IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TRACY WHITE, Plaintiff, v. STATE OF IOWA and IOWA DEPARTMENT OF HUMAN SERVICES, Defendants.	Case No. LACL146265 **DEFENDANTS' MOTION IN LIMINE**

COME NOW Defendants, pursuant to Iowa Rule of Evidence 5.104, and move the Court in limine to issue an Order prior to trial directing Plaintiff, through any representative, Plaintiff's counsel, and any witness called to testify by Plaintiff (including cross-examination of a witness called by Defendants), to refrain from directly or indirectly making any reference to the matters enumerated below in the presence of any juror, including during voir dire, opening statements, the presentation of evidence, cross-examination, and closing arguments, until the Court has the opportunity to rule on their admissibility. Defendants further move the Court to order Plaintiff's counsel to advise their client and each witness called by Plaintiff regarding the Court's limitation on evidence and testimony in this motion. Further, Defendants move the Court to order the parties to redact any exhibits accordingly. Defendants so move on the grounds that if the matters enumerated below are mentioned it would be so unfairly prejudicial that Defendants would not receive a fair trial, and an admonition to the jury would not cure the unfair prejudice.

Defendants move in limine to exclude all of the items below and state the following in support of its motion:

GENERAL ARGUMENTS APPLICABLE TO ITEMS BELOW

1. The decision to admit evidence at trial requires a two-step inquiry: (1) Is the evidence relevant? (2) If so, is its probative value substantially outweighed by the dangers of unfair prejudice or confusion? *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000) (en banc).

2. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. "Evidence which is not relevant **is not admissible**" at trial. Iowa R. Evid. 5.402 (emphasis added).

3. The converse proposition (*i.e.*, that relevant evidence must be admissible), however, is not necessarily true. *Graber*, 616 N.W.2d at 637 (citation omitted). Pursuant to step 2 above, even relevant evidence should not be admitted when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury . . . ." *Id.* at 637-38 (quoting Iowa R. Evid. 5.403). "Probative value" measures the strength and force of the relevant evidence. *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001) (citing *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988)).

4. "Unfair prejudice" is evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than established propositions in the case." *State v. Rodriquez*, 636 N.W.2d 234, 240 (Iowa 2001) (quoting *Plaster*, 424 N.W.2d at 231). Unfair prejudice arises when evidence prompts the jury to make a decision on an improper basis. *Graber*, 616 N.W.2d at 638

(quotation omitted). Even if evidence has some probative value, it may be excluded under Iowa Rule of Evidence 5.403 if it is unfairly prejudicial. *McGrew v. Otoadese*, No. 19-2137, 2021 WL 815875 at *6 (Iowa Ct. App. March 3, 2021) (Table). In deciding whether evidence should be excluded as unfairly prejudicial, the court first considers the probative value of the evidence and then balances that value with the "danger of its prejudicial or wrongful effect upon the triers of fact." *State v. Webster*, 865 N.W.2d 223, 242 (Iowa 2015) (citations omitted).

SPECIFIC ITEMS OF EXCLUSION

I. EVIDENCE SUPPORTING PLAINTIFF'S RETALIATION CLAIM SHOULD BE EXCLUDED.

On March 24, 2021, Plaintiff voluntarily dismissed her sex discrimination and retaliation claims. With her retaliation claim no longer at issue, this Court should bar any evidence that Defendants somehow threatened Plaintiff's job, put Plaintiff on work directives in retaliation for her complaints, or gave her a lower rating on her performance evaluation completed in July of 2019. Such evidence is irrelevant to Plaintiff's hostile work environment claim. Plaintiff's claims about the work directives and 2019 performance evaluations stem from events which took place in spring and summer of 2019—after McInroy's employment was terminated. Such evidence should be excluded under Iowa Rules of Evidence 5.402 and 5.403 as irrelevant to Plaintiff's hostile work environment claim, as well as because it will confuse the issues and the jury and waste time. *See Dethmers Mfg. Co., Inc. v. Automatic Equipment Mfg. Co.*, 73 F. Supp.2d 997 (N.D. Iowa 1999) (where evidence related to a previously dismissed claim was not allowed at trial because it was unrelated to remaining claims).

II. UNDISCLOSED DISCOVERY RESPONSES.

The Court should limit the evidence presented at trial to that disclosed by Plaintiff in her responses to the interrogatories provided to date. 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(3). 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 claims and/or damages, without giving Defendants adequate time to prepare to meet the evidence, would unfairly prejudice Defendants by requiring them to respond to a moving target. *See* Iowa R. Evid. 5.403.

Plaintiff submitted her Response to Defendant's First Set of Request for Production of Documents and Answers to Defendant's First Interrogatories on September 4, 2020. Subsequently, on October 2, 2020, Plaintiff served Supplemental Disclosures on Defendants. Since that time, Plaintiff has maintained that the information provided sufficiently satisfies Iowa Rule of Civil Procedure 1.503(4)(a)(3). As such, the Court should deny the admission of any additional evidence offered by the Plaintiff which is not currently in the record.

III. IMPROPER CHARACTER EVIDENCE, IRRELEVANT EVIDENCE, AND EVIDENCE THAT IS UNFAIRLY PREJUDICIAL TO DEFENDANTS.

This case involves claims that Michael McInroy sexually harassed Plaintiff and created a sexually hostile work environment for her when he showed preferential

treatment for her peer Kristin Walker based on gender stereotypes about how a woman should behave in the workplace. Plaintiff also alleges that McInroy sexually harassed other DHS employees, as well as harassed and discriminated against various employees on the basis of their race and sexual orientation.

Plaintiff presumably offers this evidence in order to demonstrate McInroy's discriminatory animus toward women, people of color, and homosexual people, and to show that his treatment of Plaintiff was "colored" by his biases. This evidence is undoubtedly also offered to convince the jury that McInroy is a person of questionable character. Other evidence discussed at length in the pleadings has no connection to McInroy or to Plaintiff. A significant amount of the evidence brought forward by Plaintiff should be excluded at trial on the basis of relevance, because it is improper character evidence, and because it is of limited (or no) probative value while being unfairly prejudicial to Defendants.

A. Standard for Analyzing Unfairly Prejudicial Evidence Under Iowa Rule of Evidence 5.403.

Iowa Rule of Evidence 5.403 permits the court to exclude evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." This analysis requires the Court to look at "(1) the need for the proffered evidence 'in view of the issues and other available evidence,' (2) whether there is clear proof it occurred, (3) the 'strength or weakness of the prior-acts evidence in supporting the issue sought to be prove[d],' and (4) the degree to which the evidence would improperly influence the jury." *Otoadese*, 2021 WL 815875 at *6, citing *Webster*, 865 N.W.2d at 243.

Much of the evidence Plaintiff will attempt to offer at trial, such as evidence of comments made to or about other employees, comments made long before her claims arose, comments that she heard about secondhand or were not made in her presence, or comments about members of minority groups of which she is not a part are not probative of her claims and would result in substantial prejudice to Defendants. Some Iowa courts as well as the Eighth Circuit have found that "[a] few isolated or sporadic . . . remarks over a long period of time, or heard secondhand, may not be enough to establish . . . discrimination." *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 470 (Iowa 2017); *Singletary v. Mo. Dep't of Corr.*, 423 F.3d 886, 893 (8th Cir. 2005) (derogatory racial comments not made directly to plaintiff were not sufficiently severe to support a hostile environment claim); *Bainbridge v. Loffredo Gardens, Inc.*, 378 F.3d 756, 759 (8th Cir. 2004) (conduct not sufficiently severe or pervasive where employer made derogatory racial comments about customers, other employees, and entire minority groups but did not direct comments at plaintiff); *Goethals v. Mueller*, Nos. 1999-190, 9-414, 98-1556, 1999 WL 1020545 at *5 (Iowa Ct. App. Nov. 10, 1999) (unreported) (dismissing plaintiff's hostile work environment claim where the remarks were directed at other employees); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981) (infrequent racial slurs which "with possible rare exceptions [were] not directed toward appellants" were not sufficient to sustain discriminatory discharge claim).

B. Standard for Analyzing "Me Too" Evidence.

Evidence that other individuals in the workplace experienced harassment, frequently referred to as "me too" evidence, is neither "per se admissible nor per se

inadmissible." *Salami v. Von Maur, Inc.*, 838 N.W.2d 680, 2013 WL 3864537, at *8 (Iowa Ct. App. July 24, 2013) (Table), citing *Sprint v. Mendelsohn*, 552 U.S. 379 (2008). "[W]hether such testimony is relevant and sufficiently more probative than unfairly prejudicial in a particular case is 'fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.'" *Id*. Such evidence typically falls within the purview of Iowa Rule of Evidence 5.404(a), which prohibits evidence of a person's character trait to "prove that on a particular occasion the person acted in accordance with the character or trait" or Rule 5.404(b), which prohibits evidence of crimes, wrongs, or other acts to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[1]

The Iowa Court of Appeals examined the admissibility of "me too" evidence in *Salami*. 2013 WL 3864537, at *8. In *Salami*, the Court provided guidance on the question of how the trial court might go about determining whether "me too" testimony is relevant and sufficiently more probative than unfairly prejudicial in a particular case. The Court of Appeals instructed that the trial court should consider (1) whether such past discriminatory behavior by the employer is close in time to the events at issue in the case; (2) whether the same decision makers were involved; (3) whether the witness and the plaintiff were treated in a similar manner; and (4) whether the witness and the plaintiff were otherwise similarly situated. *Id*. (quotation and citation omitted).

[1] Notably, character evidence may be admitted in order to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Iowa R. Evid. 5.404(b)(2). None of these apply, as discrimination the basis of sex may be intentional or unintentional and motive and intent are not at issue.

C. Evidence at Issue

The Court should exclude the following evidence and evidence like it for the reasons outlined below:

1. "Daddy" Comments[2]

In 2013 or 2014, two supervisors reported to Plaintiff that a young, female DCAT coordinator had been calling her coworker, Darin Thompson, "Daddy." Thompson also allegedly asked the DCAT coordinator upon her return from the restroom: "Did you wash your hands, young lady, or do you need a spanking?" Plaintiff addressed the situation with Thompson and with the DCAT coordinator. Plaintiff never received any additional complaints about inappropriate sexual comments by Thompson after addressing this issue with him. In fact, per Plaintiff's own testimony, the DCAT coordinator involved did not submit the complaints about Thompson's comments and appeared to call Thompson "Daddy" voluntarily. The complaints were submitted by others in the office who felt the conduct was inappropriate.

This "me too evidence" should be excluded as improper character evidence intended to show that because Thompson allegedly behaved inappropriately at some point in the distant past, other DHS employees, including McInroy, also likely behaved inappropriately in the workplace. These incidents allegedly took place three or four years before Plaintiff claims she began to feel that she was experiencing a hostile work environment.[3] *Salami*, 2013 WL 3864537 at *8. The incident(s) did not involve McInroy

[2] *See* Def. Response to Plf. Statement of Additional Material Fact (hereafter "SAMF") ¶¶ 40-46.

[3] Plaintiff claims that she began to feel she was experiencing a hostile work environment after McInroy made the "black leather" comment in January of 2017. (Def. MSJ App. 509 at 34:25-37:7).

and Plaintiff did not witness any of the alleged actions or comments, which took place in an entirely different office. *Id*. Plaintiff and the young woman involved are not similarly situated, because the young woman did not report the conduct, and per Plaintiff's own testimony did not appear to be offended by her interactions with Thompson. *Id*. Plaintiff apparently reprimanded Thompson herself, so this evidence is not relevant to DHS's "failure to act" on reports of sexual harassment in the office.

Further, this evidence is irrelevant and unfairly prejudicial. It has no probative value for Plaintiff, particularly given that it took place years before the conduct at issue in this case. *Webster* 865 N.W.2d at 243. There is no clear proof that these incidents occurred. *Id*. The only evident purpose of this evidence is to shock the jury and to encourage jurors to punish DHS for Thompson's alleged actions, despite the fact that his conduct was not directed at Plaintiff and cannot be proved to a preponderance of the evidence on this record. *Id*. As a result, it is unfairly prejudicial to Defendants and should be excluded under Iowa Rules of Evidence 5.401, 5.402, 5.403, and 5.404.

2. Comments About Job Applicants[4]

In February of 2016, while the management team was evaluating job applicants for an open position, McInroy allegedly made a comment about one of the female applicants being "dowdy" and another female applicant having "sexy" shoes. McInroy suggested that Plaintiff might want to hire the person with "sexy" shoes because Plaintiff is a "shoe person." Plaintiff agrees that she is a "shoe person" but rebuked McInroy for his comments about the applicants' appearances. The applicant described as "dowdy" was ultimately hired into the position.

[4] *See* Def. Responses to Plf. SAMF ¶¶ 163-168.

This "me too" evidence should also be excluded as improper character evidence. Again, McInroy allegedly made these comments nearly a year prior to the date Plaintiff claims she began to feel she was working in a sexually hostile work environment. *Salami*, 2013 WL 3864537 at *8. The comments were not similar to the "black leather" comment made to Plaintiff, were not directed at Plaintiff, nor were they similar to the harassment Plaintiff claims she experienced as a result of McInroy's disparate treatment of her compared to her peer, Kristin Walker. *Id*.

Further, this evidence is unfairly prejudicial to Defendants. Plaintiff and McInroy have very different recollections of this conversation. *Webster*, 865 N.W.2d at 243. Introduction of this evidence would require Defendants to rebut it, creating an unrelated mini-trial, forcing the jury to resolve an unrelated matter and resulting in a waste of time. The evidence is not probative of Plaintiff's claim that McInroy treated her differently than he treated Walker and it is also not probative of her claims that McInroy sexually harassed her. There is no evidence in this record that McInroy found Walker sexually attractive and Plaintiff unattractive. Rather, Plaintiff bases her gender stereotype claims on McInroy's preference for "agreeable" individuals over "disagreeable" individuals. This evidence is offered to encourage the jury to punish DHS—not because McInroy sexually harassed Plaintiff or treated her differently because he preferred "agreeable" women—but because he allegedly made a comment about a woman's "dowdy" appearance and about Plaintiff liking "sexy" shoes. Because this evidence is irrelevant, improper character evidence, and unfairly prejudicial, it should be excluded under Iowa Rules of Evidence 5.401, 5.402, 5.403, and 5.404.

3. Sexy Lumberjack[5]

During the fall of 2016, McInroy allegedly made a comment about a DHS employee's attire resembling a "sexy lumberjack" at a supervisor's meeting. It is unclear whether Plaintiff witnessed this comment.[6] Jennifer Ware stated that she was "aware" of the comment, but could not state with certainty that McInroy actually used the phrase "sexy lumberjack."

Further, this "me too" evidence should be excluded as improper character evidence. The comment was apparently made months prior to the "black leather" comment and months before Plaintiff began to feel McInroy had created a hostile work environment. *Salami*, 2013 WL 3864537 at *8. The comment was not directed at Plaintiff. It is unclear whether Plaintiff was even present at the time the comment was made.

Like the "dowdy" and "sexy shoe" comments, this evidence is unfairly prejudicial to Defendants. *Webster*, 865 N.W.2d at 243. There is no definitive proof that McInroy called an employee a "sexy lumberjack." Introduction of this evidence would require Defendants to rebut it, creating an unrelated mini-trial and resulting in confusion of the issues and a waste of time. Iowa R. Evid. 5.403. The evidence is not probative of Plaintiff's claim that McInroy treated her differently than he treated Walker and it is also not probative of her claims that McInroy sexually harassed her. This evidence does not support Plaintiff's claim that McInroy preferred "agreeable" individuals to "disagreeable"

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[5] *See* Def. Responses to Plf. SAMF ¶ 138.

[6] McInroy recalls that Plaintiff was present at this meeting and that she made the initial lumberjack comment, but Plaintiff appears to indicate that she learned about the "sexy lumberjack" comment from Jennifer Ware. Slaybaugh also recalls that McInroy told her that White was present during the "lumberjack" conversation and that she had made the initial comment about a "sexy lumberjack." (*See* Def. MSJ App. 372-73 at 48:13-49:18).

individuals. This evidence serves only to shock the jury and encourage jurors to punish DHS for comments which are unrelated to Plaintiff's claims. Because this evidence is irrelevant to Plaintiff's claims, improper character evidence, and unfairly prejudicial, it should be excluded under Iowa Rules of Evidence 5.401, 5.402, 5.403, and 5.404.

4. Beth Avery and Her Partner[7]

In December 2016, the Department of Human Services terminated Social Work Supervisor Beth Avery after Avery mishandled a case, resulting in the tragic death of a child. Plaintiff agreed with the decision to terminate Avery, but feels that Avery was otherwise discriminated against on the basis of her sexual orientation and gender by DHS management throughout her employment. Plaintiff claims that she "routinely" heard McInroy comment on Avery and her sexuality, though Plaintiff apparently did not report those comments at the time. Plaintiff specifically claims that McInroy said he did not want to observe Avery and her partner having sex. Plaintiff may attempt to testify about McInroy's alleged statements about Avery's sexual orientation in court. The Court should exclude this testimony as irrelevant to the events at issue in this case. In her original grievance, included in the record, Avery wondered whether she had been terminated because of her sexual orientation and age. She did not complain about sexual harassment at the time her employment was terminated.

Evidence relating to Beth Avery's employment is improper "me too" evidence and should be excluded under Iowa Rule of Evidence 5.404 (a)-(b). *See Salami*, 2013 WL 3864537 at *8. The events Avery complains about in her grievance are not close in time

[7] *See* Def. Responses to Plf. SAMF ¶¶ 22-31.

to the period when Plaintiff began to feel that she was employed in a hostile work environment. *Id.* Avery and Plaintiff are not similarly situated, in that Avery felt she had been discriminated against based on her sexual orientation and age—not her gender. *Id.*; *see also Singletary v. Missouri Dep't of Corrections*, 423 F.3d 886, 893 (8th Cir. 2005), citing *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004) (to support a hostile environment claim, the conduct must have a discriminatory character or purpose); *Clay v. Lafarge North America*, 985 F. Supp. 2d 1009, 1041 (S.D. Iowa 2013).As discussed in Defendants' Motion for Summary Judgment, Plaintiff does not have a bystander claim for discrimination against protected groups of which she is not a part. As a result, this evidence is irrelevant to Plaintiff's sexually hostile work environment claim.

Evidence of alleged comments and acts about Avery and others' sexual orientation are also unfairly prejudicial to Defendants. *Webster*, 865 N.W.2d at 243. There is no definitive proof that McInroy made any discriminatory comments about Avery or other gay or lesbian DHS employees. *Id.* Introduction of this evidence at trial would require Defendants to rebut it, creating an unrelated mini-trial and resulting in confusion of the issues and a waste of time. Iowa R. Evid. 5.403. Avery has filed her own lawsuit and will have her own day in court.

Further, evidence that McInroy allegedly made comments about Avery's sexual orientation is not probative of Plaintiff's claim that McInroy treated her differently than he treated Walker because of gender stereotypes about "agreeable" and "disagreeable" women and it is also not probative of her claim that McInroy sexually harassed her. This evidence is offered only to shock the jury, to convince the jurors that McInroy is a homophobe, and encourage them to punish DHS for comments which are unrelated to

Plaintiff's claims. Because this evidence is improper character evidence and unfairly prejudicial, it should be excluded under Iowa Rules of Evidence 5.401, 5.402, 5.403, and 5.404.

5. Lindee Jeneary Exit Interview[8]

Plaintiff obtained an exit interview completed by a former DHS employee, Lindee Jeneary, and discovered that it contained complaints about McInroy and others on the leadership team. Specifically, Jeneary claims that McInroy told her she was "too emotional" and "degraded [her] as a strong female supervisor." (P. MSJ. App. 287).

This evidence is unfairly prejudicial to Defendants. Ms. Jeneary submitted her exit interview on December 28, 2016. In her exit interview, she outlines events from the prior year (at least) and complains about the conduct of McInroy, Darin Thompson, and Pauline Rutherford. There is no evidence in this record that Jeneary complained about these incidents to DHS supervisors or gave DHS the opportunity to address her complaints. For example, Jeneary claims, without explanation, that McInroy told her she was "too emotional" and "degraded [her] as a strong female supervisor." (P. MSJ App. 287). She also transcribes a conversation with McInroy, which she characterizes as "chauvinistic", despite the fact that it does not appear to contain sexist language. (*Id.*). Introduction of this evidence at trial would require Defendants to rebut it, and would result in examination of various issues which are tangential if not completely unrelated to Plaintiff's claims. Such a mini-trial would confuse the issues relevant to Plaintiff's claims,

[8] *See* Def. Responses to Plf. SAMF ¶¶ 143-145.

forcing the jury to resolve an unrelated matter and result in a waste of time. As a result, this evidence should be excluded under Iowa Rule of Evidence 5.403.

6. "Assholes"

At some point prior to April of 2017, McInroy called a group of female CPA supervisors "assholes." The word "assholes", while certainly pejorative, is not gender-specific. *See Singletary v. Missouri Dep't of Corrections*, 423 F.3d 886, 893 (8th Cir. 2005), citing *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004) (to support a hostile environment claim, the conduct must have a discriminatory character or purpose); *Clay v. Lafarge North America*, 985 F. Supp. 2d 1009, 1041 (S.D. Iowa 2013). There is no evidence in the record that McInroy called this group of supervisors "assholes" because they are female. Indeed, social work is a woman-dominated field, so the factfinder could draw no inference from this evidence that this was a gender-based comment. As a result, this evidence should be excluded as irrelevant to Plaintiff's claims. Iowa R. Evid. 5.401 and 5.402.

7. "Tight, Short, Red Dress"[9]

In spring or summer of 2017, McInroy allegedly made an inappropriate comment about a "young, attractive female social worker" who wore a "tight, short, red dress" to work. The comment was made at a leadership meeting where Plaintiff was present. Plaintiff claims that McInroy recounted an instance in which he and another supervisor were walking behind the social worker and stated that he "could not decide if he should pray she dropped her pencil or pray that she did not."

[9] *See* Def. Responses to Plf. SAMF ¶¶ 159-161.

This "me too" evidence should be excluded as improper character evidence. There is no definite proof that McInroy made such a comment. Introduction of this evidence would require Defendants to rebut it, creating an unrelated mini-trial and resulting in confusion of the issues and a waste of time. Iowa R. Evid. 5.403. Regardless of the potential comment at a subsequent leadership meeting, the social worker was not approached by McInroy and advised on the "thought" and otherwise remains unaware of the incident. *Salami*, 2013 WL 3864537 at *8. Further, this evidence is not probative of Plaintiff's claim that McInroy treated her differently than he treated Walker. This evidence does not support Plaintiff's claim that McInroy preferred "agreeable" individuals to "disagreeable" individuals. This evidence serves only to shock the jury and encourage jurors to punish DHS for comments which are unrelated to Plaintiff's claims. Because this evidence is irrelevant to Plaintiff's claims, improper character evidence, and unfairly prejudicial, it should be excluded under Iowa Rules of Evidence 5.401, 5.402, 5.403, and 5.404.

8. "Nectar of the Gods"[10]

In May of 2018, Plaintiff learned of a conversation between Rutherford and Thompson in which Thompson referenced the "nectar of the Gods," which is apparently sweat which pools around the anus during sexual intercourse. Rutherford had recounted the story of her conversation with Thompson to Plaintiff in an attempt to demonstrate a situation where her "Crucial Conversations" training might have been applicable. Plaintiff did not overhear the original conversation, which had occurred sometime before

[10] *See* Def. Responses to Plf. SAMF ¶¶ 123-124.

Plaintiff's conversation with Rutherford. Rutherford recalls that the original conversation did not take place during work hours and that she was not offended by the conversation.

This "me too" evidence should be excluded as improper character evidence. *Salami*, 2013 WL 3864537 at *8. It is not probative of Plaintiff's claim that McInroy created a hostile work environment for Plaintiff or that he treated her differently than her colleague Kristin Walker, based on internalized gender stereotypes. McInroy did not make the comment and was apparently not present when the comment was made. There is no evidence in the record that Rutherford or the other DHS employee present ever reported the comment to McInroy. There is no evidence that Rutherford was offended by the comment or that she would have reported it if Plaintiff had not done so. This evidence is being offered for pure "shock value" and is intended to encourage the jury to punish DHS for a vulgar comment that is entirely unrelated to Plaintiff's claims in this case. *See* Iowa R. Evid. 5.401, 5.402, and 5.404.

Further, this evidence is unfairly prejudicial to the Defendants. *Webster*, 865 N.W.2d at 243. Thompson's alleged comment has no probative value for Plaintiff's claims, but given the nature of the comment it could very well prejudice the jury against DHS. As a result, Defendants ask the Court to exclude it as more prejudicial than probative under Iowa Rule of Evidence 5.403.

9. "Eye Candy"[11]

On June 6, 2018, Plaintiff became aware that an IT Technician sent a Child Protective Worker ("CPW"), Mary Collins, a sexually-suggestive email (in which he stated

[11] *See* Def. Responses to Plf. SAMF ¶¶ 125-129.

that he would miss his "eye candy" when she left DHS) and generally made Collins uncomfortable by hanging around her cubicle. A supervisor reported the issue to Plaintiff for resolution as part of following the chain of command. Plaintiff claims that she reported the incident to Rutherford, and Rutherford failed to address the situation "for several days." Rutherford estimates that she interviewed Collins two or three days after the incident happened. Plaintiff's notes documenting the event establish that Collins received the inappropriate email on Wednesday, June 6, 2018 and was interviewed by Rutherford with relation to the event on Monday, June 11, 2018.

At oral argument, Plaintiff's counsel stated that this evidence was being offered to demonstrate Defendants' lack of responsiveness to sexual harassment complaints, rather than to support Plaintiff's own claims of sexual harassment. Nevertheless, Defendants ask the Court to exclude this evidence as improper character evidence. Defendants further ask the Court to exclude this evidence as irrelevant to Plaintiff's claims that she was sexually harassed by McInroy and treated differently than her colleague Kristin Walker because of gender stereotypes about how a woman should behave in the office. *Salami*, 2013 WL 3864537 at *8. McInroy was not involved in the incident involving Collins. Plaintiff was not the recipient of the unwanted comment or attention, nor was she present to witness it. Further, despite Plaintiff's claims, DHS did investigate Collins's complaint, though not as quickly as Plaintiff would have liked, and ultimately coached and counseled the harasser. (*See* Def. Response to Plf. SDMF ¶¶ 127-129). There is plenty of evidence relating to DHS's investigation of Plaintiff's own complaints, and no need to create a mini-trial relating to whether DHS's three-day response time was sufficient with regard to Ms.

Collins's complaint. As a result, this evidence should be excluded under Iowa Rules of Evidence 5.401, 5.402, and 5.404.

10. Darci Patterson (Fairchild)[12]

Plaintiff makes various claims about Darci Patterson's inappropriate behavior in the workplace. Plaintiff claims that Patterson "grabbed a subordinate's breast, talked about women's breasts; talked about the "size of black dick;" asked a subordinate who was dating a Black man what the sex was like; and gave dildos as gifts to DHS employees. . . . Tracy personally observed Darci engage in inappropriate behavior, sexual comments, discussions about women's breasts, and discussions about 'dicks.'" (Plf. MSJ Resistance Brief, pp. 6-7 (citations to the record omitted)). Plaintiff also claims that on one occasion when she went out to dinner with Patterson and other DHS employees, Patterson would not refrain from talking about the waiter's penis. (Def. Response to P. SAMF ¶ 174). Plaintiff does not claim that she was sexually harassed by Patterson and this evidence is irrelevant to Plaintiff's claims that she was sexually harassed by McInroy and treated differently than her peer Kristin Walker based on gender stereotypes about how a woman should behave in the office. Iowa R. Evid. 5.041, 5.402.

At oral argument on Defendants' Motion for Summary Judgment, Plaintiff's counsel indicated that she did not intend to offer this evidence to show that Plaintiff was sexually harassed by Patterson, but rather, to demonstrate DHS's inaction with relation to complaints of sexual harassment in the office.[13] As an initial matter, whether and when

[12] *See* Def. Responses to Plf. SAMF ¶¶ 169-173.
[13] Plaintiff claims that she reported Patterson's inappropriate sexually-explicit conduct to McInroy and Armstrong in 2017, but this statement is not otherwise supported in the record. (*See* Def. Response to P. SAMF ¶¶ 171-174).

DHS received a report of Patterson's inappropriate behavior is not clear on this record and whether DHS responded quickly to complaints about Patterson's behavior is not probative of the timeliness of its response to Plaintiff's complaints. The Court should allow the jury to determine whether DHS responded appropriately to Plaintiff's complaints without cluttering the record with unrelated, irrelevant evidence. *See* Iowa R. Evid. 5.401, 5.402, 5.403.

If the Patterson evidence is only being offered to show Defendants' inaction with regard to complaints of sexual harassment, then there is no need to explore the issues with Patterson's conduct in depth in front of the jury or to provide specific examples of statements or conduct. A simple statement that Plaintiff complained about the inappropriate conduct of a subordinate should suffice, particularly since Patterson's behavior was not directed at Plaintiff, but was apparently either observed by Plaintiff or reported to Plaintiff in her role as a DHS supervisor. Since this evidence has minimal probative value to Plaintiff's hostile work environment claims, and because many of the comments are vulgar and could be shocking to the jury and incite it to punish DHS, it should be excluded as unfairly prejudicial to Defendants. Iowa R. Evid. 5.403. Further, voluminous evidence relating to Patterson's behavior has the potential to distract from the issues pertinent to Plaintiff's case and to create a mini-trial, resulting in a waste of time and resources. *Id*.

If the Court determines that the specifics of Patterson's inappropriate behavior should come into evidence, it should still exclude any comments or actions which are unrelated to sexual harassment or which happened off-site or after work hours. Iowa R.

Evid. 5.401, 5.402. Further, if this evidence is ultimately admitted, the jury should be clearly instructed regarding which parts of Plaintiff's claims it is intended to prove.

11. "Poop" and "BM" [14]

Throughout the period at issue in her complaint, Plaintiff alleges that Thompson talked "incessantly in leadership meetings about human excrement." Thompson admitted in his deposition that he frequently uses the words "poop" or "BM" at work because he does not like to use curse words and feels that they are inappropriate. Plaintiff claims that McInroy failed to intervene to stop Thompson from making these inappropriate comments. Thompson's preference for the words "poop" and "BM" contain no subtext of gender-based slurs. *See Singletary v. Missouri Dep't of Corrections*, 423 F.3d 886, 893 (8th Cir. 2005), citing *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004) (to support a hostile environment claim, the conduct must have a discriminatory character or purpose); *Clay v. Lafarge North America*, 985 F. Supp. 2d 1009, 1041 (S.D. Iowa 2013). There is no evidence that these words were used to degrade Plaintiff or other women. As a result, this evidence is irrelevant to Plaintiff's hostile work environment claim and should be excluded. Iowa R. Evid. 5.401, 5.402.

12. "Get Low" [15]

On June 12, 2018, Pauline Rutherford sang partial lyrics of the song "Get Low" at a leadership meeting in which Plaintiff was present. The record shows that Rutherford sang the song after the meeting had ended. Plaintiff found Rutherford's rendition of the song to be offensive because it contained explicit language, because the group had just

[14] *See* Def. Responses to Plf. SAMF ¶ 47.
[15] *See* Def. Responses to Plf. SAMF ¶¶ 130-131.

finished processing the CPW's harassment complaint about the IT Technician, and because McInroy failed to intervene or redirect the conversation. (App. 530 at 118:13-119:1).

While a reasonable person could find the lyrics to this song offensive, the lyrics Rutherford sang are not degrading to women and do not contain gender-based slurs. *See Singletary v. Missouri Dep't of Corrections*, 423 F.3d 886, 893 (8th Cir. 2005), citing *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004) (to support a hostile environment claim, the conduct must have a discriminatory character or purpose); *Clay v. Lafarge North America*, 985 F. Supp. 2d 1009, 1041 (S.D. Iowa 2013). This evidence is not probative of Plaintiff's claims and should be excluded as irrelevant. Iowa R. Evid. 5.401, 5.402.

13. Comments About DHS Employees Who Are Members of Minority Racial or Ethnic Groups, or who are members of the LGBT+ Community.

Plaintiff makes various complaints and comments about McInroy's alleged disdain for DHS employees who are members of minority racial or ethnic groups or who are members of the LGBT+ community. (*See* Def. Response to Plf. SAMF ¶ 77). As discussed in Defendants' Motion for Summary Judgment, Plaintiff does not have a bystander claim for discrimination against minorities. The factors related to any claim for a sexually hostile work environment focus on "a protected group" and the harassment must be based on "a protected characteristic." *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n.*, 672 N.W.2d 733, 744 (Iowa 2003). Further, Plaintiff's claims relating to indiscriminate hiring and disparate treatment of minority employees are not part of her lawsuit and are purely speculative.

Defendants ask the Court to exclude all evidence relating to such claims, including by ordering the parties to redact such complaints from their exhibits pursuant to Iowa Rules of Evidence 5.401, 5.402, 5.403, and 5.404. Plaintiff's allegations about McInroy's alleged racism and homophobia have zero probative value for her hostile environment claim and would result in unfair prejudice to Defendants. Such claims would only serve to incite the jury to punish DHS for its alleged wrongs against minority employees. *Webster*, 865 N.W.2d at 243; *State v. Rodriquez*, 636 N.W.2d 234, 240 (Iowa 2001).

IV. EVIDENCE IN OPENING STATEMENTS

Defendants request that the Court order that no exhibits be used in opening statements prior to a determination of their admissibility.

V. EXPERT TESTIMONY ON CAUSATION

Plaintiff may attempt to testify that certain medical conditions were caused by or exacerbated by Defendants. Generally, a plaintiff must provide expert testimony relating to the cause of a medical condition. *Doe v. Central Iowa Health System*, 766 N.W.2d 787, 794 (Iowa 2009). The exception to this general rule is if the causal connection is within the knowledge and experience of lay persons. *Id.* Plaintiff has designated her therapist, Margaret Conrad, MSW, LISW, and physician Dr. Stephanie Stitt-Cox, M.D., as expert witnesses under Iowa Rule of Civil Procedure 1.500(2)(c)(1)-(2). Margaret Conrad is expected to testify about "her treatment of Plaintiff; Plaintiff's medical conditions; symptoms of those conditions; diagnosis and prognosis of such conditions; the cost of future treatment; and other information that may be contained in Plaintiff's medical records." (P. Expert Witness Designation). Dr. Stephanie Stitt-Cox is also expected to testify about "her treatment of Plaintiff; Plaintiff's medical conditions; symptoms of those

conditions; diagnosis and prognosis of such conditions; the cost of future treatment; and other information that may be contained in Plaintiff's medical records." (P. Expert Witness Designation).

While Plaintiff's treating physicians may testify as fact witnesses, they may not testify as to medical causation relating to Plaintiff's conditions, as no interrogatory response or expert reports have been provided setting forth their opinions. When a treating doctor "assumes a role in litigation analogous to the role of a retained expert" supplementation of discovery with expert reports may become obligatory. *Stellmach v. State*, 901 N.W. 2d 837 (Table) (Iowa Ct. App. 2017), quoting *Day v. McIlrath*, 469 N.W. 2d 676, 677 (Iowa 1991) and citing *Carson v. Webb*, 486 N.W. 2d 278, 280-81 (Iowa 1992). As such, any evidence seeking to show that Plaintiff's increased anxiety, depression, PTSD symptoms or other physical symptoms are causally connected to Defendants' actions in this case should be excluded.

VI. EXHIBITS OR WITNESSES NOT PREVIOUSLY DISCLOSED.

Defendants move the Court to exclude any exhibits or witnesses not previously disclosed in discovery, pursuant to the supplementation requirements of Iowa R. Civ. P. 1.503(4). Defendants would be prejudiced should any such documents be introduced or witness(es) be allowed to give testimony. *See Lawson v. Kurtzhals,* 792 N.W.2d 251 (Iowa 2010) (affirming district court ruling on motion in limine prohibiting the admission of evidence not timely provided by Plaintiff).

VII. EVIDENCE OF EMOTIONAL DISTRESS AND ECONOMIC DAMAGES.

In her Petition, Plaintiff claims that she is seeking damages for "mental and emotional distress, fear, anguish, humiliation, betrayal, stress, medical expenses, lost enjoyment of life, lost wages and employment benefits." (Pet. ¶ 121). In response to

Defendants' Interrogatory No. 20, which seeks detailed information about "each and every element and claim for damages . . . Plaintiff claims to have sustained as a result of Defendants' alleged wrongful conduct," Plaintiff notes that she is seeking "reimbursement for past and future lost wages and benefits, and past and future emotional distress." (*See* Plaintiff's Answers to Defendants' First Set of Interrogatories No. 20 attached to this motion). In her expert witness designation, Plaintiff notes that her treating physicians will testify about the "cost of future [medical] treatment." During her deposition, Plaintiff admitted that she does not have a claim for lost wages and benefits, but stated that she is making a claim for medical expenses, including her copays for therapy, her treatment for shingles, and an ophthalmologist bill. Plaintiff intends to claim damages for treatment occurring between December 31st of 2017 through the present day.

Despite these inconsistencies, Defendants generally understand that Plaintiff is claiming past and future emotional distress damages and damages relating to her past and future medical care related to Defendants' alleged actions in this case. However, Plaintiff has not provided an estimate of her total damages in this case, let alone the time period at issue or a calculation of "each and every element and claim for damages" requested by Defendants in discovery. In response to Defendants' Interrogatory No. 20, Plaintiff simply listed five pages of jury verdicts in other cases and stated simply that "a verdict for emotional distress damages within these ranges would likely be appropriate." (*See* Plf. Response to Def. Rog. No. 20 attached to this motion). The emotional distress damages Plaintiff lists for various cases span between $65,000 and $4.28 million. This broad range of emotional distress verdicts hardly puts Defendants on notice of the monetary value Plaintiff places on her emotional distress claim, or the amount she expects to recover. It does not provide the requested method of computation. Though Defendants

agree that determination of emotional distress damages is within the province of the jury, trial attorneys must routinely value cases as a part of their practice and providing an estimate is not impossible. Furthermore, provision of an estimate of Plaintiff's emotional distress damages is both necessary and required under Iowa law. *See* Iowa R. Civ. P. 1.503; *Gordon v. Noel*, 356 N.W.2d 559, 564 (Iowa 1984).

Though Plaintiff provided waivers for Defendants to obtain her medical and billing records, Plaintiff provides no estimate of the damages she is claiming with relation to her past and future medical treatment, and provides no substantive response to Defendants' Interrogatories No. 20 or No. 21, which seek, in part, the "amount of expenses you have been told you could reasonably expect to incur" in future medical expenses and a computation of her damages. (*See* attached). Defendants are not obligated to comb through Plaintiff's medical records to determine which doctor or therapist visits she believes are the result of Defendants' alleged actions in this case, which expenses she attributes to Defendants, or how she computed her damages.

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. *Id*. 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, at *4 (Iowa Ct. App. 2007), citing *Gordon*, 356 N.W.2d at 564; *Nicholson v. Bioment, Inc.*, No. 18-CV-3057-CJW-KEM, 2020 WL 3399898 (N.D. Iowa February 14, 2020) (slip opinion) (barring Plaintiffs from seeking future medical expenses at trial as a sanction for failure to comply with their disclosure obligations).

There is no requirement that Defendants file a motion to compel or that an order compelling such discovery be made before the Court can enter an order in limine precluding the admission of undisclosed damage evidence. *See id*., at *5 (affirming district court granting of motion in limine precluding evidence of damages). In *Lawson v. Kurtzhals*, 792 N.W.2d 251 (Iowa 2010), the Iowa Supreme Court observed that the defendant had "attempted to determine the amount of damages claimed through both interrogatories and in a deposition of [the plaintiff]." 792 N.W.2d at 258. "The discovery deadline passed with no supplementation of [plaintiff's] prior answers." *Id*. Although the plaintiff "finally provided the amount of damages claimed" immediately before trial, the district court excluded evidence of damages and the Iowa Supreme Court affirmed the decision. *Id*. at 258-59.

Since Plaintiff has failed to provide any reasonable estimate of her damages in response to written interrogatories, during her deposition, or in an expert report, this Court should exclude any evidence relating to Plaintiff's emotional distress damages and her damages related to her past and future medical care.

REQUEST FOR RELIEF

WHEREFORE, Defendants respectfully request that the Court grant their Motion in Limine in full.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on April 19, 2021:

☐ U.S. Mail ☐ FAX
☐ Hand Delivery ☐ Overnight Courier
☐ Federal Express ☐ Other
☒ EDMS

Signature: */s/ Audra Drish*