IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ALLYN WAYNE ROBERTS, Plaintiff, vs. CITY OF DES MOINES, Defendant.	Case No. LACL144995 **PLAINTIFF'S MOTIONS IN LIMINE**

1. ANY EVIDENCE, TESTIMONY, OR ARGUMENT THAT ALLYN MUST PRESENT TESTIMONY FROM A PSYCHOLOGIST OR PHYSICIAN TO RECOVER EMOTIONAL DISTRESS DAMAGES.

Expert or other medical testimony is not required to establish a plaintiff's emotional distress in a discrimination case. *Kim v. Nash Finch Co.*, 143 F.3d 1046, 1065 (8th Cir. 1997); *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 724 (1st Cir. 1994). The proof in most cases comes from the plaintiff herself, in addition to family and friends. *See, e.g. Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1097 (2007); *Kim v. Nash Finch Co.*, 143 F.3d at 1065; *Wilmington v. J.I. Case Co.,* 793 F.2d 909, 922 (8th Cir. 1986). In fact, the plaintiff's testimony alone is sufficient. *Christensen*, 481 F.3d at 1097; *Williams v. Trans World Airlines, Inc.,* 660 F.2d 1267, 1272-73 (8th Cir. 1981); *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 78 (2d Cir. 2004); *Turic v. Holland Hospitality, Inc.,* 85 F.3d 1211, 1215 (6th Cir. 1996).

This is not to say that emotional distress does not need to be proven. It "must be supported by competent evidence of a genuine injury." *Christensen*, 481 F.3d at 1096-97. However, emotional distress may also be inferred from the circumstances of the retaliatory action itself. *See Berger v. Ironworkers Reinforce Rodmen Local 201*, 170 F.3d 1111, 1138 (D.C. Cir. 1999); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974).

Numerous cases have found the plaintiff and his family fully capable of testifying about physical symptoms of emotional distress as varied as:

- high blood pressure – *Kim*, 143 F.3d at 1065;
- sleeping problems – *Shepard v. Wapello County*, 303 F. Supp. 2d 1004, 1021 (S.D. Iowa 2003);
- sweating, nausea, and insomnia – *Heaton v. The Weitz Co., Inc.*, 534 F.3d 882, 892 (8th Cir. 2008);
- depression – *Farfaras v. Citizens Bank & Tr. of Chicago*, 433 F.3d 558, 565-66 (7th Cir. 2006);
- tachycardia – *Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 532 (10th Cir. 2000).

Allyn anticipates Defendant may suggest to the jury that he should not be awarded emotional distress damages unless his physician or psychologist links his emotional distress to the Defendant's illegal conduct. Any such argument is a misstatement of law, and serves no purpose other than to confuse the jury or encourage the jury to decide the case on an improper basis.

2. OFFERS OF SETTLEMENT AND OFFERS TO CONFESS JUDGMENT

Iowa Rule of Evidence 5.408 prohibits evidence of offers to compromise, as well as conduct or statements made in settlement negotations. This includes offers of reinstatement contigent upon the release of claims. Rule 5.408(a)(2) expressly provides that "a statement made during compromise negotiations about the claim" is not admissible "to prove the validity . . . of a disputed claim." Rule 5.408(b) contains exceptions outlining when evidence of settlement negotiations are admissible; however, none of those scenarios apply in this case. Accordingly, any reference to, or use of, settlement communications is inadmissible.

3. EVIDENCE BARRED BY THE COLLATERAL SOURCE RULE IS INADMISSIBLE

"The collateral source rule is a common law rule of evidence that bars evidence of compensation received by an injured party from a collateral source." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 156 (Iowa 2004). "The rule prevents the jury from reducing the tortfeasor's

obligation to make full restitution for the injuries caused by the tortfeasor's negligence." *Id.* "Under the collateral source rule, recovery from a tortfeasor is not affected by payments of collateral benefits." *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 558 (Iowa 1980).

Although Iowa Code section 668.14 has modified the collateral source rule in personal injury cases, it contains an exception for IPERS and social security benefits. *See* Iowa Code § 668.14(1); *see also Snipes v. Chicago, Cent. & Pacific R. Co.*, 484 N.W.2d 162, 167 (Iowa 1992) ("In actions seeking damages for personal injury, evidence of collateral sources of payment is admissible unless 'the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant'"). The amount that Plaintiff has received from IPERS is undoubtedly "state or federal programs" and evidence of such payments, as well as any argument that Plaintiff's damages should be reduced by such amounts, must be excluded.

4. EVIDENCE RELATED TO ALLYN'S APPLICATION FOR LONG-TERM DISABILITY BENEFITS IS INADMISSIBLE.

During Allyn's FMLA leave, he applied for long-term disability benefits as he managed his initial Parkinson's treatment. Allyn never received long-term disability because he planned to return to work. Evidence that Allyn applied for disability payments is inadmissible for several reasons.

First, disability payments are considered a collateral source. *Collins v. King,* 545 N.W.2d 310, 311 (Iowa 1996). The common law rule is that a plaintiff's right to recover damages is not reduced by payments received from a collateral source, thus any such payments are inadmissble. *Id.* The purpose of disability payments is to replace lost earnings. *Id.* at 312. *See also Hopping v. Coll. Block Partners*, 599 N.W.2d 703, 706-07 (Iowa 1999) ("the collateral source doctrine precludes damages for time lost from work from being reduced as a result of sick leave or disability insurance protections against loss of earnings that are not subject to a right of subrogation in the payor."). At trial, Allyn will seek lost wages and benefits only from the date Defendant fired him going forward, not for the

time he was off work managing his Parkinson's. *Cf. Wessels v. Chapman*, 2016 WL 1688775, *2 (N.D. Iowa, April 26, 2016) (admitting evidence of short- and long-term disability benefits because the plaintiff **did** seek lost wages for the time she received disability benefits).

Second, evidence or argument that Allyn received long-term disability benefits is irrelevant and inadmissible under Iowa Rule of Evidence 5.401 and 5.402. Evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Iowa R. Evid. 5.401. "Evidence which is not relevant is not admissible." Iowa R. Evid. 5.402. Allyn's receipt of disability benefits does not make the existence of any fact that is of consequence to the determination of this case more or less probable. Moreover, evidence related to Allyn's receipt of disability benefits bears no relation to whether Defendant discriminated against him on the basis of his disability or whether Defendant retaliated against Allyn. Accordingly, Allyn's receipt of disability benefits fails to meet the minimum standard for relevance.

Finally, the introduction of this evidence serves no purpose other than to improperly suggest to the jury that Allyn is "double-dipping" and should not receive additional compensation for his injuries. Because Allyn is not seeking lost wages and benefits during the time he received disability payments, Allyn is not "double dipping." The probative value of this evidence is substantially outweighed by the danger of unfair prejudice, and the Court should exclude any evidence related to Allyn's receipt of disability benefits pursuant Iowa Rule of Evidence 5.403 as well.

5. ANY REFERENCE BY DEFENSE COUNSEL TO THEMSELVES AND DEFENDANT COLLECTIVELY AS "WE"

Defense counsel is Defendant's in-house counsel; however, they were not involved in the decisions and actions at issue in this case. As such, defense counsel should not be able to refer to themselves and Defendant collectively as "we." Saying things like "we did our best," "we investigated," or "what else were we supposed to do?" blurs the line between counsel and client.

This gives the false impression to the jury that any action taken by Defendant was done in conjunction with an attorney and must therefore have been legal. Through the association of client and counsel as "we," defense counsel would be vouching for Defendant's credibility, something counsel is explicitly precluded from doing under Iowa Rule of Professional Conduct 32:3.4(e).

Therefore, Defense counsel should be precluded from referring to themselves and their clients with the pronoun "we," at least in the context set forth above.

6. ANY EVIDENCE REGARDING THE DISMISSED INDIVIDUALS FORMERLY BEING DEFENDANTS IS IRRELEVANT AND CONFUSING

Allyn's Petition charged two individuals—Jonathan Gano and James Wells—in addition to the City of Des Moines. On April 16, 2021, Plaintiff dismissed Mr. Gano and Mr. Wells without prejudice.

Evidence or argument that Plaintiff brought discrimination and retaliation claims against the dismissed individuals is irrelevant and inadmissible under Iowa Rules of Evidence 5.402 and 5.403. The fact that Plaintiff initially charged these individuals and then made the decision to dismiss them prior to trial is not probative as to any fact of consequence in the jury's adjudication of Plaintiff's claims. The only purpose served by such evidence would be to improperly suggest to the jury that Plaintiff is litigious, or his claims are disingenuous. Such evidence would be unfairly prejudicial to Plaintiff and, if admitted, would require a "mini-trial" about a claim that has been dismissed, introducing needless delay, confusion, and waste of judicial resources.

7. ANY EVIDENCE OR TESTIMONY REGARDING ALLYN'S ALLEGED INTENT TO APPLY FOR SSDI IS INADMISSIBLE

During Allyn's IPERS application process, he stated that he planned to file for social security disability insurance ("SSDI") benefits. Allyn ultimately never applied for SSDI nor did he discuss an application for SSDI with his doctor. Because Allyn never filed for SSDI, this issue is moot. However, Plaintiff anticipates Defendant plans to introduce this information into evidence to

somehow establish that Allyn was too disabled to work. This is improper and inadmissible.

First, Allyn never applied for SSDI; therefore, he did not make any affirmations that he was too disabled to work—as required by the SSDI application process. The fact Allyn simply considered this option has no bearing on the facts of this case and is irrelevant under Iowa Rule of Evidence 5.401.

Moreover, this this evidence should not be admitted because its prejudicial effect would substantially outweigh any probative value. *See* Iowa R. Evid. 5.403; *Baumgarden v. Challenge Unlimited, Inc.*, 2006 WL 334253, *3-4 (S.D. Ill. 2006) (the court granted the plaintiff's motion in limine barring evidence that the plaintiff was determined by an ALJ to be eligible for SSDI benefits for purposes of proving the proposition that the plaintiff was disabled as defined by the Social Security Act and therefore not entitled to damages under the FMLA; *E.E.O.C. v. Western Trading Company, Inc.*, 2013 WL 607769 *1 (D. Co. 2013) (the court granted the plaintiff's motion in limine to exclude evidence of the plaintiff's receipt of Social Security benefits, in part, "…because it prejudicial effect would substantially outweigh any probative value… the evidence would be only minimally relevant while it would be significantly prejudicial in that a juror could easily conclude that Mr. Riley is not entitled to any additional compensation if he is already receiving Social Security benefits.").

The standard for receipt of SSDI benefits does **not** consider whether the plaintiff could have continued working with reasonable accommodations. *See, e.g., Cleveland v. Policy Mgt. Sys. Corp.*, 526 U.S. 795, 802–05 (1999) (recognizing "an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it.") (emphasis original). Trying to use an SSDI application (let alone merely the contemplation of filing for SSDI) as a basis for arguing an employee was unable to work is like comparing apples and oranges. It simply does not make sense given the legal framework of a disability discrimination or failure to accommodate case. Introducing

this evidence would only serve to confuse the jury and would carry minimal to no probative value. Thus, it should be excluded under the rules.

Furthermore, any such argument that Plaintiff ***should*** have applied for SSDI to mitigate his damages should also be barred because this evidence is not admissible because it is a collateral source.

8. DEFENDANT FAILED TO PLEAD THE FAILURE TO MITIGATE AFFIRMATIVE DEFENSE AND SHOULD BE FORECLOSED FROM MAKING ANY SUCH ARGUMENT THAT ALLYN'S DAMAGES SHOULD BE REDUCED ON THIS BASIS

On July 22, 2019, Defendant filed their Answer in this case. Their Answer did not include the Failure to Mitigate affirmative defense. Now, the discovery, pleadings, and motions deadlines have passed. We are on the eve of trial. Defendant is now hinting that they plan to rely on the Failure to Mitigate Affirmative defense. It would be improper for this Court to allow Defendant to instruct the jury or make any argument before the jury that Allyn's damages should be reduced because he failed to mitigate his damages. *See Coe v. N. Pipe Products, Inc.*, 589 F. Supp. 2d 1055, 1096 (N.D. Iowa 2008) (noting that a defendant is only entitled to an affirmative defense instruction when it has been pled).

Under the Iowa Rules of Civil Procedure, Defendant is required to plead their affirmative defenses. Iowa Rule of Civil Procedure 1.405 sets forth the type of information that a defendant may put in the Answer and also the type of information a defendant *must* put in the Answer. Specifically (regarding an affirmative defense), "**It must state any additional facts deemed to show a defense**." Iowa R. Civ. P. 1.405 (emphasis added). Failure to plead an affirmative defense normally results in its waiver unless the issue is tried with the parties' consent. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996). The trial court has considerable discretion in allowing amendments. *Whalen v. Connelly*, 545 N.W.2d 284, 293 (Iowa 1996).

An affirmative defense rests on facts not in the petition. *Erickson v. Wright Welding Supply,*

Inc., 485 N.W.2d 82, 86 (Iowa 1992); *Peoples Trust & Sav. Bank v. Baird*, 346 N.W.2d 1, 4 (Iowa 1984); *Baker v. Beal*, 225 N.W.2d 106 (Iowa 1975). Therefore, any reliance on facts which would avoid liability although admitting the allegations in the petition is considered an affirmative defense. Iowa R. Civ. P. 1.405(1) requires that facts which would constitute an affirmative defense must be stated in the responsive pleadings, and courts have consistently ruled that failure to plead an affirmative defense is a waiver of that defense. *Smith v. Smith*, 646 N.W.2d 412 415 (Iowa 2002); *Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352, 355 (Iowa 1994). The only facts Defendant has produced to support this affirmative defense are that Allyn refused to accept the two positions Defendant offered—**positions that Defendant admits were demotions**.

Courts have ruled that there are only two exceptions which allow introduction of Affirmative Defenses which were not pled in the responsive pleadings. One exception is when the defense was created by case law not in existence at the time the defendant filed its initial Answer. *McElroy v. State*, 637 N.W.2d 488, 497 (Iowa 2001). The other exception is an instance when both parties have consented to the affirmative defense being introduced at trial. *Id.* at 492; *Arkae Dev., Inc. v. Zoning Bd. of Adjustment*, 312 N.W.2d 574, 575 (Iowa 1981). Neither of these exceptions apply in this case.

In analyzing the requirement that affirmative defenses must be pled in a defendant's Answer, legal scholars have noted that "the purpose of the rule requiring defendants to plead affirmative defenses to avoid a waiver, is to provide notice to the plaintiffs of the defenses that will be raised, and to prevent an unfair surprise at trial." 61A Am. Jur. 2d *Pleading* § 290 (2007). If Defendant is allowed to introduce facts they did not plead in response to Plaintiff's Petition, the purpose of this rule is defeated because Plaintiff has received no notice of Defendant's intentions, which clearly will result in prejudice to Allyn.

In this case, Defendant has made no excuse for why notice of this defense was not given to Allyn long before the completion of discovery in this case. It is also clear that the Defendant must have been aware of any facts which would support the "failure to mitigate" affirmative defenses at the time they fired Allyn, more than two years ago, or in the least should have known by the time of its decisionmakers' depositions in November 2020, almost 6 months ago. It is not possible that only recently Defendant became aware of facts which they could use to support this affirmative defense. This is a situation where the Defendant has chosen at the last possible moment to assert a brand-new affirmative defense, the assertion of which would clearly unfairly prejudice Allyn as he was unable to question witnesses about the defense during depositions or serve interrogatories on Defendant to gather information about any facts that would support the affirmative defense.

Defendant may only file a late Answer with good cause. "Good cause" considers the impact of the late answer under all the circumstances. *See Millington v. Kuba,* 532 N.W.2d 787, 791–92 (Iowa 1995). A "factor to consider in determining 'good cause' is whether the plaintiff would suffer prejudice by the filing of the untimely answer. If the proposed answer would substantially change the issues in the case so as to cause unfair surprise to the plaintiff, the court will likely find prejudice." *McElroy v. State*, 637 N.W.2d 488, 495 (Iowa 2001) (internal citations omitted). As discussed above, Plaintiff will most certainly suffer great prejudice if Defendant is allowed to assert these affirmative defenses at this late hour.

Assuming arguendo the Court allows Defendant to amend their Answer to include the failure to mitigate affirmative defense, evidence and argument regarding the defense should not be permitted because it is simply not supported by the law or the facts in the record to date.

Demotions are not comparable jobs that can be considered appropriate mitigation; rather, when a defendant requires a plaintiff to take a demotion, this constitutes an adverse action. *See Jones v. Fitzgerald*, 285 F.3d 705, 714 (8th Cir. 2002) ("Employment actions commonly considered serious

enough to inflict constitutional injury include refusals to hire, refusals to promote, reprimands, demotions, and discharges."); *McGregory v. Crest/Hughes Techs.*, 149 F. Supp. 2d 1079, 1091–92 (S.D. Iowa 2001) (a plaintiff's demotion, despite not resulting in a change in pay, constituted an adverse action when it "meant a substantial reduction in duties and lacked supervisory status").[1]

The only "offer" that a plaintiff must entertain from his employer who unlawfully terminated him is one that is identical to the job he wanted to keep. *Ford Motor Co. v. E. E. O. C.*, 458 U.S. 219, 232 (1982) (set requirement for "unconditional offers of reemployment); *see also NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1320-1321 (1972) (a plaintiff does not need to "seek employment which is not consonant with his particular skills, background, and experience" or "which involves conditions that are substantially more onerous than his previous position"); *Wonder Markets, Inc.*, 236 N.L.R.B. 787, 787 (1978) (an offer of reinstatement was ineffective when the plaintiff was offered a different job, although the former position still existed); *Good Foods Manufacturing & Processing Corp.*, 195 N.L.R.B. 418, 419 (1972) (the defendant's offer of reinstatement was ineffective because the job offered had different conditions of employment and benefits); *Harvey Carlton*, 143 N.L.R.B. 295, 304 (1963) (offer of reinstatement ineffective because employees would return on probation).[2] Defendant did not offer Allyn an identical position.

Moreover, what is required for a plaintiff to mitigate economic is only accepting a substantially similar position—i.e. it must offer the same pay, hours, benefits, and duties. *See Dollar v. Smithway Motor Xpress, Inc.,* 787 F.Supp.2d 896, 916 (N.D. Iowa 2011); *Newhouse v. McCormick & Co., Inc.,* 910 F.Supp. 1451, 1457-58 (1996); *Smith v. A.S. America, Inc.* 227 F.Supp.3d 1039, 1043-44 (W.D. Mo. 2016); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-112 (1991); *EEOC v. Fred Meyer Stores, Inc.*, 2013 WL 3045705, at *19 (D. Or. June 17, 2013); *Armstrong v. Clarkson College,*

[1] It would run completely counter to our civil rights laws if the same employment action a plaintiff could rely on to bring a discrimination or retaliation claim could also be used against him as a basis to reduce his damages.
[2] *See also* Refresher On and Thoughts About Unconditional Offers of Reinstatement (**Exhibit A**).

297 Neb. 595, 624-625, 901 N.W.2d 1, 24-25 (2017).

When Defendant demanded Allyn take a demotion, he was an Arborist with an hourly rate of $29.94 and a Grade 20 position. Allyn's job allowed him to be outside, trimming trees and going around the city to perform his work. He loved it. Conversely, the demotion options Defendant offered him were:

- **Fleet Services Serviceperson**
  - Grade: 18
  - Hourly Rate: $27.39

- **Public Works Assistant**
  - Grade: 18
  - Hourly Rate: $27.39

Neither of the positions offered entailed similar job duties to that of an Arborist—they were more or less a custodial/mechanic position and an administrative assistant position. Both were lower grades, lower pay, and completely different hours. Based on the foregoing, Allyn's refusal to accept Defendant's demotion offers does not support a failure to mitigate affirmative defense. Thus, the Court must look to other evidence offered by Defendant to support this affirmative defense.

However, Defendant has not produced any other evidence to support a failure to mitigate defendant. For example, Defendant has not identified available ***and comparable*** jobs that Allyn should have applied for but failed to. Had the defense been pled, Plaintiff would have sought discovery on the issue and filed a dispositive motion on this defense prior to trial. Because that was not the case, Plaintiff is now left at this juncture to rely on a motion in limine to address the issue.

Accordingly, Plaintiff respectfully requests that Defendant be foreclosed from making any argument or offering any evidence that Plaintiff failed to mitigate his damages, specifically any argument implying that Plaintiff had an obligation to accept the demotion positions offered by Defendant.

WHEREFORE, Plaintiff respectfully requests that the Court grant his Motion in Limine and prohibit Defendant, its attorneys, and its witnesses from referencing the above subject in front of the jury at any time during the trial, including voir dire, opening statements, and closing statements.

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