claim

Instruction No. 21

> As used in these instructions, plaintiff's sex or protected activity was a "motivating factor" in the decisions made by the defendants if that status or activity played a part in the later actions of the defendants toward the plaintiff. A motivating factor is one that helped compel the defendants' decisions, but it does not have to have been the only reason for those actions and the precise weight in the defendants' decisions is not important.
>
> You may find that plaintiff's sex or protected activity was a motivating factor in the decisions of the defendants if it has been proved by a preponderance of the evidence that the defendants' stated reasons for their decisions are not the real reasons, but were a pretext to hide sexual harassment, sex discrimination or retaliation.

Defendants objected to defining "motivating factor" as "played a part" in the context of the retaliation claim, and after some discussion, suggested that the Court use alternate wording to clarify that "played a part" applied only to the sex discrimination claim.[3] The result of Defendants' changes would have been to allow the rest of the definition of "motivating factor" to apply to the retaliation claim, but not the "played a part" language. The Court overruled the objection and gave the instruction as worded above.

[3]Defendants made other objections to the instruction, but focus on this one for the purposes of this motion.

Defendants argued that in the recent case of *Haskenhoff*, a majority of the Iowa Supreme Court stated that "played a part" is not the correct standard on retaliation claims. Specifically, Justices Waterman, Mansfield, and Zager believed that the correct standard is "significant factor," so they were not in favor of "played a part." 2017 WL 2705389, at *23 ("In the marshaling instruction for Count II, retaliatory discharge, the district court should have instructed the jury that Haskenhoff must prove the protected activity was a significant factor . . . ."). Justice Cady stated: "I also agree the standard is 'a motivating factor.' Nevertheless, the district court instruction modified this standard to only require that the discrimination 'played a part.' This change in the standard was not justified." *Id.* at *36 (Cady, J., concurring in part and dissenting in part).

Defendants acknowledge that in *Haskenhoff*, the marshaling instruction on the retaliation claim did not include the words "motivating factor," only "played a part." *Id.* at *6. Here, in contrast, the marshaling instruction included "motivating factor" and it was further defined as "played a part." *See* Instr. Nos. 17, 21. Nevertheless, Defendants contend that "played a part" inappropriately lowered Plaintiff's causation standard, making it easier to establish retaliation. Despite what is stated in the marshaling instruction, a standard is, in reality, the last way it is defined to the jury. Justice Cady appears to indicate that the two may exist in harmony, but defining it as "played a part" does "eliminate the central concept of the standard that the protected activity be a motivating factor in the employer's decision." *Haskenhoff*, 2017 WL 2705389, at *36 (Cady, J., concurring in part and dissenting in part (citation omitted)). Particularly in the context of retaliation claims, allowing "played a part" to define "motivating factor" is inappropriate. It has to be a factor that motivated the action, not just played a part (however small) in the action.

D. Instruction Applicable to Damages

Instruction No. 23

If you find in favor of the plaintiff, then you must determine an amount that is fair compensation for her damages. You may award damages only for injuries that the plaintiff has proven were caused by the defendants' wrongful conduct. In doing so you shall consider the following items:

1. Any emotional distress sustained by the plaintiff caused by the unlawful conduct of the defendants from the date of any such conduct to the present time. Emotional distress includes all highly unpleasant mental reactions such as mental anguish, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment and worry.

2. The present value of any future emotional distress sustained by the plaintiff caused by the unlawful conduct of the defendants from the date of your verdict into the future.

The amount, if any, you assess for emotional distress in the past and future cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by a party as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. The amounts, if any, you find for each of the above items will be used to answer the questions contained in the verdict form.

Defendants requested that the Court include the concept of "punishment" in this instruction. Specifically, Defendants requested that the sentence "Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties" be replaced with the final sentence from Eighth Circuit Model Instruction 5.70 on damages: "Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy." The Court overruled this objection and noted that the language in the Court's jury instruction followed the Iowa model instruction.

"A requested instruction must be given by the court if 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." *Dohmen v. Iowa Dep't for the Blind*, 794 N.W.2d 295, 302 (Iowa Ct. App. 2010) (quotation omitted). Defendants are concerned that in this case, the jury acted in part out of anger and a desire to punish. Punitive damages are not allowed by the ICRA, but without the requested sentence, jurors were not told that they could not award damages out of punishment. That concept was not otherwise embodied in other instructions. The sentence was important to protect Defendants' interests, and without it, the jury may have increased the award of emotional distress damages out of a desire to punish.

CONCLUSION

Defendants request a new trial, and in the alternative, remittitur of damages.

Respectfully submitted,

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