IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

HARRY KOHRT, Plaintiff, v. MIDAMERICAN ENERGY CO. and JANE TEW, Defendants.	))))))))))	Civil No. 3-00-CV-10090 RULING GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND ORDER

Defendants' motion for summary judgment is before the Court. Plaintiff, Harry Kohrt ("Kohrt"), filed a complaint against MidAmerican Energy Company (MEC) and his former supervisor, Jane Tew, alleging statutory and state common-law violations arising from his termination by MEC and the company's refusal to rehire him as a lineman. Against MEC, Kohrt's amended complaint alleges discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621-634 and the Iowa Civil Rights Act (ICRA), Iowa Code § 216.6 (Count I); retaliation (Count II); and wrongful discharge in violation of public policy based on Kohrt's allegation that MEC terminated him and refused to rehire him because he disagreed with certain MEC safety policies (Count IV). Against Tew, Kohrt alleges interference with contract (Count III). Defendants move for summary judgment, claiming that there are no disputed material facts and that they are entitled to judgment as a matter of law. Plaintiff resists, and defendants filed a reply. Oral argument was requested, but the Court finds it unnecessary. The motion is fully submitted.

I. BACKGROUND

The following facts relevant to this motion either are not in dispute or are viewed in a light most favorable to the nonmovant.[1] In the fall of 1967, Kohrt began his employment with Iowa-Illinois Gas and Electric Company ("Iowa-Illinois") as a ground man patrolman. Kohrt became an electric distribution supervisor in 1987, and remained employed with Iowa-Illinois until July 1995 when there was a merger and Iowa-Illinois ceased to exist. Following the merger, all former Iowa-Illinois employees had to apply for positions with MEC. Kohrt was then hired by MEC to work as an electric distribution supervisor. According to Don Welvaert, Kohrt's supervisor at the time, Kohrt was the lowest qualified among the supervisors who were selected. Kohrt disputes the truth of Welvaert's statement, however, because he believes he had more education and experience than other supervisors, he had received a good performance review in 1995, and he was very well-regarded among line crew members.

In December 1995, MEC offered Kohrt a safety and training coordinator position, which he refused. He received favorable feedback in a 1996-97 performance evaluation, and on a scale of 1-9, received 4's (showing development opportunity) and mostly 5's and 6's (fully acceptable).

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[1] As a preliminary matter, plaintiff has submitted documents which are inadmissible under Federal Rule of Procedure 56(e) because they are unauthenticated and unaccompanied by affidavits. *See Rill v. Trautman*, 950 F. Supp. 268, 269 (E.D. Mo. 1996) ("To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Federal Rule of Civil Procedure 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.") (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2722, at 58-60 (1983)). Defendants have also submitted exhibits which do not comply with Rule 56(e). Nevertheless, neither party has moved to strike any of the exhibits. In the absence of an objection, all of the evidence will be considered by this Court. *See, e.g, Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 294-95 (8th Cir. 1987); *Williams v. Evangelical Retirement Homes of Greater St. Louis*, 594 F.2d 701, 703 (8th Cir. 1979) (citations omitted) ("Absent a motion to strike or other timely objection, the trial court may consider a document which fails to conform to the formal requirements of Rule 56(e).").

In April 1997, Kohrt was terminated from the position of electric distribution supervisor. He asked for the reason and was not given an answer, except that a manager with MEC, Virginia Dasso, told him she regarded his experience as valuable for the safety and training position. Kohrt then took the safety and training coordinator position over several other options, including applying for another position within the company, returning to the position of lineman journeyman, or accepting a severance package and leaving the company.

In February 1998, Guy Jackson became Kohrt's new supervisor. Less than two days later, Kohrt's safety and training coordinator position was eliminated. Jackson had determined that MEC could fulfill its safety duties without the position. Kohrt was given thirty days to consider other positions within MEC or accept a severance package. As a result of reorganization, Russell White later became supervisor of the safety department of MEC and reviewed Jackson's decision with respect to the elimination of Kohrt's position. Although White stated that the size of the employee base in the area required the reinstatement of the safety and training coordinator position, according to Jane Tew, White felt that Kohrt's termination was improperly handled under company procedures and was not supported by the records. On March 17, 1998, White sent Kohrt a letter offering him the reinstated safety and training coordinator position, specifically indicating that the position was at-will. There was never a written agreement for Kohrt's employment. Kohrt accepted the position.

Jane Tew became Kohrt's supervisor in April 1998 as the manager of safety, training, and regulatory compliance. Within a few days, Tew began documenting Kohrt's performance. Kohrt recalls that Tew or White told him to "think outside the box" and "pick up the pace," but they never told him that his performance was unsatisfactory. Kohrt was terminated on December 7, 1998. Kohrt disputes the reasons given in his termination letter, namely failure to

communicate with his supervisor; the fact that he "knew nothing" about retrofitting MEC's trucks to accommodate fall protection equipment, a project he had allegedly been assigned to oversee; and failure to perform satisfactorily after being counseled regarding his poor performance.[2] Kohrt had communicated frequently with Tew, whether via voice mail, electronic mail, by leaving messages with her secretary, or in person at meetings. There were no problems or complaints with his efforts on retrofitting. His work was well-received by linemen. In addition, MEC failed to follow its own procedures with respect to Kohrt's termination.

On April 6, 1999, Kohrt filed a charge of discrimination against MEC with the Equal Employment Opportunity Commission (EEOC) alleging age and sex discrimination and retaliation with respect to his termination. He did not list Jane Tew as a respondent. Kohrt never filed any claims or charges within MEC regarding discrimination or retaliation. Although the EEOC issued Kohrt a right-to-sue letter on his discrimination charge, Kohrt did not file a lawsuit in response to that letter.[3]

Before filing the April 6, 1999 charge with the EEOC, on March 17, 1999, Kohrt responded to a newspaper advertisement by applying for a position with MEC as a lineman. He was forty-nine years old at the time.[4] Kohrt was not interviewed for the position. Randy Stein

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[2] Paul B. Priest, Vice President of Employee and Labor Relations and HR Compliance at MEC, states in his affidavit that Kohrt was terminated for "failure to comply with supervisory directives and instructions, failure to fulfill job expectations, and failure to perform job duties and responsibilities in a satisfactory manner." Defendants' Appendix (Motion for Summary Judgment) at 9, ¶ 2. Kohrt also disputes these explanations, and emphasizes that they are inconsistent with the reasons outlined in his termination letter.

[3] Kohrt concedes that the issue of discrimination in his termination cannot be litigated, because this action was filed after the ninety-day right-to-sue period on that issue expired.

[4] Kohrt had previously sought to return to the lineman position in the fall of 1998 (prior to his termination) and had been unsuccessful. Kohrt again unsuccessfully applied for a lineman

stated that he received the applications for the lineman position but did not consider Kohrt to be the top applicant because he had no recent lineman experience. He had not been a lineman since October 1987. Christopher Walton was interviewed for the position, in part because he had recent experience. Kohrt believes, however, that Stein's statements are inaccurate and a pretext for age discrimination. Stein's testimony is inconsistent with what MEC told the Iowa Civil Rights Commission (ICRC). In its response to the ICRC, MEC asserted that Stein never reviewed Kohrt's application, and that the only requirements for the lineman's position were being a certified lineman and possessing (or having the ability to obtain) a commercial driver's license, not mentioning the need for recent experience. Stein's testimony and MEC's response to the ICRC also reveal inconsistent reasons for why Kohrt was not hired.

Had Kohrt's application progressed, MEC states that it nevertheless would not have rehired him because it has a policy against hiring persons previously terminated for cause. Kohrt disputes the truth of this assertion because no such policy is in writing, Stein was not aware of such a policy, and other employees with performance problems were terminated and rehired in the past. There have also been instances when because of grievances or arbitration, MEC has been required to restore a terminated union employee to a bargaining unit position. Kohrt asserts that his age was a reason for MEC's failure to rehire him, pointing to comments made by Virginia Dasso and Russell White. In addition, since the time of his March 1999 application, there have been five lineman openings at MEC filled by individuals ages 27 (Christopher Walton, the first lineman hired after March 1999), 38, 33, 29, and 33. The average age of these new hires is 32.

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position with MEC on June 5, 2001, after the present action was filed. Evidence regarding that application is irrelevant to this action.

On September 7, 1999, Kohrt filed new charges with the ICRC based on MEC's refusal to rehire him as a lineman. The ICRC issued a right-to-sue letter on April 7, 2000, and Kohrt filed this action in state court on May 28, 2000.[5] It was later removed to this Court, and Kohrt subsequently amended his complaint to add a claim for wrongful discharge in violation of public policy. This count focuses on two MEC safety policies: the use of one- or two-person crews in responding to calls, and the use of body belts or harnesses for fall restraint when linemen are working out of buckets on power lines. MEC states that its linemen are free to use either body belts or harnesses. Further, MEC states that its practice is to send one person to investigate a situation, and to send a second person any time one is needed. Kohrt believes that he was terminated for disagreeing with the company's one-person work policy. He believes that one person can safely investigate, but should not perform work alone due to the need for available first aid and cardiopulmonary resuscitation (CPR) assistance in the event of an emergency. Linemen work around high levels of voltage which can cause serious injury and death by electric shock, and a lineman at MEC temporarily lost his eyesight while performing work alone. Kohrt's conduct included articulating his position on one-person work in a meeting and in a letter to Jane Tew. Several MEC managers were critical of Kohrt's resistance to (or lack of support for) the one-person work policy as well as his failure to support the company position on fall protection. Tew considered Kohrt's action in voicing his opposition to the one-person work

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[5] Although the ICRC charges were apparently cross-filed with the EEOC, there is no indication in the record that Kohrt ever received a right-to-sue letter from the EEOC on these charges. Nevertheless, this Court has reviewed the relevant case law and concludes that an EEOC right-to-sue letter is not a prerequisite to filing an ADEA claim in federal court. *See Perepchuk v. Friendly's Ice Cream Corp.*, No. 3:CV-97-1988, 2000 WL 1372876, at *5 (M.D. Pa. Mar. 28, 2000) (stating that "unlike Title VII and ADA claims, no right-to-sue letter is required prior to filing an ADEA claim in federal court") (citations omitted).

policy at a safety meeting to be misconduct. In addition, MEC has refused to send a second person to a site in some circumstances, and has threatened to discipline and terminate other employees if their efforts in support of their positions on safety issues cause disruption. Kohrt admits that in 1998 a labor arbitrator found that MEC's policy on work crews did not violate the collective bargaining agreement. The arbitrator also found that the policy did not violate Occupational Safety and Health Administration (OSHA) standards. Kohrt contends, however, that the arbitrator's decision is not preclusive on whether one-person work as practiced by MEC is a safe policy or whether the policy would now be approved by OSHA in light of a change in the regulations.[6]

II. LEGAL ANALYSIS

A. Standard of Review

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994) (citations omitted). The moving party must establish its right to judgment with such clarity that there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982) (citations omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material*

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[6] On January 1, 1998, after the grievances were filed and before the arbitration decision was final, OSHA amended its regulations to provide that body belts could no longer be used for fall arrest. Kohrt believes that this change now requires two-person work because a lineman cannot get out of a harness while suspended without help.

fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Retaliation Claim

Plaintiff does not resist MEC's motion for summary judgment on his claim of retaliation (Count II). Therefore, summary judgment will be granted on this count.

C. Age Discrimination Claim

In Count I, Kohrt claims that he was subjected to discrimination by defendant MEC on the basis of his age in violation of the ADEA and the ICRA.[7] The ADEA seeks to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Kunzman v. Enron Corp.*, 902 F. Supp. 882, 893 (N.D. Iowa 1995) (quoting 29 U.S.C. § 621(b)). The ADEA forbids employment discrimination against employees aged forty and older. *Id.* (citing 29 U.S.C. § 631(a)). It provides that it is unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.* (quoting 29 U.S.C. § 623(a)(1)).

A plaintiff may present a case of age discrimination based upon either direct or

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[7] The Court's analysis of Kohrt's ADEA claim applies equally to his ICRA claim, because the ICRA is interpreted to mirror federal law, including the ADEA. *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 n.2 (8th Cir. 2000) (citing *Montgomery v. John Deere & Co.*, 169 F.3d 556, 558 n.3 (8th Cir. 1999)).

circumstantial evidence. *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1411 (8th Cir. 1997). Because the record in this case reveals no direct evidence of age discrimination, this Court analyzes Kohrt's claim according to the standards for circumstantial evidence. Age discrimination claims under the ADEA which are based on circumstantial evidence follow the familiar burden-shifting framework originally set forth for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Schiltz*, 115 F.3d at 1412. First, Kohrt must establish a prima facie case of age discrimination. In order to establish a prima facie case on a failure to hire claim, Kohrt must show that (1) he belonged to the protected class; (2) he was qualified for the position for which he applied; (3) he was not hired for the position applied for despite his being sufficiently qualified; and (4) the employer finally filled the position with a person sufficiently younger to permit an inference of age discrimination.[8] *Id.* (citing *Kralman v. Ill. Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994)); *see also Ryther v. KARE 11*, 108 F.3d 832, 838 (8th Cir. 1997) (en banc) (listing elements of prima facie age discrimination case).

If Kohrt establishes a prima facie case, the burden then shifts to MEC to articulate a legitimate, nondiscriminatory reason for its decision not to hire him. *Schiltz*, 115 F.3d at 1412 (citing *McDonnell Douglas*, 411 U.S. at 802); *see also Ryther*, 108 F.3d at 836. If MEC provides such a reason, the burden shifts back to Kohrt "to offer proof that would allow a rational fact-finder to conclude that the proffered reason was not the true reason for the employment action, and that age was." *Yates v. Rexton, Inc.*, 267 F.3d 793, 800 (8th Cir. 2001) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993)). The elements of Kohrt's prima facie case

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[8] Courts should remain flexible in applying the *McDonnell Douglas* analysis, and vary the elements of the test in accordance with the facts of each individual case. *Schiltz*, 115 F.3d at 1412 (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 n.6 (1981)).

combined with evidence of pretext and disbelief of the proffered reason may *permit* an inference of intentional discrimination, but do not *require* it. *Ryther*, 108 F.3d at 837. Kohrt can avoid summary judgment at this stage only by presenting "evidence that considered in its entirety, (1) creates a question of material fact as to whether the defendant's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision." *Hindman v. Transkrit Corp.*, 145 F.3d 986, 991 (8th Cir. 1998) (citations omitted); *see also Yates*, 267 F.3d at 800 (citing *Fisher*, 225 F.3d at 921). At all times, Kohrt retains the burden of persuasion. *Hindman*, 145 F.3d at 991 (citation omitted).

Assuming without deciding that Kohrt has established a prima facie case of age discrimination, defendant MEC has met its burden of articulating a legitimate, nondiscriminatory reason for refusing to rehire him. MEC presents evidence that it did not rehire Kohrt as a lineman in March 1999 because he lacked recent lineman experience. Defendants' Statement of Undisputed Facts in Support of Summary Judgment at ¶¶ 23, 26. Christopher Walton was interviewed for the position, in part because he had recent experience. *Id.* at ¶ 25. Even if Kohrt's application had progressed, MEC indicates that it has a policy against hiring persons previously terminated for cause, and that he had been terminated for cause. *Id.* at ¶¶ 27, 28. The burden is therefore on Kohrt to prove that these proffered reasons are pretextual and that his age was the true reason for the action.

Kohrt argues that there is evidence of pretext consistent with a reasonable inference of age discrimination, precluding summary judgment on his age discrimination claim. He argues that MEC failed to follow its own policies in his termination and application for rehiring, that MEC gave conflicting reasons for refusing to rehire him, and that MEC's reasons for terminating him cannot withstand scrutiny. MEC argues that Kohrt is precluded from arguing pretext based

on the events surrounding his prior termination because he did not litigate following the EEOC's determination on that issue. Assuming that Kohrt is not precluded from making these arguments, and assuming without deciding that the evidence creates a question of material fact as to whether MEC's proffered reasons for failing to rehire Kohrt are pretextual, he still cannot survive summary judgment because the evidence does not create a reasonable inference that age was a determinative factor in the decision not to rehire him. *See Hindman*, 145 F.3d at 991.

Kohrt was forty-nine years old when he applied for a job with MEC in March 1999. Plaintiff's Revised Statement of Facts 1.04.02 (hereinafter "Plaintiff's Statement of Facts") at ¶ 88. However, MEC's and Stein's inconsistent explanations regarding the hiring process and the reason for not hiring Kohrt, Plaintiff's Revised Response to Defendant's Statement of Undisputed Facts (hereinafter "Plaintiff's Response") at ¶ 23, do not support a finding of age discrimination. Neither does the evidence that MEC hired five younger linemen (with an average age of thirty-two) since the time of Kohrt's application, Plaintiff's Statement of Facts at ¶ 87, or the fact that Kohrt possessed the minimum qualifications necessary for the lineman position. Plaintiff's Response at ¶ 23. Kohrt argues in his brief that he did have recent lineman experience, and that Stein's testimony to the contrary suggests age discrimination. Kohrt admits, however, that at the time he applied for the lineman position in March 1999, he had not worked as a lineman since October 1987. Plaintiff's Response at ¶ 26. Kohrt also argues that Virginia Dasso's "reservation on whether Mr. Kohrt was qualified for the lineman's position was whether he could climb a pole. She would not have asked this question were Mr. Kohrt age 25." Plaintiff's Resistance to MEC's & TEW's Motion for Summary Judgment at 7; *see also* Plaintiff's Statement of Facts at ¶ 81. Dasso actually testified, in response to a question asking if she knew of any reason why Kohrt couldn't perform the lineman's duty for MEC, "I don't know

if Harry can climb a pole. That would have been required." Plaintiff's 1/4/02 Revised Appendix to Response to Motion for Summary Judgment at 108 (hereinafter "Plaintiff's Appendix") (Dep. of Virginia Dasso at 21). This comment does not indicate age discrimination, and it was made during Dasso's June 2001 deposition, well after the present action was filed. In addition, Dasso was not involved in the decision not to rehire Kohrt and did not even know about his application. *Id.* at 107 (Dep. of Dasso at 20). Her testimony cannot support a finding of intentional discrimination because she did not take part in the hiring decision and because it has no causal relationship to the decision not to rehire. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995). Lastly, Kohrt argues that a comment in the deposition of Russell White evidences age discrimination. *See* Plaintiff's Statement of Facts at ¶ 80. White stated that he is about the same age as Kohrt (White was fifty-four years old at the time) and that being a lineman is "not something that you might want to do after you've been around a while," clarifying that "I don't know that physically he [Kohrt] couldn't do it, but maybe psychologically you may not want to do it" after having been in a supervisory position. Plaintiff's Appendix at 186-87 (Dep. of Russell White at 32-33). Again, this testimony is insufficient to create a reasonable inference of age discrimination, there is no evidence that White was involved in the hiring process for the position, and it was given during a June 2001 deposition, well after the hiring decision was made. *See Hutson*, 63 F.3d at 779.

Although it is unfortunate that Kohrt was not able to return to the company where he had worked for over thirty years, his evidence is insufficient to permit a rational fact-finder to conclude that he was not rehired due to intentional discrimination based on age. Summary judgment will be granted on Kohrt's ADEA and ICRA claims.

D. Interference with Contract Claim

In Count III, Kohrt alleges that Jane Tew intentionally and improperly interfered with his employment relationship with MEC because "he would not join in her sexual bantering, cursing and otherwise fawn over her as a boss and because he expressed his opposition to company policies which he believed created unsafe working conditions for line crews." First Amended Complaint at ¶ 10; *see also* ¶¶ 36-37. He further alleges that Tew caused him to be fired by falsely accusing him of poor performance. Defendant Tew argues that Kohrt's interference with contract claim should be dismissed in part because it is founded on sex discrimination and is therefore preempted by the ICRA, meaning that the ICRA provides the exclusive remedy for the discriminatory conduct upon which the claim is based. Alternatively, Tew argues that she cannot be held liable on this claim because as Kohrt's supervisor, she was acting as an agent of a party to the employment contract. Plaintiff argues that the interference with contract claim is not preempted because it is separate and does not require proof of discrimination. He also contends that an at-will employment relationship can support an interference claim.

In general, a person who intentionally and improperly interferes with the performance of a contract between another and a third person commits a tort. *Nesler v. Fisher & Co., Inc.*, 452 N.W.2d 191, 194-95 (Iowa 1990). The elements of this tort include the following: (1) plaintiff had a contract with a third party; (2) defendant knew of the contract; (3) defendant intentionally and improperly interfered with the contract; (4) the interference caused the third party or plaintiff not to perform, or made performance more burdensome or expensive; and (5) damage resulted. *Id.* at 198 (citations omitted).[9] A claim of interference with contract can only be committed by a

[9] The Iowa Supreme Court has also held that a contract terminable at will is more properly protected as a prospective business advantage rather than as a contract, and therefore a

third party, not by a party to the contract. *Harbit v. Voss Petroleum, Inc.*, 553 N.W.2d 329, 331 (Iowa 1996) (citing *Grahek v. Voluntary Hosp. Coop. Assoc. of Iowa, Inc.*, 473 N.W.2d 31, 35 (Iowa 1991) and *Nesler*, 452 N.W.2d at 194); *see also Knutson v. Sioux Tools, Inc.*, 990 F. Supp. 1114, 1125-26 (N.D. Iowa 1998) (discussing *Harbit* and *Grahek*). Supervisors are not third parties to an employee's employment contract. *See id.* (citing *Harbit*, 553 N.W.2d at 331).

It is undisputed that Kohrt's employment was at-will. Plaintiff's Response at ¶ 15. It is also clear from the record that Jane Tew was Kohrt's supervisor at the time she allegedly interfered with his employment relationship with MEC. I conclude that as a supervisor, Tew was an agent of MEC and not a third party to the employment relationship between Kohrt and MEC, and therefore cannot be liable on an interference with contract claim. *See Knutson*, 990 F. Supp. at 1125-26; *Harbit*, 553 N.W.2d at 331. Tew is entitled to summary judgment on Count III.[10]

E. Wrongful Discharge Claim

In Count IV, Kohrt alleges wrongful discharge in violation of the public policy of promoting workplace safety. He states that MEC terminated him and refused to rehire him as a lineman in determinative part because of his support for making the safety of linemen "more important than cost savings on the issues of one-man work, fall arrest and fall protection and first aid response time." First Amended Complaint at ¶ 40. Defendant MEC argues that Kohrt cannot establish a prima facie case of wrongful discharge, and Kohrt responds that he has established his case and should be able to present his claim to a jury.

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higher standard of proof applies, requiring substantial evidence that the defendant's predominant or sole motive was to damage the plaintiff. *Compiano v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 462, 464 (Iowa 1999) (citation omitted).

[10] It is unnecessary to consider defendant Tew's alternate argument regarding preemption.

Iowa law recognizes a common-law exception to the general rule of at-will employment when an at-will employee is discharged by an employer in violation of public policy. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 281 (Iowa 2000). In order to establish a claim for wrongful discharge in violation of public policy, Kohrt must establish (1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge. *Id.* (citing *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998)). With respect to causation, the protected conduct must be the determinative factor in the decision to terminate the employee. *Id.* at 289 (citing *Teachout*, 584 N.W.2d at 301-02). A wrongful discharge occurs when a protected activity has been recognized through the existence of an underlying public policy which is undermined when an employee is discharged from employment for engaging in the activity. *Id.* at 281 (citations omitted). The Iowa Supreme Court limits the tort action for wrongful discharge to "cases involving only a well-recognized and clear public policy," *id.* at 282 (citation omitted), and has not been asked to extend the sources of public policy beyond Iowa statutes and the Iowa Constitution. *Id.* at 283. When the Iowa Supreme Court has not previously identified a particular public policy to support an action, the employee must first identify a clear public policy which would be adversely impacted if dismissal resulted from the conduct engaged in by the employee. *Id.* at 282 (citations omitted). The existence of a public policy and the issue of whether that policy is undermined by a discharge from employment present questions of law for the court to decide. *Id.* (citations omitted). Causation is more suitable for resolution by the finder of fact. *Id.* (citation omitted).

Kohrt argues that Iowa Code § 88.1 provides a statutory basis for his protected activity. That statute provides, in relevant part:

It is the policy of this state to assure so far as possible every working person in the state

safe and healthful working conditions and to preserve human resources by:

> 1. Encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and perfect existing programs for providing safe and healthful working conditions. . . .
>
> 12. Encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

Iowa Code § 88.1. Kohrt argues that his "conduct of expressing his opposition to a company policy . . . falls within an area of clearly articulated public policy." Plaintiff's Resistance to MEC's & TEW's Motion for Summary Judgment at 9. It is not clear from Kohrt's brief whether he is referring to MEC's policy regarding the use of one- or two-person crews in responding to calls, or the use of body belts or harnesses for fall restraint when linemen are working out of buckets on power lines. In his revised response to defendant's statement of undisputed facts, however, Kohrt clarifies that he believes he was terminated for his stand on the one-person work policy. Plaintiff's Response at ¶ 43. He believes that one person can safely investigate a situation, but should not perform work alone. Plaintiff's Statement of Facts at ¶ 29. Kohrt believes that another person should be available to provide first aid and cardiopulmonary resuscitation (CPR) assistance in the event of an emergency. *Id.* at ¶¶ 26-28, 34. Linemen work around high levels of voltage which can cause serious injury and death by electric shock. *Id.* at ¶ 32. One lineman at MEC temporarily lost his eyesight while performing work alone. *Id.* at ¶ 36.

The public policy Kohrt alleges here does not fit with other public policies that have been recognized in Iowa and recently mentioned by the Iowa Supreme Court. *See Fitzgerald*, 613 N.W.2d at 281-82 (citing *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998) (public policy in favor of permitting employees to make demand for wages due gives rise to an action for wrongful discharge for making a demand for wages); *Teachout*, 584 N.W.2d at 299 (public

policy of this state in favor of reporting suspected child abuse gives rise to an action for wrongful discharge for reporting or intending to report child abuse); *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) (public policy of this state in favor of permitting employees to seek unemployment compensation gives rise to an action for wrongful discharge for seeking partial unemployment benefits); *Springer v. Weeks & Leo Co., Inc.*, 429 N.W.2d 558, 560 (Iowa 1988) (public policy of this state in favor of permitting employees to seek workers' compensation for work-related injuries gives rise to an action for wrongful discharge for asserting a right to workers' compensation benefits)). In addition, Kohrt admits that in 1998, a labor arbitrator found that MEC's policy on work crews did not violate the collective bargaining agreement. Plaintiff's Response at ¶ 45. The arbitrator also found that the policy did not violate OSHA standards. Plaintiff's Statement of Facts at ¶ 43.

Nevertheless, viewing all the facts in the light most favorable to Kohrt and giving him the benefit of all reasonable inferences that may be drawn from the record, I conclude that he has presented just enough evidence to establish a prima facie case of wrongful discharge in violation of public policy. Kohrt was an at-will employee. Plaintiff's Response at ¶ 15. He has identified a clear public policy in favor of promoting workplace safety which would be adversely impacted if dismissal resulted from his conduct in resisting MEC's one-person work policy. *See Fitzgerald*, 613 N.W.2d at 282. Kohrt's conduct included articulating his position on one-person work in a meeting and in a letter to Jane Tew. Plaintiff's Response at ¶ 42. He was terminated, and has generated a genuine issue of material fact on the causal connection between his conduct and the discharge. *See Fitzgerald*, 613 N.W.2d at 281. Several MEC managers were critical of Kohrt's resistance to (or lack of support for) the company policy on one-person work. Plaintiff's Statement of Facts at ¶¶ 16, 17, 19-21. Tew considered Kohrt's action in voicing his opposition

to the one-person work policy at a safety meeting to be misconduct. *Id.* at ¶ 23. MEC has refused to send a second person to a site in some circumstances, Plaintiff's Response at ¶ 41, and has threatened to discipline and terminate other employees if their efforts in support of their positions on safety issues cause disruption. Plaintiff's Statement of Facts at ¶¶ 40, 41. A reasonable fact-finder could find that Kohrt's conduct in resisting the one-person work policy was the determinative factor in the decision to discharge him. *See Fitzgerald*, 613 N.W.2d at 289 (citing *Teachout*, 584 N.W.2d at 300). Summary judgment will be denied on this count.

III. RULING AND ORDER

Defendants' motion for summary judgment is GRANTED as to Counts I, II, and III, and DENIED as to Count IV. It is ORDERED that Jane Tew is DISMISSED as a defendant in this case.

DATED this 5th day of February, 2002.

RONALD E. LONGSTAFF, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

HARRY KOHRT,	)	
	)	NO. 3:00-cv-30090
Plaintiff,	)	
	)	RULING ON DEFENDANT'S MOTION
vs.	)	FOR JUDGMENT AS A MATTER
	)	OF LAW AND MOTION FOR
MIDAMERICAN ENERGY CO.,	)	NEW TRIAL
	)	
Defendant.	)	

The above resisted motions are before the Court following hearing (#96). The Court has carefully considered the arguments and statements of counsel, their written submissions and the trial record, and now rules as follows on the issues presented. The case is before the undersigned by the consent of the parties pursuant to 28 U.S.C. § 636(c).

BACKGROUND

Plaintiff Harry Kohrt was fired by MidAmerican Energy Co. (MidAmerican) on December 7, 1998 for alleged unsatisfactory performance as set forth in a termination letter of that date. Kohrt had worked for MidAmerican or its predecessors for over thirty years. At the time of his termination, he was a safety and training coordinator for MidAmerican in the Davenport, Iowa area.

Kohrt sued MidAmerican and his supervisor Jane Tew. As against MidAmerican, Kohrt alleged discriminatory discharge in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 and the Iowa Civil Rights Act (ICRA),

Iowa Code ch. 216, retaliation, interference with contract, and wrongful discharge in violation of public policy derived from the Iowa Occupational Safety and Health Act (IOSHA), Iowa Code ch. 88. MidAmerican and Tew moved for summary judgment. In a February 5, 2002 ruling, Chief Judge Longstaff, to whom the case was then assigned, granted the motion and dismissed all of the claims except the wrongful discharge claim against MidAmerican. Tew was dismissed as a defendant. The remaining claim came before the undersigned and a jury for trial commencing March 11, 2002.[1] On March 13, 2002, the jury returned a verdict in favor of Kohrt and against MidAmerican in the total amount of $720,000. Of this the jury found damages for past wages and benefits of $145,000, future wages and benefits in the amount of $475,000, and past mental pain and suffering in the amount of $100,000. No award was made for future mental pain and suffering. MidAmerican now moves for judgment as a matter of law or, alternatively, for new trial. Fed. R. Civ. P. 50(b), 59.

JUDGMENT AS A MATTER OF LAW (JAML)

A.

MidAmerican raises four purely legal issues in support of its JAML motion: (1) no public policy wrongful discharge action emanates from IOSHA; (2) if there is such a cause of action, the

[1] The Court has supplemental jurisdiction over the wrongful discharge claim. 28 U.S.C. § 1367(a).

requirements of Iowa Code § 88.9(3) dealing with discrimination against, and discharge of, an employee who has engaged in conduct protected by IOSHA must be applied; (3) an April 15, 1998 arbitration is issue preclusive; and (4) damages for emotional distress are not recoverable without medical testimony. MidAmerican raises one sufficiency of the evidence issue; that Kohrt's opposition to company policies he considered to be unsafe was not adequately causally connected to his termination.

The last, fact-based issue is judged by the following standard:

> Judgment as a matter of law is proper "[o]nly when there is a complete absence of probative facts to support the conclusion reached" so that no reasonable juror could have found for the nonmoving party.

Henderson v. Simmons Foods, Inc., 217 F.3d 612, 615 (8th Cir. 2000) (quoting Hathaway v. Runyon, 132 F.3d 1214, 1220 (8th Cir. 1997)). To prevail, MidAmerican must demonstrate that all of the evidence points in its direction and "is susceptible of no reasonable interpretation sustaining" Kohrt's claim. Ogden v. Wax Works, Inc., 214 F.3d 999, 1006 (8th Cir. 2000). In viewing the evidence, "the court must assume as proven all facts that the nonmoving party's evidence tended to show, give [him] the benefit of all reasonable inferences, and assume that all conflicts in the evidence were resolved in [his] favor." Hathaway, 132 F.3d at 1220; see Haynes v. Bee-Line Trucking Co., 80 F.3d 1235, 1238 (8th Cir. 1996).

B.

1. The Existence of a Public Policy Wrongful Discharge Action

(a) The Claim and Statutory Basis

Kohrt's job involved safety and safety training. He alleged he was fired because he had opposed company policies concerning the use of one-man work crews and certain fall-arrest equipment. In 1995 MidAmerican merged with the utility company Kohrt was then employed with, Iowa-Illinois Gas and Electric Company. As a cost-saving measure MidAmerican promoted the use of one-man work crews whenever possible, a change from what Kohrt was used to. Kohrt favored the use of two-man crews except for the simplest tasks, and he believed the linemen should make the decision about whether a given situation required a two-man crew. It was a safety issue for Kohrt. If one worker was injured or needed help, the other was available to assist. By 1996 the issue had become a significant point of contention between management and labor, and ultimately was the subject of an arbitration discussed later.

Linemen often work at heights in baskets or buckets raised from a truck. The fall-arrest issue had to do with whether the emphasis should be on fall-restraint or fall-arrest equipment. The fall-restraint system favored by Kohrt's superiors used a body belt attached to a short lanyard to restrain the worker from falling out of the basket. The safety problem with a body belt, as

Kohrt and the linemen who testified viewed it, was that if the worker fell out of the basket the worker would dangle from a belt at his or her midsection. The fall-arrest system Kohrt favored put the worker in a harness which gave better support and kept the worker upright if the worker fell out.

IOSHA begins by articulating the public policy of Iowa concerning worker safety: "It is the policy of this state to assure so far as possible every working person in the state safe and healthful working conditions and to preserve human resources . . . ." Id. § 88.1. The statute goes on to identify a number of ways this public policy is to be accomplished, including by:

> 1. Encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and perfect existing programs for providing safe and healthful working conditions.
>
> . . . .
>
> 12. Encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

Id. §§ 88.1(1), (12).[2] IOSHA also prohibits discrimination against, and discharge of, an employee "because the employee has filed a complaint or instituted or caused to be instituted a

[2] The relevant provisions of IOSHA involved in this case mirror those of the federal OSHA as identified in the discussion which follows. 29 U.S.C. § 651 et seq. The federal and state public policies behind the statutes are identical. Id. §§ 651(b)(1), (13).

proceeding under or related to this chapter . . . or because of the exercise by the employee on behalf of the employee or others of a right afforded by this chapter." Id. § 88.9(3). An employee claiming discharge or discrimination prohibited by IOSHA may file a complaint with the labor commissioner who is to investigate and is authorized to commence an action in court to secure relief for the employee. Id.

(b) The Arguments

MidAmerican argues "[n]o cause of action exists under Section 88.1, Code of Iowa" standing alone, and that the section must be read with others in IOSHA, specifically § 88.9(3) which equips the labor commissioner, and only the labor commissioner, with the authority to remedy discrimination or discharge in violation of the Act. (Def. Mem. at 3). MidAmerican does not dispute that IOSHA articulates a clear public policy in favor of promoting workplace safety, but contends it provides its own mechanism to enforce that policy which ought to be viewed as exclusive of any private right of action for wrongful discharge. MidAmerican believes to allow a parallel private right of action interferes with the means provided by the legislature and effectively prevents the commissioner from performing the commissioner's enforcement function. MidAmerican finds support for its argument in the language of Iowa Code § 88.20, part of which cautions against construing IOSHA "to enlarge or diminish or affect

in any other manner the common law or statutory rights, duties, or liabilities of employers and employees . . . ."

Kohrt relies on the Court's February 5, 2002, ruling denying summary judgment with respect to the wrongful discharge claim. In that ruling Chief Judge Longstaff, applying the analysis in Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1998), and subsequent case law, held a claim for wrongful discharge in violation of public policy could arise from a discharge which undercut the "clear public policy in favor of promoting workplace safety" in IOSHA. (Ruling at 17). The Court further held that Kohrt had presented enough evidence to make the case that the policy "would be adversely impacted if dismissal resulted from [Kohrt's] conduct in resisting [MidAmerican's one-man crew] policy." (Id.) Kohrt argues the summary judgment ruling is the law of the case with respect to the existence of a private right of action, and that the ruling correctly applied the Springer analysis as developed in Iowa case law. Key cases employing this analysis are: Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 283 (Iowa 2000)(public policy must be "well recognized and clearly defined" for exception to the at-will employment doctrine to apply); Teachout v. Forest City Comm. Sch. Dist., 584 N.W.2d 296, 300 (Iowa 1998)("employee's activity must advance a well-recognized and defined public policy of the state"); Tullis v. Merrill, 584 N.W.2d 236, 238-39 (Iowa 1998) (public policy wrongful discharge action

recognized for terminations in violation of anti-discrimination provision in the Iowa Wage Payment Collection Law, Iowa Code § 91A.10(5)); Lara v. Thomas, 512 N.W.2d 777, 782 (Iowa 1994)("retaliatory discharge of an employee who files a claim for partial unemployment benefits 'serves to frustrate a well-recognized and defined public policy of the state,'" quoting Springer, 429 N.W.2d at 560); Springer, 429 N.W.2d at 560 (articulating the original standard and holding that a wrongful discharge cause of action lies where "the discharge serves to frustrate a well-recognized and defined public policy of the state").

To MidAmerican's argument that section 88.20 is a statutory barricade to a wrongful discharge action, Kohrt responds that a full reading of the provision indicates it is irrelevant to the issue. Section 88.20 states in whole:[3]

> Nothing in this chapter shall be construed to supersede or in any manner affect any workers' compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

(c) Discussion

Section 88.20. Taking the § 88.20 issue first, the Court agrees with Kohrt that the provision only pertains to the relative

[3] Section 88.20 is virtually identical to the federal OSHA's § 4(b)(4), 29 U.S.C. § 653(b)(4).

rights of employers and employees under existing law pertaining to "injuries, diseases, or death of employees" in connection with their employment. The words "injuries . . . of employees" logically refer to physical injuries, and coupled with "diseases, or death" can have no other meaning. The tort of wrongful discharge in violation of public policy is founded on "interference with the contract of hire," a property interest. Springer, 429 N.W.2d at 560. It is not a law "with respect to injuries, diseases, or death of employees."

Law of the Case. "The law of the case doctrine prevents relitigation of a settled issue in a case and requires that courts follow decisions made in earlier proceedings to insure uniformity of decisions, protect the expectations of the parties and promote judicial economy." In re Just Brakes Corp. Sys., 293 F.3d 1069, 1072 (8th Cir. 2002)(quoting Klein v. Arkoma Prod. Co., 73 F.3d 779, 784 (8th Cir.), cert. denied, 519 U.S. 815, 816 (1996)). Absent final judgment or appellate mandate, an issue is not "settled," but the concerns which underlie the law of the case doctrine are relevant when a court is asked to reconsider an issue already decided in a case. More specifically, this Court believes a decision on the same issue in the same case by another judge is entitled to appropriate consideration and deference from a subsequent judge to whom the case is assigned. It is persuasive if not legally binding authority. This Court would reverse a prior

ruling on an issue of law made by another judge in the same case only if convinced the former ruling was clearly erroneous or subsequent developments in the law had made the first ruling wrong. Neither circumstance is present here. The existence of a public policy wrongful discharge cause of action stemming from IOSHA has not been resolved by the Iowa courts and, though reasonable legal minds may differ, finds support in Iowa case law.

Springer and its Progeny. Springer first recognized the public policy exception to the at-will employment doctrine in the case of a discharge for filing a workers' compensation claim. 429 N.W.2d at 560-61. The principle has been extended to enforce a variety of public policies. See, e.g., cases cited supra, at 7-8. Whether the Iowa Supreme Court would do so with respect to the public policy articulated in IOSHA is, as noted, an open question which places this federal court in the position of assessing what the Iowa Supreme Court would be likely to do. Cassello v. Allegiant Bank, 288 F.3d 339, 340 (8th Cir. 2002)(where highest court of state has not addressed a legal issue, federal court applies rule of decision it believes highest state court would apply). Two cases in particular provide an indication, Tullis and Fitzgerald, supra.

The Iowa Wage Payment Collection Law ("wage payment law") at issue in Tullis is a close analog. Iowa Code ch. 91A. IOSHA and the wage payment law are in the same "Employment Services" subtitle

of Title III of the Iowa Code. Iowa Code § 91A.10(5), in language practically indistinguishable from that in § 88.9(3), also prohibits discharge or discrimination against an employee for exercising certain rights under the wage payment law. As with IOSHA, any employee who feels discriminated against may file a complaint with the labor commissioner who is authorized to bring an action to obtain relief for the employee. Like IOSHA, only the labor commissioner may sue to enforce the anti-discrimination provision. The relief specified is the same in both statutes.

Referring expressly to § 91A.10(5) Tullis held "Iowa Code chapter 91A plainly articulates a public policy prohibiting the firing of an employee in response to a demand for wages due under an agreement with the employer." 584 N.W.2d at 239. The Tullis court did not deal with the argument MidAmerican makes here, that there should be no private cause of action for a violation of the anti-discrimination provision. Id. at 239 n.3. However, it is difficult to avoid the significance of its holding with respect to similar provisions in IOSHA.[4]

More recently, in Fitzgerald the Iowa Supreme Court identified § 88.9(3) and § 91A.10(5) as among those specific statutes which provide protection for employees. 613 N.W.2d at

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[4] Chapter 91A also recognizes a right of action by an employee for wages due and liquidated damages, and upon assignment, the labor commissioner may sue for the employee. See Iowa Code §§ 91A.8, .10(1)-(3). This right to sue has no counterpart in IOSHA, but IOSHA is not concerned with collecting debts.

283 & n.3. The court continued that the public policy exception to the at-will employment rule was not limited to such statutes, but included other statutes which define a clear public policy and "imply a prohibition against termination from employment to avoid undermining that policy." Id. This dicta suggests that § 88.9(3), like § 91A.10(b), may serve as the foundation for a public policy wrongful discharge action. But it is also contradictory because the Fitzgerald court included the anti-retaliation provision in the Iowa Civil Rights Act (ICRA) among the specific statutes which protect employees. Id.; see Iowa Code § 216.11(2) (formerly codified at § 601A.11(2)). As discussed below, the court has held ICRA preempts a wrongful discharge action based on conduct within its purview.

MidAmerican correctly states that, in all likelihood, an employee cannot advance a private, statutory lawsuit under the authority of § 88.9(3). Section 88.9(3) mirrors section 11(c) of the federal OSHA. 29 U.S.C. § 660(c). It is probable the Iowa Supreme Court would follow the lead of those federal courts which have considered the issue in holding that there is no private right of action to enforce the anti-discrimination provision in OSHA. See George v. Aztec Rental Ctr., Inc., 763 F.2d 184, 186-87 (5th Cir. 1985); Taylor v. Brighton Corp., 616 F.2d 256, 259-64 (6th Cir. 1980); Fletcher v. United Parcel Serv., Local Union 705, 155 F. Supp. 2d 954, 957 (N.D. Ill. 2001); Pitchford v. Aladdin Steel,

Inc., 828 F. Supp. 610, 613-14 (S.D. Ill. 1993). Any action under section 11(c) is exclusively that of the Secretary of Labor and, so too, under Iowa Code § 88.9(3) would be exclusively that of the Iowa labor commissioner. See Taylor, 616 F.2d at 259; Fletcher, 155 F. Supp. 2d at 957 (citing Powell v. Globe Indus., Inc., 431 F. Supp. 1096, 1100 (N.D. Ohio 1977)). The legal issue here, however, is not whether an employee may sue under § 88.9(3), but whether the employee may pursue a parallel common-law wrongful discharge cause of action under the line of cases following Springer, a different issue.

The Iowa Supreme Court has considered whether an employee may pursue a separate cause of action apart from a statutory remedy for unlawful discharge in cases discussing the preemptive effect of ICRA. Iowa Code ch. 216. It is an unfair employment practice under ICRA to discharge or discriminate against an employee because of age, race, creed, color, sex, national origin, religion or disability. Id. § 216.6(1)(a). A person claiming discrimination must first seek administrative relief by filing a complaint with the Iowa civil rights commission. Id. § 216.16(1). After the complaint has been on file for a period of time, the complainant may seek a release to commence an action in court. Id. § 216.16(2). The Iowa Supreme Court has held ICRA is preemptive and exclusive of other causes of action based on conduct which would be actionable under its provisions as an unfair employment

practice. See, e.g., Channon v. United Parcel Serv., Inc., 629 N.W.2d 835, 857-58 (Iowa 2001); Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993); Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 638 (Iowa 1990); Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 196 (Iowa 1985). More specifically, the Iowa Supreme Court has stated "[o]ur civil rights statute . . . preempts an employee's claim that the discharge was in violation of public policy when the claim is premised on discriminatory acts." Borschel v. City of Perry, 512 N.W.2d 565, 567-68 (Iowa 1994). The court has not explained at length the reasons for giving preemptive effect to ICRA, but the discussion in Northrup and Vaughn suggests the court viewed the broad remedial purposes of the statute and its distinctive procedural requirements of a predicate administrative complaint and prompt initiation of any lawsuit after termination of the administrative process as evincing a legislative intent that ICRA be the sole avenue to remedy the conduct proscribed. 372 N.W.2d at 197; 459 N.W.2d at 638.

The ICRA preemption rule is not easily transferable to § 88.9(3) of IOSHA. Like ICRA, IOSHA requires the filing of a complaint with the labor commissioner in a comparatively short period of time (30 days), and provides for administrative investigation. But the process stops there unless the commissioner elects to sue. Unlike ICRA the employee does not have the right to initiate an action in court after administrative investigation.

Moreover, though IOSHA is broadly remedial, the anti-discrimination provision itself is narrow, as the paucity of case law indicates. MidAmerican does not have the argument that recognition of a parallel cause of action for conduct prohibited by § 88.9(3) threatens to disrupt the efficacy of a broad remedial statute with a carefully reticulated scheme of enforcement.

In light of the undeniably clear public policy expressed in IOSHA, the Iowa case law tending to support the summary judgment ruling, and the corresponding lack of case law to the contrary, the Court will not retreat from the summary judgment ruling recognizing Kohrt's cause of action for wrongful discharge in violation of the public policy articulated in IOSHA.[5]

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[5] Both sides refer the Court to case law from other jurisdictions in support of their respective positions. See Sherman v. Kraft Gen. Foods, Inc., 651 N.E.2d 708, 712-13 (Ill. App. 1995)(claim of discharge for reporting asbestos-related occupational hazards recognized as stating a claim for discharge in violation of public policy arising from state constitution and federal OSHA § 11(c), and citing cases from other jurisdictions recognizing cause of action where plaintiff alleges discharge in retaliation for reporting occupational hazards); Schweiss v. Chrysler Motors Corp., 922 F.2d 473, 474 (8th Cir. 1990)(complaint that discharge of at-will employee was because employee reported employer's violations of OSHA stated claim for wrongful discharge under Missouri law which was not preempted by OSHA); Ohlsen v. DST Indus., Inc., 111 Mich. App. 580, 584, 314 N.W.2d 699, 701-02 (Mich. App. 1981)(Michigan occupational safety statute, MIOSHA, containing similar prohibition against retaliatory discharge held exclusive of a private wrongful discharge action, citing Schwartz v. Michigan Sugar Co., 106 Mich. app. 471, 480, 308 N.W.2d 459, 466-67 (Mich. App. 1981). Unlike IOSHA, the Michigan statute gave the employer and employee a right to administrative hearing and judicial review of a determination by the state department of labor on whether the anti-discrimination statute was violated. See

(continued...)

2. The Requirements of Iowa Code § 88.9(3)

MidAmerican argues that if Kohrt's wrongful discharge action is derived from the public policy in favor of workplace safety expressed in chapter 88, then he should be required to satisfy the statutory prerequisites for a claim of retaliatory discharge outlined in the statute and administrative regulations, specifically, the filing of a complaint. Iowa Code § 88.9(3) prohibits discrimination or discharge "because the employee has filed a complaint . . . under or related to this chapter . . . ." MidAmerican contends that there is no evidence Kohrt lodged a complaint concerning either the one-man crew or fall-arrest equipment issues and, accordingly, that element of an action under the statute has not been proved.

MidAmerican gets some support for this argument from the Tullis case. After concluding Tullis' retaliatory discharge claim was actionable, the court held that a formal letter written by Tullis to the employer constituted a complaint relating to unpaid wages for the purposes of § 91A.10(5). 584 N.W.2d at 239-40. The court arguably appeared to assume the lodging of a complaint was an

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[5](...continued)
M.C.L.A. 408.1065(1)-(8). The Michigan courts held an employee had to exhaust administrative remedies. 314 N.W.2d at 702; 308 N.W.2d at 463).

These cases illustrate the arguments on both sides, but are of limited value in predicting how the Iowa Supreme Court would rule.

element of the claim. However, the actual holding in Tullis was that an employer can not fire an employee "in response to a demand for wages," which is much broader. Id. at 239.

If an employee is not suing under the statute, there is no reason to apply the elements of a statutory cause of action. The elements of the tort of wrongful discharge in violation of public policy are now clearly established in Iowa law and apply regardless of the statute under which the public policy arises. The elements are "(1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge." Fitzgerald, 613 N.W.2d at 281. What activity is protected is determined by assessing whether the employee's dismissal for engaging in the activity "jeopardizes or undermines the public policy." Id. at 283-84; see Teachout, 584 N.W.2d at 301.

The jury instructions identified the protected activity as good faith opposition to company policies which Kohrt reasonably believed subjected employees to the risk of serious injury or death. The facts, viewed favorably to Kohrt, help illustrate the claimed public policy implications of his discharge. Kohrt was a safety and training coordinator. Safety was his job. He advocated two-man crews and the use of harnesses as fall-arrest equipment in safety meetings and in discussions with, and in the presence of, his operations manager, Donald Welvaert, and others in company

management. His opinions were well known. Though he softened them when asked to put his opinions in writing, he remained a proponent of two-man crews after an arbitrator ruled in favor of the company in a one-man crew case.

The safety of employees was a paramount concern of both MidAmerican and its employees. Maintaining and repairing high voltage power lines is hazardous work. Electricity can kill or maim in an instant. The record reflects a dispute about the extent to which Kohrt's policies diverged from company policies on the one-man crew and fall-arrest issues, but the jury could have found Kohrt was seen by safety director Tew, who authored his termination letter, and others as not supportive of the company's policies. If Kohrt was discharged because of his positions on these safety issues, the public policy in favor of encouraging reduction in occupational safety hazards and discourse between management and labor on the subject was undermined no less than if he had expressed his concerns in a formal complaint.

Even if the complaint requirement of section 88.9(3) were to be held to apply, the administrative regulations of the Iowa labor commissioner take a liberal view of what is protected by the statute. The range of protected complaints "'related to' the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application." Iowa

Admin. Code § 875-9.9(1)(88).[6] The regulation cautions that the "salutary principles of the Act" would be undermined if employees were discouraged from complaining to their employers about occupational safety and health matters. Such complaints, "made in good faith," are protected conduct under the commissioner's regulations. Id. § 875-9.9(3)(88). Generally, Iowa courts "accord administrative rules the force and effect of law as long as they are 'reasonable and consistent with legislative enactments.'" Greenwood Manor v. Dep't of Public Health, 641 N.W.2d 823, 835 (Iowa 2002)(quoting Harlan Sprague Dawley, Inc. v. Iowa State Bd. of Tax Review, 601 N.W.2d 66, 69 (Iowa 1999); First Iowa State Bank v. Iowa Dep't of Natural Res., 502 N.W.2d 164, 168 (Iowa 1993)). The regulations do not require that a complaint have any particular formality. Given the liberality of the regulations, it does not do any violence to the statute to regard Kohrt's expressions of opinion on safety issues at odds with the company's policies as tantamount to a protected "complaint."

3. The Arbitration/Issue Preclusion

Mike Banks is a MidAmerican lineman. On March 8 and March 9, 1997, he was sent out on trouble calls as a one-man crew. According to Banks at one of these he was going to change a cutout and called for assistance. His supervisor told him to wait and

[6] As with the statute, these regulations track those of the Secretary of Labor. 29 C.F.R. § 1977.9(a), (b).

ultimately determined he did not need assistance, though this is not clear from the arbitrator's findings. (Ex. 12 at 6-8). Banks filed a grievance and was supported by the union. The matter went to arbitration. As phrased by the arbitrator[7] "the issue in this dispute is whether the Company violated the collective bargaining agreement when it assigned the Grievant, Mike Banks, to work alone on March 8 and March 9, 1997; and, if so, what remedies shall issue?" (Id. at 2). The arbitrator held against Banks. He noted that a collective bargaining agreement provision requiring two-man crews for work on energized lines of 750 volts or over contained an exception for "replacing fuses and cutouts, operating disconnect switches, replacing street lamps and similar normal 'one-man operations.'" (Id. at 3). The arbitrator concluded that Banks was engaged in re-fusing work on the dates in question, expressly within the exception from the two-man crew requirement. The arbitrator also concluded MidAmerican did not violate OSHA regulations with respect to the work performed by Banks. Accordingly, the arbitrator held "the union failed to prove that the company violated either the party's collective bargaining agreement, the Company's safety rules or the OSHA standards." (Id.

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[7] There were five arbitrators, evidently two appointed by management and two by the union. Presumably the union and management arbitrators appointed the arbitrator who signed the award. Though the award states that two of the five arbitrators dissented and two assented to the fifth arbitrator's determination, it appears the fifth arbitrator, Mr. Bailey, effectively made the decision.

at 20). The arbitration was seen as a test case by both the union and management. Its result was taken by MidAmerican as a conclusive finding that its one-man crew policy did not violate the labor contract or OSHA, though the actual grievance holding was limited to the re-fusing work performed by Banks on March 8 and March 9, 1997.

MidAmerican argues the arbitrator's decision is issue preclusion on the question of whether Kohrt had a "good faith, reasonable belief" that the one-man crew policy subjected employees to the risk of serious injury or death.

Issue preclusion has four elements in Iowa:

> (1) [T]he issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and essential to that resulting judgment.

Dettmann v. Kruckenberg, 613 N.W.2d 238, 244 (Iowa 2000) (quoting American Family Mut. Ins. Co. v. Allied Mut. Ins. Co., 562 N.W.2d 159, 163-64 (Iowa 1997)); Brown v. Kassouf, 558 N.W.2d 161, 163 (Iowa 1997); see North Star Steel Co. v. MidAmerican Energy Holdings Co., 184 F.3d 732, 737 (8th Cir.), cert. denied, 528 U.S. 1046 (1999). Where issue preclusion is used defensively as MidAmerican does, neither mutuality of parties nor privity is required if the party against whom the doctrine is invoked was

> . . . so connected in interest with one of the parties in the former action as to have had a full and fair

> opportunity to litigate the relevant claim or issue and be properly bound by its resolution.

Dettmann, 613 N.W.2d at 244 (quoting Brown, 558 N.W.2d at 163-64, quoting in turn Opheim v. American Interinsurance Exch., 430 N.W.2d 118, 120 (Iowa 1988)); see American Family, 562 N.W.2d at 164. Ordinarily it is the defendant who is not the party to the earlier action, however, the Iowa Supreme Court has found defensive issue preclusion may also be used against a plaintiff who was a stranger to the former decision claimed to be preclusive. American Family, 562 N.W.2d at 164; Opheim, 430 N.W.2d at 120.

The Iowa Supreme Court has recognized that arbitration awards "may have preclusive effect in later litigation if the issues are identical." Deerfield Const. Co. v. Crisman Corp., 616 N.W.2d 630, 632 (Iowa 2000) (citing Westegard v. Davis County Comm. Sch. Dist., 580 N.W.2d 726, 728 (Iowa 1998)).

The issue involved in the arbitration -- whether the work performed by Mr. Banks on the dates in question violated the collective bargaining agreement -- is not the same as in the present case -- whether Kohrt had a good faith, reasonable belief that the company's one-man crew and fall-arrest equipment policies subjected employees to a risk of serious injury or death. That the arbitrator held the one-man work performed by Banks was permitted by contract and regulation does not necessarily preclude the reasonableness of Kohrt's beliefs. Moreover, the interpretation and applicability of OSHA regulations is ultimately a matter of law

for those charged with enforcing them, subject to judicial review. The arbitrator was not discharging that function. The Court doubts very much that the labor commissioner or the Iowa courts would give the arbitrator's decision preclusive effect in regulatory proceedings or on judicial review.

MidAmerican's arbitration issue preclusion argument appears to be founded on the Court's March 7, 2002 limine ruling in which the Court stated "plaintiff must show that he had a reasonable good faith belief <u>that a safety violation of sufficient magnitude was occurring</u> at the time . . ." (emphasis added). In finally submitting the case and after further consideration of the statute and the labor commissioner's regulations, the Court determined that Kohrt did not have to prove that a specific safety violation was occurring. Neither Iowa Code § 88.9(3) nor the labor commissioner's regulations require the complaint which results in a retaliatory discharge be meritorious or involve a specific allegation of a safety violation. It is sufficient if the complaint is "related to" IOSHA, that it is "about occupational safety and health matters." Iowa Code § 88.9(3); Iowa Admin. Code § 875-9.9(3). It would be anomalous if a wrongful discharge action required stricter proof.

4. Emotional Distress Damages

MidAmerican argues that medical testimony is required to prove emotional distress resulting from a discharge. The Court

disagrees in the case, as here, where the plaintiff does not contend the discharge resulted in any diagnosable mental or physical condition, but rather claims to have suffered the unpleasant feelings and anguish which, in common experience, result from termination, in this case after many years of employment. The Court continues to hold this view as expressed on the record at trial.

MidAmerican relies on Vaughn and Roling v. Daily, 596 N.W.2d 72 (Iowa 1999), for its argument here. Language taken out of context supports MidAmerican's reliance on Roling, however, the case involved a plaintiff who had been in a severe motor vehicle accident which resulted in claimed emotional injuries. The Iowa Supreme Court held a psychologist's testimony connecting plaintiff's major depressive and post-traumatic stress disorders to the accident was sufficient. Id. at 75-76. In Vaughn, a religious discrimination and wrongful discharge case, the plaintiff attributed physical ailments (a dramatic weight loss, colitis and bloody stools) to the termination of his employment. 459 N.W.2d at 636-37. The court held expert testimony was required to connect these conditions. Neither case stands for the proposition that medical testimony is always necessary to prove emotional distress damages resulting from an event. In fact, the Vaughn court identified the evidentiary standard as whether causation would be "within the common knowledge and experience of the layperson." Id.

at 637. Ordinarily, unless an actual mental or physical injury is claimed, lay jurors are capable of making this connection in an employment case.

The Iowa Supreme Court has held that emotional distress damages under ICRA are recoverable "without a showing of physical injury, severe distress, or outrageous conduct." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 526 (Iowa 1990). In City of Hampton v. Iowa Civil Rights Comm'n, 554 N.W.2d 532, 537 (Iowa 1996), the court reduced to $20,000, but still allowed, an award for emotional distress where the complainant presented relatively little evidence and no medical evidence in support of the claim for emotional distress damages. In Hamer v. Iowa Civil Rights Comm'n, 472 N.W.2d 259, 265 (Iowa 1991), the court reinstated a commission award of emotional distress damages the district court had reversed in part because no medical evidence supported them. In Niblo v. Parr, 445 N.W.2d 351, 355-57 (Iowa 1989), a public policy wrongful discharge case, the court recognized "humiliation" and "wounded pride" can cause mental anguish and "[d]istressful emotions not involving bodily injury are compensable" in holding that emotional distress need not be serious or severe to be compensable. These cases are against the evidentiary rule MidAmerican argues. If hurt feelings without injury are claimed, causation is not really a medical issue.

Federal courts do not require expert medical testimony to prove emotional distress damages caused by unlawful discrimination. Delph v. Dr. Pepper Bottling Co. of Paragould, Inc., 130 F.3d 349, 357-58 (8th Cir. 1997); Kim v. Nash Finch Co., 123 F.3d 1046, 1065 (8th Cir. 1997). Absent a statutory difference, "Iowa courts . . . traditionally turn to federal law for guidance in evaluating ICRA." Vivian v. Madison, 601 N.W.2d 872, 873 (Iowa 1999). If the issue were raised, this Court believes the Iowa Supreme Court would follow federal case law with respect to the recovery of emotional distress damages. There is no principled basis to distinguish between the evidentiary requirements for such damages under civil rights laws and for other types of wrongful discharge.

5. Causation

Finally, MidAmerican argues the evidence is insufficient to show that Kohrt's termination was causally related to his opposition to MidAmerican's one-man crew and fall-arrest equipment policies. Kohrt was required to prove that his opposition to the policies was "the determining factor" in MidAmerican's decision. See Fitzgerald, 613 N.W.2d at 289. "A factor is determinative if it is the reason that 'tips the scales decisively one way or the other,'" even if it is not the predominant reason behind the employer's decision. Teachout, 584 N.W.2d at 302 (citing Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 686 (Iowa 1990)). In

considering a sufficiency of the evidence question, every reasonable indulgence in favor of the prevailing party is given. See supra at 3.

The reasons stated in Kohrt's termination letter were that he had not communicated with safety director Tew as required, had not made satisfactory progress in retrofitting trucks to accommodate work positioning and fall protection equipment, and his lack of preparedness in training sessions. Kohrt produced evidence which called into question the accuracy and bona fides of each of these reasons. He testified he had attempted to contact Tew regularly and had left messages for her. Linemen who attended Kohrt's safety presentations testified he was a good and knowledgeable presenter. Kohrt had been given to the end of 1998 to identify trucks that needed retrofitting. He still had several weeks to go when he was fired. Ample evidence was before the jury from which it could have concluded that Kohrt had a strong commitment to safety.

There was other evidence from which the jury may have questioned the motivation behind Kohrt's termination. MidAmerican did not follow its own Performance Development Policy and Procedure in terminating Kohrt. (Ex. 13). On November 23, 1998, Kohrt was summoned to Des Moines where, upon his arrival, he was placed under oath and questioned on the record by human resources manager Paul Priest in the presence of Tew and Tew's boss, general services

manager Russell White. The jury could have concluded from the testimony about the conduct of the examination that it was both inquisitorial and reflected an effort to justify a termination decision already made.

That the jury could have disbelieved the reasons given for Kohrt's termination is not proof that his opposition to the one-man crew and fall-arrest equipment policies was the determining factor. Kohrt, however, presented additional evidence in support of a causal connection. The one-man crew issue in particular was a subject on which both management and labor had strong feelings which carried over into 1997 and 1998. Tew had received complaints from other managers about Kohrt's failure to support the company position and, after the arbitration, his continued discussion of it. For example, it was reported to her that at a safety meeting Kohrt had said he was "being told to do this" and he did not agree.

Tew admonished Kohrt in writing to support the company position on one-man crews which she felt had been approved by the arbitration. (See Ex. 9). Tew asked Kohrt to put his opinion on one-man crews in writing. His first letter was equivocal. (Ex. 20 at 1-2). He was told to try again. In his second letter Kohrt wrote that it was his opinion "that the person in the best position to make the call whether or not additional help is needed is the person in the field, at the scene, doing the work. I don't see a problem with sending one person to first look at the situation and

then determine what he needs to complete his work." (Ex. 20 at 5). MidAmerican says that this, in fact, was its policy and it was satisfied with Kohrt's response. But Kohrt's opinion was that the lineman at the scene would make the decision. There was evidence that some supervisors would decline to send additional help when requested. In light of the background circumstances, the jury may have concluded MidAmerican viewed the tepid support in Kohrt's letters as indicating he still had concerns about the safety of the company's position on one-man crews.

Tew also received information about Kohrt's promotion of a harness for fall-arrest equipment. She identified three managers who complained to her about Kohrt's position on the subject.

Giving Kohrt the benefit of every reasonable inference which can be drawn from the evidence and viewing all conflicts in the evidence in his favor, reasonable jurors could have disbelieved the reasons given for Kohrt's discharge and found that what tipped the scales decisively against him in the discharge decision were his positions on the one-man crew issue and fall-arrest equipment. See Teachout, 584 N.W.2d at 302.

The motion for judgment as a matter of law should be denied.

NEW TRIAL

A.

MidAmerican moves for new trial on four grounds: (1) the jury's awards for past and future wage loss lack evidentiary support and are excessive because they are based on the difference between Kohrt's current employment as a lineman for a municipal utility (the City of Geneseo, Illinois) and the wages plaintiff would have earned as a lineman for MidAmerican, a position he had not held since 1987; (2) the jury failed to reduce future damages to present value; (3) the damages awarded for mental pain and suffering are excessive; and (4) the Court's instructions were erroneous in several particulars. Kohrt responds, as to the first of these issues, that MidAmerican failed to object to the evidence on which the jury's damages calculation was made or plaintiff's closing argument on the subject, and further with respect to the other grounds noted that the evidence supported the damage awards made and the Court's instructions correctly stated the law.

A federal court is guided by the law of the forum state in determining questions as to the adequacy or excessiveness of a verdict. See Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 430-31 (1996); Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565, 572 (8th Cir. 1998); Piotrowski v. Southworth Products Corp., 15 F.3d 748, 754 (8th Cir. 1994); Keenan v. Computer Assoc., Int'l, Inc., 13 F.3d 1266, 1273 (8th Cir. 1994); Johnson v. Cowell

Steel Structures, Inc., 991 F.2d 474, 477 (8th Cir. 1993); Peoples Bank & Trust Co. v. Globe Int'l Publ'g, Inc., 978 F.2d 1065, 1070 (8th Cir. 1992). In Iowa a new trial may be granted where damages are excessive or inadequate, or the verdict is not sustained by sufficient evidence. Iowa R. Civ. P. 1.1004(4), (6). The governing standards are well established in Iowa case law.

> . . . The real question in most cases . . . is the amount and sufficiency of evidence to support the award made. Certainly where the verdict is within a reasonable range as indicated by the evidence the courts should not interfere with what is primarily a jury question.
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> . . . .
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> . . . The determinative question posed is whether under the record, giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties.

Kautman v. Mar-Mac Comm. Sch. Dist., 255 N.W.2d 146, 147-48 (Iowa 1977); see Penney v. Praxair, Inc., 116 F.3d 330, 333 (8th Cir. 1997) (applying Iowa law); Johnson v. Knoxville Comm. Schl. Dist., 570 N.W.2d 633, 641-42 (Iowa 1997); Cowan v. Flannery, 461 N.W.2d 155, 157-58 (Iowa 1990); Blume v. Auer, 576 N.W.2d 122, 126 (Iowa App. 1997).

Review of a jury's determination of damages must be on the particular facts of the case; comparison with other cases is of doubtful value. Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990); Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516, 526 (Iowa 1977); Householder v. Town of Clayton, 221

N.W.2d 488, 493 (Iowa 1974). The Court is required to view the evidence in the light most favorable to the verdict. See Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 763 (Iowa 1999); Olson v. Prosoco, Inc., 522 N.W.2d 284, 292 (Iowa 1994). The non-economic elements of a damage award are particularly questions for the jury. Foggia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889, 891-92 (Iowa 1996); Matthess v. State Farm Mut. Auto. Ins. Co., 521 N.W.2d 699, 704 (Iowa 1994). The jury's findings are not to be disturbed merely because the court might have reached a different conclusion. Matthes, 521 N.W.2d at 704.

B.

1. The Jury's Damages Findings

(a) Lost Wages and Benefits

The jury found damages for past lost wages and benefits in the amount $145,000 and damages for future lost wages and benefits in the amount of $475,000. It is undisputed that the jury could not have returned these amounts unless it based its wage loss calculations on the higher wages Kohrt would have received as a lineman.

As a safety and training coordinator, Kohrt was paid approximately $60,000 per year. Linemen were paid an hourly wage which, without overtime, at the time of trial approximated $51,250 per year. However, linemen also worked a great deal of overtime.

Michael Johnson, a lineman for twenty-eight years, testified he had most recently earned about $80,000 in a year.

After his termination Kohrt was unemployed until he was hired as a lineman by the City of Geneseo on April 12, 1999. In 1999 Kohrt earned about $27,000 from the City. His earnings increased to $36,000 in 2000 and to $45,000 in 2001, his current wage level. At the time of trial Mr. Kohrt was thirteen years and some months from the expected date of his retirement.

The parties stipulated in the final pretrial order that Kohrt's benefits in his present employment are worth about $2,400 less per year than the benefits he received at MidAmerican.

MidAmerican argues it is speculative that Kohrt ever would have been employed again as a lineman had he continued working for MidAmerican. Kohrt responds first that MidAmerican has not preserved error with respect to the use of linemen's wages as the measure of wage loss damages. He notes MidAmerican did not raise the issue in its Rule 50 motion at trial or in its objections to the jury instructions. MidAmerican also did not object to testimony about the current wages of MidAmerican linemen, or to the closing argument of plaintiff's counsel that linemen's wages should be used in determining damages.

In denying a pre-trial motion in limine on this subject filed by MidAmerican, the Court reasoned that evidence of Kohrt's attempts to be hired and rehired as a lineman in 1998 and 1999

could be relevant to MidAmerican's defense of failure to mitigate and its motivation for the termination decision. The objection was not renewed at trial. The Court continues to believe that evidence of Kohrt's potential work in some other capacity for MidAmerican was relevant. The question now is not relevancy, but the sufficiency of the evidence to permit the jury to conclude it was more probable than not that had Kohrt stayed employed with MidAmerican he would have become a lineman and earned more money.

The measure of damages issue was reserved in the final pretrial order.[8] MidAmerican did not waive anything by failing to address the question in its Rule 50 motion or trial objections. The factual basis for determining damages need not have been included in the Rule 50 motion because resolution of the issue would not have led to judgment as a matter of law on a claim or defense. Fed. R. Civ. P. 50(a)(1). The jury instructions were silent on what basis the jury should calculate the "[w]ages and benefits plaintiff would have earned in his employment with defendant if his employment had not been ceased . . . ." (Inst. No. 12). The evidence of linemen's wages was independently

[8] In the final pretrial order, plaintiff listed "whether [Kohrt's] economic loss should be measured by his earnings as a Safety Training Coordinator and what his earnings would have been had he been allowed to transfer to linemen's work" as a factual issue and MidAmerican listed "[w]hether plaintiff can recover economic damages exceeding the difference between his earnings in the position he occupied at the time he was discharged and what he is earning now" as a legal issue.

admissible in evidence. Finally, MidAmerican was not required to object to the closing argument of Kohrt's counsel. An objection to opposing counsel's argument is not necessary to preserve an issue about the sufficiency of the evidence to support the argument. MidAmerican has not failed to preserve the measure of damages issue.

The Court agrees with MidAmerican that it is entirely speculative that plaintiff would have earned wages and benefits from MidAmerican as a lineman if his employment had not ceased. Kohrt points to two pieces of evidence which he says permitted the jury to award damages on this basis. After he gave the sworn statement to Mr. Priest on November 23, 1998, Kohrt spoke to a new manager, Randy Stein, following a safety meeting about the statement and his future with the company. Kohrt testified he told Stein "maybe it's time for me to go back to the union as a lineman." (Tr. Rough Draft, Attch to Def. Mem. at 111). Kohrt did not hear anything further from Stein. (Id.).

On September 29, 1998, following one of her meetings with Kohrt, Jane Tew wrote that she asked Kohrt "if he would rather look elsewhere for a position such as to the line crew." (Ex. 16). Kohrt responded he had considered it but thought he would try to continue in his present position.

These brief, ambiguous references are not sufficient to allow a reasonable person to conclude that had Kohrt not been

discharged he would have remained employed at MidAmerican as a lineman. The jury's awards for past and future lost wages and benefits are therefore lacking in evidential support. It follows that MidAmerican is entitled to new trial. As there is no basis to believe the jury's liability findings were affected by evidence of damages and the two issues are not intertwined, new trial is appropriate only on the issue of damages. See Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1239-40 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); Thompson v. Allen, 503 N.W.2d 400, 401 (Iowa 1993). The new trial should include claimed emotional distress damages, both past and future, because unlike with liability, the Court cannot be assured that the jury did not consider damages as a whole in reaching its final findings. See Brant v. Bockholt, 532 N.W.2d 801, 805 (Iowa 1995) ("[j]ury determinations of damages are apt to be influenced by the recovery allowed for other elements of damage").

The Court may conditionally grant a motion for new trial but allow plaintiff to avoid a new trial if plaintiff agrees to remit an amount of damages as determined by the Court. See Hetzel v. Prince William County, 523 U.S. 208, 211 (1998); Donovan v. Penn Shipping Co., 429 U.S. 648, 648-49 (1977); Thorne v. Welk Inv. Inc., 197 F.3d 1205, 1212 (8th Cir. 1999); In re Knickerbocker, 827 F.2d 281, 289 (8th Cir. 1987). Though this case concerns a state law claim, remittitur is a procedural issue governed by federal,

rather than state law. Parsons v. First Investors Corp., 122 F.3d 525, 528 (8th Cir. 1997); Knickerbocker, 827 F.2d at 289 n.6. Where remittitur is appropriate, due regard for the Seventh Amendment right to jury trial requires that "remittitur to the maximum amount proved" be the standard. Knickerbocker, 827 F.2d at 289 n.6; see Slatton v. Martin K. Eby Constr. Co., Inc., 506 F.2d 505, 509 (8th Cir. 1974), cert. denied, 421 U.S. 931 (1975).

As there is no basis to believe passion or prejudice influenced the jury's verdict, see Sanford v. Crittenden Mem. Hosp., 141 F.3d 882, 885 (8th Cir. 1998), and the amount of damages for lost wages and benefits is largely a matter of calculation based on undisputed facts, Kohrt should have an opportunity to consent to a remittitur.

Kohrt was earning approximately $60,000 per year at the time of his discharge. He earned $27,000 from the City of Geneseo in 1999. The stipulated benefit difference is $2,400 for a total wage and benefit loss of $35,400.[9] The differential in 2000 was $26,400 ($60,000 plus $2,400 minus $36,000), the differential in 2001 was $17,400 ($60,000 plus $2,400 minus $45,000), and the differential in 2002 to the time of trial was approximately $3,425 (2.5 months worth of the 2001 differential). The total of these

[9] MidAmerican's calculations add in an additional $15,000 for 1999, apparently for the three months Kohrt was unemployed. (Def. Mem. at 11). Since the assumption is that Kohrt would have made $60,000 in 1999 had he worked for MidAmerican, this additional amount is not necessary to make Kohrt whole.

amounts is $82,625. Kohrt's income at MidAmerican was unlikely to have been static during this period. A remittitur amount of $86,000 is appropriate for past wage and benefit loss.

The future differential between what Kohrt would have earned at MidAmerican and what he can be expected to earn for the City of Geneseo would approximate what it was for 2001, $17,400. The Court accepts MidAmerican's assumed future loss period of 13.8 years to the time Kohrt testified he expected to retire, age 65. The total gross future wage and benefit differential is therefore about $240,000. Of course, the differential would not have remained the same over the years. This possibility, the uncertain economic climate, and the jury's intent to fully compensate Kohrt for this item make a minimal reduction for present value appropriate. The remittitur amount for future wage and benefit loss will be $200,000.

(b) Reduction for Present Value

Since new trial will be granted conditionally and the remittitur amount of future damages, if accepted, is reduced to present value, this issue is moot.

(c) Emotional Distress Damages

Though comparison with other cases is not supposed to be a significant factor, that admonition seldom deters the impulse to look elsewhere. Both sides refer the Court to other cases for comparison. MidAmerican cites City of Hampton, 554 N.W.2d at 537,

which, applying an abuse of discretion standard, reduced a $50,000 administrative award to $20,000 in view of the slight evidence and lack of mental and psychiatric evidence to support it. In the present case the determination was made by a jury. Review of an agency decision involves a different calculus than review of a jury verdict. The Seventh Amendment gives the latter considerable impetus. A jury verdict is entitled to appropriate deference within the range of reason and, as noted before, the non-economic items are peculiarly within the province of the jury.

For his part, Kohrt refers the Court to Eighth Circuit cases upholding awards for emotional distress in the $100,000 range. See Ross v. Douglas City, 234 F.3d 391, 397 (8th Cir. 2000); Kim, 123 F.3d at 1065; see also Madison v. IBP, Inc., 257 F.3d 780, 802-03 (8th Cir. 2001), cert. granted, judgment vacated on other grds., 122 S. Ct. 2583 (2002).

The jury's award of $100,000 for past emotional distress is at the upper limit on this record. Compare Delph, 130 F.3d at 357 with Kim, 123 F.3d at 1065. Kohrt did not produce medical evidence in support of his claim for emotional distress damages. Mrs. Kohrt testified that before his termination Mr. Kohrt had been an easygoing, calm man. After he was fired she observed he had difficulty sleeping and his appetite was depressed. He lost twenty pounds. Mrs. Kohrt described her husband as anxious and nervous, "worried sick" about getting another job. Mr. Kohrt described

himself as feeling depressed and cheated because he felt he had been doing a good job. He described his difficulty sleeping and his weight loss, and said he still had problems. He has not been able to replace the income he once earned. See Ross, 234 F.3d at 397. Both Mr. and Mrs. Kohrt described the discharge as having a "devastating" effect on Mr. Kohrt. In awarding emotional distress damages, the jury could also have considered the likely effect of discharge under the circumstances in question on an employee who had provided many years of service, had a solid record of employment, and had sincerely held concerns about the safety issues which led to his discharge.

Viewing the evidence favorably to Kohrt, and giving the jury its right to accept or reject the evidence and give that weight to it which it felt was merited, the verdict here was not excessive and accomplishes substantial justice on the point.

2. Instructions

MidAmerican contends the Court's instructions were erroneous in various particulars. These issues have been considered by the Court before in the record on instructions. The Court respectfully adheres to the rulings there made. Moreover, most of the claimed errors in the instructions are related to other legal issues discussed previously.

One claimed error bears mention. Kohrt had to prove that his opposition to the policies in question "was the determining

factor in MidAmerican's decision to discharge him." (Inst. No. 7). In this regard the jury was instructed that "[t]he 'determining factor' need not be the main reason behind the decision. It need only be the reason which tips the scales decisively one way or another." (Inst. No. 10). MidAmerican claims this was error because the determining factor should be "the" reason for termination. In Teachout the Iowa Supreme Court discussed what is meant by the phrase "determinative factor." The court said, in language which mirrors the instruction here, "[a] factor is determinative if it is the reason that 'tips the scales decisively one way or the other,' even if it is not the predominant reason behind the employer's decision." 584 N.W.2d at 302 (quoting Smithway Motor Xpress, Inc., 464 N.W.2d at 686). MidAmerican cites Fitzgerald for its apparent argument that "the determinative factor" means the sole or predominant reason for the discharge. Fitzgerald, however, merely referred to the determinative factor standard and cited Teachout for its meaning. 613 N.W.2d at 289.

The instruction given also tracks the instruction in Iowa Uniform Civil Jury Instruction No. 3100.3.

ORDERS

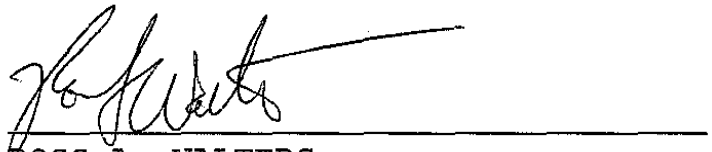
In view of the foregoing, the following orders are entered:

1. Defendant's motion for judgment as a matter of law is denied;

2. Defendant's motion for new trial is granted in part and the judgment is conditionally vacated. New trial shall be had on plaintiff's damages provided, however, the motion for new trial will be denied if on or before September 19, 2002, plaintiff files a consent to remittitur of all past damages in excess of $186,000 and all future damages in excess of $200,000. If remittitur is consented to the unremitted portion of the judgment will stand plus interest as stated therein.

IT IS SO ORDERED.

Dated this 30th day of August, 2002.



ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE