Case No. 24-2286

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff - Appellee

v.

DRIVERS MANAGEMENT, LLC; WERNER ENTERPRISES, INC.,

Defendants - Appellants

BRIEF OF APPELLANTS

On appeal from the United States District Court for the District of Nebraska,
Case No. 8:18-cv-00462

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SUMMARY OF THE CASE

In 2016, Victor Robinson—a deaf individual with no commercial driving experience—applied for a truck driver position with Appellant Werner Enterprises, Inc. ("Werner"). If hired, Robinson would be required to complete Werner's "placement driver program," a mandatory training program in which new drivers ride with an experienced driver who provides contemporaneous coaching while the trainee is driving. Because Robinson is deaf, Werner determined any communications with his trainer would have to be nonverbal (such as via sign language), requiring Robinson, his trainer, or both, to divert attention from the road. Ultimately, Werner declined to hire Robinson because Werner could not identify any accommodations that would allow him to safely communicate with his trainer while driving, without diverting attention from the road.

The Equal Employment Opportunity Commission ("EEOC") thereafter filed this lawsuit, alleging Werner discriminated against Robinson based on his deafness. The District Court erroneously concluded that because Werner declined to hire Robinson due to its inability to accommodate his deafness, his deafness was the "but for" cause of Werner's hiring decision. As a result, the District Court erroneously directed a partial verdict for the EEOC on the element of causation and the jury thereafter found for the EEOC. Because the District Court erred in multiple respects, the judgment should be vacated. Werner requests 15 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

Appellant Werner Enterprises, Inc. is a publicly held corporation. On or about December 31, 2020, Appellant Drivers Management, LLC was absorbed into Werner Enterprises, Inc., and is no longer a separate corporate entity. BlackRock, Inc. owns more than 10% of Werner's publicly-traded stock. The Vanguard Group also owns more than 10% of Werner's publicly-traded stock.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 because this case involves federal questions under the Americans with Disabilities Act, 28 U.S.C. § 12101 *et seq*. This appeal is from a final decision of the District Court dated May 23, 2024. A notice of appeal was timely filed on June 24, 2024. *See* Fed. R. App. P. 4(a)(1)(B)(ii). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in directing a verdict for the EEOC on the element of causation where there was evidence Werner declined to hire Robinson because, as a consequence of his disability, he was unable to safely communicate with his trainer while driving. *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212, 1219 n.3 (8th Cir. 1999); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997).

2. Whether the District Court erred in dismissing Werner's undue hardship defense where there was evidence the EEOC's proposed accommodations would fundamentally alter Werner's training program by eliminating the ability for Robinson to communicate with his trainer while driving. *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999); *DeBord v. Board of Educ.*, 126 F.3d 1102, 1106 (8th Cir. 1997).

3. Whether the District Court erred in dismissing Werner's direct threat defense, where there was evidence Werner conducted an individualized assessment of Robinson's application and determined he would pose a threat to himself and others. *Witchet v. Union Pac. R.R. Co.*, No. 8:18CV187, 2020 U.S. Dist. LEXIS 260843, at *18-19 (D. Neb. Feb. 21, 2020); *Anderson v. Norfolk S. Ry. Co.*, No. 21-1735, 2022 U.S. App. LEXIS 9604, at *9 (3d Cir. Apr. 11, 2022) (3d Cir. Apr. 11, 2022).

4. Whether the District Court abused its discretion by admitting irrelevant and unfairly prejudicial evidence of stray remarks by non-decisionmakers and other trucking companies' training practices. *Arraleh v. Cty. of Ramsey*, 461 F.3d 967, 975 (8th Cir. 2006); *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 427-28 (8th Cir. 1999); *EEOC v. Schneider Nat'l, Inc.*, 481 F.3d 507, 510 (7th Cir. 2007).

5. Whether the District Court erred in submitting the issue of punitive damages to the jury where there was insufficient evidence to support punitive damages. *Kolstad v. ADA*, 527 U.S. 526, 529-30 (1999); *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 903 (8th Cir. 2006).

6. Whether the District Court erred in submitting the EEOC's discrimination claims to the jury where Robinson was not a "qualified individual" as a matter of law, or in the alternative, there was insufficient evidence Robinson was a "qualified individual." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 558

(1999), *superseded by statute on other grounds*; *Higgins v. Union Pac. R.R. Co.*, 931 F.3d 664, 671 (8th Cir. 2019); 29 C.F.R. pt. 1630 App'x. at 1630.2(n).

7. Whether the District Court erred in awarding injunctive relief. *Briscoe v. Fred's Dollar Store*, 24 F.3d 1026, 1028-29 (8th Cir. 1994); *Taylor v. Jones*, 653 F.2d 1193, 1203 (8th Cir. 1981).

8. Whether the District Court erred in awarding prejudgment interest. *Contitech USA, Inc. v. McLaughlin Freight Servs., Inc.,* 91 F.4th 908, 915 (8th Cir. 2024); *Crabar/Gbf, Inc. v. Wright*, No. 8:16-CV-537, 2023 U.S. Dist. LEXIS 166069, at *9 (D. Neb. Sep. 19, 2023).

STATEMENT OF THE CASE

The EEOC filed this lawsuit in 2018, claiming Werner violated the Americans with Disabilities Act and discriminated against Robinson by failing to hire him as a commercial truck driver. (App. 1-8, R. Doc. 1, at 1-8). Werner is a motor carrier transporting truckload shipments throughout the United States. (App. 121-22, R. Doc. 246-2, at 2-3). Werner and its drivers are subject to the Federal Motor Carrier Safety Regulations ("FMCSRs"), promulgated by the Department of Transportation ("DOT"), which set minimum qualifications for drivers of commercial motor vehicles ("CMVs") and minimum safety standards for motor carriers. *See* 49 C.F.R. Parts 390, 391, 392, and 395. The FMCSRs specifically authorize motor carriers to

adopt "more stringent requirements relating to safety of operation and employee safety and health." 49 C.F.R. § 390.3(d).

The FMCSRs establish certain physical qualifications for CMV drivers, including a "Hearing Standard," which states:

> A person is physically qualified to drive a commercial motor vehicle if that person --. . . (11) First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

49 C.F.R. § 391.41(b)(11). Werner is required by federal law to ensure all applicants for driving positions meet the requirements in § 391.41. 49 C.F.R. § 391.11.

Although the FMCSRs dictate all drivers operating CMVs in interstate commerce must meet the Hearing Standard, the FMCSA created a process by which individuals may apply for a waiver from the Hearing Standard. 49 C.F.R. § 391.41(a)(3)(ii); 78 FR 7479 (Feb. 1, 2013). In February 2013, the FMCSA began issuing exemptions ("Hearing Exemption"), allowing deaf individuals to obtain a Commercial Driver's License ("CDL"), despite their inability to meet the Hearing Standard. 78 FR 7479. The FMCSA conceded it had not identified any studies addressing the relationship between hearing loss and crash risk among CMV drivers and "there could be potential consequences of a driver being hearing impaired and/or deaf while operating a CMV under some scenarios." 78 FR 7479, 7480.

Robinson applied for a truck driver position with Werner in 2016. (App. 179-80, R. Doc. 246-6, at 38-39). At that time, Robinson held an FMCSA Hearing Exemption. (App. 174, R. Doc. 246-6, at 33 (Depo. 128:2-19)). Although Robinson attended a CDL course and obtained a CDL, he had no commercial driving experience. (App. 148, 153, R. Doc. 246-6, at 7, 12 (Depo. 24:23-25:7, 45:13-17)). Robinson's CDL course included "actual practice moving the vehicle," driving "short distances around the yard, outside the yard, but close by, and then back," and what Robinson called a "full day on the road." (App. 152, R. Doc. 246-6, at 11 (Depo. 41:11-20)). However, when Robinson drove for "a full day," he only drove 15-50 miles at a time and his instructor told him where to go. (App. 153, R. Doc. 246-6, at 12 (Depo. 42:5-13)).

At that time, Werner required applicants with less than 6 months of commercial driving experience to complete its "placement driver program" before driving solo. (App. 44, 50, R. Doc. 226-2, at 25, 31 (Depo. 98:7-25, 123:12-19); App. 280-94, R. Doc. 246-2, at 8-22). The program was designed to enhance safe driving skills and assist new drivers in transitioning to the industry. (App. 130-31, R. Doc. 246-2, at 11-12). Placement drivers (formerly "student drivers") are paired with a more experienced "driver trainer" for approximately 275 hours. (App. 130-31, R. Doc. 246-2, at 11-12, 19; App. 44, 82, R. Doc. 226-2, at 25, 63 (Depo. 98:7-15, 250:5-9)). During the over-the-road portion of that program, the placement driver

is observed by the trainer while driving and instructed on safety procedures and proper techniques. (App. 49, 65-66, R. Doc. 226-2, at 30, 46-47 (Depo. 118:9-24, 184:16-185:6); App. 97-98, R. Doc. 226-11, at 2-3; App. 138, R. Doc. 246-2, at 19).

Unlike the limited driver training Robinson did in CDL school, placement drivers haul actual loads for customers and may drive throughout the country, staying away for days at a time. (App. 291-94, R. Doc. 246-2, at 19-22). Because their routes are dictated by customer needs, placement drivers encounter widely varying driving conditions, such as steep mountain grades, congested metropolitan areas, and "uncontrollable and constantly-changing weather and traffic conditions," all while operating a commercial motor vehicle weighing up to 80,000 pounds on public roads. (App. 138, R. Doc. 246-2, at 19; App. 106-10, R. Doc. 231-2, at 2-6). To ensure placement drivers have the skills to handle the CMV under those varying conditions, they are expected to communicate with their trainers while driving to facilitate real-time training on subjects such as defensive driving, how to handle certain scenarios, and how to respond to emergencies. (App. 44, 49, R. Doc. 226-2, at 25, 30 (Depo. 98:2-25, 118:9-24)). Due to the variable conditions and lengthy routes, Werner's placement driver program is very different from a CDL course, during which a CDL student only operates the CMV in a controlled environment, covering short pre-assigned routes. (App. 106-07, R. Doc. 231-2, at 2-3; App. 152-53, R. Doc. 246-6, at 11-12 (Depo. 41:11-20, 42:5-13)).

Werner determined Robinson would need to complete the placement driver program because he lacked experience. (App. 44, R. Doc. 226-2, at 25 (Depo. 98:2-25)). Jaime Hamm (formerly Jaime Maus), Werner's Vice President of Safety, Compliance, and Terminal Management, was tasked with evaluating Robinson's application and investigating potential accommodations. (App. 50, R. Doc. 226-2, at 31 (Depo. 124:17-24)). Hamm first contacted numerous government entities, industry organizations, and independent motor carriers to investigate potential means for communicating with a totally deaf driver during over-the-road training but none of those entities had any guidance to share regarding how to safely accommodate a totally deaf driver during over-the-road training. (App. 24-28, R. Doc. 226-2, at 5-9 (Depo. 20:1-33:16); Trial Tr. IV, at 808:7-819:14).

Hamm also participated in a call with Robinson through a video relay service to discuss potential accommodations. (Trial Tr. IV, at 812:25-819:14). Robinson proposed having his trainer write notes on a white board or use hand signals or having an interpreter in the cab. (Trial Tr. IV, at 105:1-107:8). Hamm was concerned those methods of communication would require Robinson to divert his attention from the road, leading to an increased risk of accidents. (Trial Tr. IV, at 817:23-819:14). Hamm was also concerned Robinson, an inexperienced commercial driver, might be unable to receive effective real-time instructions in an emergency situation. (App. 46, R. Doc. 226-2, at 27 (Depo. 106:1-107:8). Ultimately, Hamm informed

Robinson during that call that Werner could not hire him because she could not identify any safe means by which he could complete the in-cab training portion of the placement driver program. (App. 46, R. Doc. 226-2, at 27 (Depo. 108:1-12).

The EEOC filed this lawsuit in 2018, alleging Werner discriminated against Robinson based on his deafness and asserting claims for failure to hire because of disability and the need for accommodation. (App. 5-6, R. Doc. 1, at 5-6). At the close of discovery, the parties filed cross motions for summary judgment. (App. 181, R. Doc. 248). The District Court granted the EEOC's motion in part and dismissed Werner's "undue hardship" and "direct threat" defenses. (Add. 11-15, App. 309-13, R. Doc. 265, at 11-15). The District Court also overruled Werner's motion in limine to exclude evidence of certain stray remarks by non-decisionmakers and other companies' training practices. (Add. 40-41, App. 426-27, R. Doc. 265, at 12-13). The District Court also granted the EEOC's pretrial motion in limine to exclude relevant evidence of Robinson's driving record. (Add. 31-32, App. 417-18, R. Doc. 303, at 3-4).

At trial, Werner offered evidence Werner has hired deaf drivers with at least six months' experience for the over-the-road driver position. (Trial Tr. IV, at 823:11-824:1). Because experienced drivers are not required to go through the training program before driving solo, Hamm explained there is no need for them to communicate with a trainer while driving. (Trial Tr. IV, at 823:11-824:1). However,

because Robinson lacked experience, he was only considered for a placement driver role. (Trial Tr. IV, at 772:19-773:24, 823:7-10).

Hamm testified a placement driver must be able to engage in instantaneous, effective communication with a trainer while driving, without diverting attention from the road. (App. 49, 67, R. Doc. 226-2, at 30, 48 (Depo. 118:14-24, 190:12-16); Trial Tr. IV, at 794:16-801:12, 828:11-929:7). Werner's expert Bill Adams, a commercial truck driver with over 30 years of experience in driver training, also testified about the importance of in-cab communication with driver trainees and the detrimental impact of omitting such communications from a training program. (Trial Tr. IV, at 674:13-24). Hamm testified she ultimately declined to hire Robinson because she could not identify any means by which he could safely communicate with his trainer while driving, without diverting attention from the roadway. (App. 49, 67, R. Doc. 226-2, at 30, 48 (Depo. 118:14-24, 190:12-16); Trial Tr. IV, at 794:16-801:12, 808:7-819:14, 828:11-929:7).

After Werner rested, the District Court granted a partial directed verdict for the EEOC on the element of causation, concluding the EEOC proved, as a matter of law, "Robinson suffered an adverse employment action because of his disability." (Add. 49, App. 437, R. Doc. 316, at 5). The District Court reasoned Werner "determined that it could not safely train Robinson because of his deafness," Werner "provided no alternate theory of causation," and because Werner's explanation was

"premised on Robinson's deafness, his disability is the 'but-for' cause of Werner's hiring decision as a matter of law." (Add. 47-48, App. 435-36, R. Doc. 316, at 3-4). The District Court also declined to instruct the jury to consider whether Robinson was qualified for the placement driver position. Instead, over Werner's objection, the District Court instructed the jury it could find for the EEOC if the jury determined Robinson was qualified for an *over the road truck driver* position and could perform *that job* with or without reasonable accommodations and Werner declined to hire him. (Trial Tr. V, at 905:2-906:21; App. 464-65, R. Doc. 322, at 10-11).

The jury found for the EEOC on both claims and awarded compensatory and punitive damages. (App. 477, R. Doc. 323). After a bench trial on back pay and equitable relief, the District Court granted Werner's motion to reduce the jury verdict to the statutory maximum; entered a judgment, including backpay, in the amount of $335,682.25; and entered an order for injunctive relief requiring Werner to report certain data to the EEOC regarding all "hearing-impaired" applicants for the over-the-road truck driving position. (App. 556, R. Doc. 353, at 14; Add. 66, App. 558, R. Doc. 354, at 1).

Werner filed a timely post-trial motion seeking a new trial or to alter or amend the judgment, raising numerous errors. (App. 559, R. Doc. 355). The EEOC filed a Motion to Amend the Judgment to include prejudgment interest. (App. 565, R. Doc. 358). The District Court granted the EEOC's motion but largely denied Werner's

Motion. (Add. 89, App. 593, R. Doc. 376, at 23). The District Court did slightly revise the injunction, limiting its reach to applicants for commercial truck driving positions with a Hearing Exemption. The District Court entered an amended final judgment on May 23, 2024, for $335,682.25, plus prejudgment interest of $11,060.67 and injunctive relief. (Add. 90-91, App. 594-95, R. Doc. 377, at 1-2). This appeal follows.

SUMMARY OF THE ARGUMENT

This Court should vacate the judgment below and remand for a new trial because the District Court erroneously directed a verdict for the EEOC on the element of causation. Although case law confirms declining to hire an applicant because he cannot perform job duties *as a consequence* of a disability is *not* the same as declining to hire him "because of his disability," the District Court erroneously held otherwise. As a result, the jury was not asked to decide whether the EEOC proved Werner declined to hire Robinson due to intentional discrimination, an essential element of the EEOC's prima facie case. The District Court's ruling on the causation issue constitutes prejudicial, reversible error.

A new trial is also warranted because the District Court improperly weighed the evidence and failed to adhere to the summary judgment standard in dismissing Werner's affirmative defenses of undue burden and direct threat. The District Court also abused its discretion by admitting irrelevant and unfairly prejudicial evidence

of stray remarks by non-decisionmakers and other companies' training practices years after the hiring decision at issue and excluding relevant evidence of Robinson's poor safety record. The District Court also committed reversible error by submitting the issue of punitive damages to the jury and by awarding broad-ranging injunctive relief without a sufficient evidentiary basis. Finally, the District Court erred in awarding prejudgment interest despite the EEOC's failure to preserve that claim. For these reasons, this Court should vacate the judgment and remand for a new trial.

In the alternative, this Court should vacate the judgment and render judgment for Werner because, as a matter of law, Robinson was not a "qualified individual." It is undisputed Robinson cannot meet the Hearing Standard in the FMCSRs and Supreme Court case law confirms Werner may hold applicants to the Hearing Standard regardless of any exemption. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 558, 119 S. Ct. 2162, 2165 (1999), *superseded by statute on other grounds*. Moreover, Werner offered undisputed evidence that Robinson was only eligible for the placement driver role and Werner requires all placement drivers to communicate with their trainers while driving. In response, the EEOC simply argued Werner should eliminate or alter that essential function to accommodate Robinson's disability. As a matter of law, eliminating an essential function or lowering a company standard because a prospective disabled employee cannot perform that function or meet that standard is not a reasonable accommodation. Because

Robinson was not a qualified individual as a matter of law or, in the alternative, the jury lacked a sufficient evidentiary basis to determine Robinson was qualified, this Court should vacate the judgment and render judgment for Werner.

ARGUMENT

I. The District Court committed reversible error by directing a verdict for the EEOC on the element of causation.

A. Standard of Review

This Court reviews the "grant of a motion for directed verdict *de novo*, applying the same standard used by the district court[.]" *Randall v. Federated Retail Holdings, Inc.*, 429 F.3d 784, 787 (8th Cir. 2005). Judgment as a matter of law is proper only "if during a trial by jury a party has been heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). If "there is sufficient evidence, so that reasonable persons could reach different conclusions, a directed verdict is improper." *Id.*

B. The District Court's ruling on causation was contrary to case law and to the record.

It is well-established the plaintiff in a discrimination case must show he suffered an adverse employment action *because of* his disability – *i.e.*, he was subjected to "intentional discrimination." *Lipp v. Cargill Meat Solutions Corp.*, 911 F.3d 537, 543 (8th Cir. 2018); 42 U.S.C. § 12112(a)-(b)(1). Here, the District Court

held "no reasonable juror could find that Werner failed to hire Mr. Robinson for any reason other than his deafness," because Werner "determined that it could not safely train Robinson because of his deafness," and Werner "provided no alternate theory of causation." (Add. 47-49, App. 435-37, R. Doc. 316, at 3-5). Because Werner's explanation for declining to hire Robinson was "premised on Robinson's deafness," the District Court concluded "his disability is the 'but-for' cause of Werner's hiring decision as a matter of law.'" (Add. 47-49, App. 435-37, R. Doc. 316, at 3-5). That analysis is contrary to this Court's case law and to the trial record.

1. The District Court erroneously relied on an out-of-circuit case that has not been followed by this Court.

In reaching its conclusion, the District Court erroneously relied on *Davidson v. Am. Online Inc.*, 337 F.3d 1179, 1189 (10th Cir. 2003), to conclude any employment decision "premised on" Robinson's deafness established but-for causation as a matter of law. (Add. 48, App. 436, R. Doc. 316, at 4). In so holding, the District Court overlooked "**the meaningful distinction between taking an employment-related action *because of* a disability and taking an employment-related action *as a consequence of* a disability**." *Passley v. Mo. Dep't of Soc. Servs.*, No. 1:18-cv-00155-SNLJ, 2019 U.S. Dist. LEXIS 34744, at *6 (E.D. Mo. Mar. 5, 2019) (citing *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997)) (emphasis in original). As the Seventh Circuit explained in *Matthews*:

> **Even if the individual is qualified, if his employer fires him for any reason other than that he is disabled there is no discrimination because of the disability. *This is true even if the reason is the consequence of the disability* . . . The employer who fires a worker because the worker is a diabetic violates the Act; but if he fires him because he is unable to do his job, there is no violation, *even though the diabetes is the cause of the worker's inability to do his job*.**

128 F.3d at 1196 (emphasis added). This Court has embraced that reasoning, stating "**firing an employee *because of the job performance consequences of a disability* . . . , rather than the disability itself, *is not actionable under the ADA***." *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212, 1219 n.3 (8th Cir. 1999) (emphasis added); *see also Passley*, 2019 U.S. Dist. LEXIS 34744, at *7.

The *Davidson* Court's analysis is contrary to this well-established law. Specifically, while *Davidson* held an employer violated the ADA when its hiring decision was "*related to* [the plaintiff's] disability," this Court confirmed an employer may take an adverse employment action due to a *consequence* of a disability, rather than the disability itself, *without* violating the ADA. *Compare Davidson*, 337 F.3d at 1189; *with Mole*, 165 F.3d at 1219 n.3 and *Harris v. Polk Cty.*, 103 F.3d 696, 697 (8th Cir. 1996) (rejecting plaintiff's argument that her employer violated the ADA by basing an employment decision "on a symptom of her mental illness," recognizing "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees").

Consistent with the reasoning of *Matthews*, Werner offered evidence that Werner declined to hire Robinson because Werner determined he was unable to safely perform required aspects of the placement driver job, *as a consequence of* his deafness. (Add. 49, 67, R. Doc. 226-2, at 30, 48 (Depo. 118:14-24, 190:12-16); Add. 130-31, R. Doc. 246-2, at 11-12; Trial Tr. IV, at 794:16-801:12, 808:7-819:14, 828:11-929:7). Specifically, Werner offered evidence *all* new drivers must complete observed over-the-road driving hours and are expected to communicate with their trainers while driving and immediately implement the trainer's feedback. (Trial Tr. IV, at 794:1-795:6). Werner also presented evidence that its placement driver program—including the instantaneous in-cab communication component—is an essential part of its training process, as Werner's trainers instruct inexperienced drivers on safety procedures and proper driving techniques in real time to enhance their driving skills and reduce the risk of accidents. (App. 49, R. Doc. 226-2, at 30 (Depo. 118:14-19); App. 130, R. Doc. 246-2, at 11). Werner also offered expert testimony from a commercial driver regarding the importance of instantaneous in-cab communication to the training process. (Trial Tr. IV, at 674:13-24). Hamm also testified she investigated potential accommodations through a video call with Robinson and discussions with industry experts and other trucking representatives but was unable to identify any means by which Robinson could safely communicate with his trainer while driving. (Trial Tr. IV, at 817:23-819:14).

Based on this evidence, the jury could have found Werner declined to hire Robinson not because he *is* deaf but because, *as a consequence of his deafness*, he was unable to meet a requirement for the placement driver position: the ability to safely communicate with his trainer while driving. Case law confirms that is *not* the same as refusing to hire Robinson *because* he is deaf, even if his inability to safely perform that task is a *consequence* of his deafness. *See Matthews*, 128 F.3d at 1196; *Mole*, 165 F.3d at 1219 n.3.

In denying Werner's post-trial motion on this issue, the District Court conceded "the ADA allows an employer to fire a disabled worker 'because he is unable to do his job,'" but attempted to distinguish *Matthews*. (Add. 72, App. 576, R. Doc. 376, at 6). Specifically, the District Court explained:

> The employer in *Matthews* implemented a reduction-in-force plan that scored employees based on work performance, and a disabled employee had too low of a score due to work he missed because of his disability. The *Matthews* Court determined that the employer did not violate the ADA because it presented a facially neutral policy that adversely affected a disabled employee, and it was the consequences of the disability that caused the employee to be terminated.
>
> Contrary to Werner's assertions, that case doesn't fit the facts here. Werner decided Robinson was unable to do his job because he was deaf, not because of a collateral consequence of his deafness. Werner argues it didn't hire Robinson because he couldn't "safely engage in contemporaneous communication with his trainer without driving, without diverting his eyes from the road." But that's just describing his deafness with more words, not identifying a "consequence" of it.

(Add. 72, App. 576, R. Doc. 376, at 6).

Respectfully, that analysis is flawed. It is undisputed that, at the time Robinson applied, *all inexperienced drivers* had to participate in the placement driver program and communicate with a trainer while driving without diverting their eyes from the road. (App. 44, 50, R. Doc. 226-2, at 25, 31 (Depo. 98:7-25, 123:12-19); Trial Tr. IV, at 794:1-795:6). It also undisputed that all accommodations proposed by Robinson – including a white board or written communications – would require diverting attention from the road or could not be done while driving, thereby eliminating any ability for real-time communications. Thus, this is not a case in which an employer enacted a requirement intended to screen out individuals with disabilities. To the contrary, just as in *Matthews*, the requirement that placement drivers communicate with their trainers in real time is a facially neutral requirement that, as a consequence of his deafness, Robinson was indisputably unable to meet.

For the same reasons, the District Court was simply wrong in stating Werner's reason for not hiring Robinson was just "describing his deafness with more words, not identifying a consequence of it." (Add. 72, App. 576, R. Doc. 376, at 6). To the contrary, as *Matthews* makes clear, a disabled applicant's inability to perform essential functions of the job can be a legitimate, stand-alone reason for not hiring an applicant, even if his inability to perform that function stems from a disability. 128 F.3d at 1195. In other words, "[i]f an insulin-dependent diabetic cannot be depended upon to drive a bus safely, he cannot complain about being disqualified

from working as a bus driver, even though he can show that he would be fully qualified were it not for his being a diabetic." *Id.* (internal citations omitted). Consistent with this case law, the jury could have found Werner declined to hire Robinson not because he was deaf but because, a*s a consequence of his deafness*, he could not safely communicate with his trainer while driving, an essential function of the placement driver position.

Taken to its logical conclusion, the District Court's reasoning means any time an employer attempts to accommodate an employee but is unable to do so, the causation element of a discrimination claim has been proven as a matter of law. That conclusion runs contrary to well-settled case law holding a plaintiff must prove an adverse action was taken ***on the basis of*** a disability, and not just for a reason that "related to" or is a consequence of a disability. *See Matthews*, 128 F.3d at 1196; *Harris*, 103 F.3d at 697. Because there was evidence from which a reasonable jury could conclude Werner's hiring decision was premised on Robinson's inability to safely complete an essential function of the job *as a consequence* of his disability, the District Court erred in directing a verdict for the EEOC on causation and this Court should vacate the judgment and remand for a new trial.

2. A reasonable juror could have found Werner declined to hire Robinson for the over-the-road driver position because he lacked experience.

The District Court was also wrong in concluding Werner offered "no alternate theory of causation" because there was evidence from which a reasonable juror – if allowed to consider causation – could have determined Werner declined to hire Robinson for the over-the-road driver position because he had no prior experience. Werner offered undisputed evidence that at the time Robinson applied, Werner required at six months' experience for the over-the-road driver position and Robinson had *no* commercial driving experience. (Trial Tr. IV, at 772:2-775:20, 785:5-25). Accordingly, Werner instead considered Robinson for a placement driver position. (Trial Tr. IV, at 772:19-773:24, 823:7-10).

Over Werner's objection, however, the District Court declined to instruct the jury on the placement driver position, instead instructing the jury to consider whether Robinson could perform the essential functions of the over-the-road truck driver position, *a position for which Robinson admittedly lacked the requisite experience*. (Trial Tr. V, at 905:2-906:21; App. 464-65, R. Doc. 322, at 10-11). Because it is undisputed Robinson had no prior experience, a reasonable juror – if allowed to determine causation – could have found Werner declined to hire Robinson for that position because he lacked experience. (App. 599, Trial Ex. 2). Accordingly, the

District Court erred in directing a verdict for the EEOC on causation and this Court should vacate the judgment and remand for a new trial.

II. The District Court committed reversible error by dismissing Werner's affirmative defenses of undue hardship and direct threat.

A. Standard of Review

This Court reviews a grant of summary judgment *de novo*. *De Mian v. City of St. Louis, Missouri*, 86 F.4th 1179, 1182 (8th Cir. 2023). Summary judgment is proper only if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A court does not "weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue." *Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins. Co.*, 536 F.3d 939, 944 (8th Cir. 2008). "If … a reasonable jury could return a verdict for either party, then summary judgment is not appropriate." *Redmond v. Kosinski*, 999 F.3d 1116, 1120 (8th Cir. 2021) (quotation omitted).

B. The District Court improperly weighed the evidence in dismissing Werner's undue burden defense.

Under the ADA, a proposed accommodation is unreasonable if it would impose an undue hardship on the operation of the employer's business. 42 U.S.C. §§ 12112(b)(5), 12111(10). "Undue hardship" refers to any accommodation that is unduly costly, extensive, substantial, or disruptive, or would *fundamentally alter the*

nature or operation of the program. *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999); *see also* 29 C.F.R. pt. 1630 App'x. at 1630.2(p).

Werner offered evidence that observed over-the-road driving was an essential function of its training process for inexperienced drivers, implemented to improve safe driving practices, reduce accidents, and determine preparedness for solo trips. (Add. 49, 67, R. Doc. 226-2, at 30, 48 (Depo. 118:14-24, 190:12-16); Add. 130, R. Doc. 246-2, at 11). That program teaches inexperienced drivers how to safely handle conditions not encountered in CDL school through real-time instruction from a seasoned trainer. (Add. 44, 49, R. Doc. 226-2, at 25, 30 (Depo. 98:12-17, 118:14-24); App. 106-10, R. Doc. 231-2, at 2-6). Both Hamm and Werner's expert testified instantaneous communication is a fundamental part of this program, as "constant and immediate two-way communication" allows inexperienced drivers to be safely coached in real-time on best practices while operating 80,000 pound vehicles. (App. 65-67, R. Doc. 226-2, at 46-48 (Depo. 184:16-185:6, 190:10-16); App. 106-10, R. Doc. 231-2, at 2-6).

Werner also presented evidence that all accommodations proposed by the EEOC would have fundamentally altered the safety and efficacy of Werner's program. If Werner permitted Robinson to communicate with his trainer while driving through hand signals, flash cards, short written commands or colored flags (as proposed by EEOC), Werner would have to accept the fact Robinson would be

"divert[ing] [his] attention from the roadway," creating a "risk of injury and potential fatality." (App. 106-10, R. Doc. 231-2, at 2-6). Alternatively, if Werner utilized the EEOC's proposal to conduct all communications at predetermined stops, through sign language or in writing, there would be no way for Robinson's trainer to coach him through difficult or emergency situations in real time. (App. 106, R. Doc. 231-2, at 2). On this record, a reasonable jury could conclude the EEOC's proposed accommodations would "*fundamentally alter the nature or operation of the program*." *Buckles*, 176 F.3d at 1101; *see also* 29 C.F.R. pt. 1630 App'x. at 1630.2(p).

Despite this evidence, the District Court reasoned Werner's undue hardship defense "[wa]sn't particularly applicable," stating "**the Court is not *persuaded* that providing training with non-verbal instead of verbal cues would 'fundamentally alter' the nature of Werner's business.**" (Add. 15, App. 313, R. Doc. 265, at 15) (emphasis added). The District Court also reasoned "Werner ha[d] other, more pertinent legal grounds to present its factual argument about safety concerns and the need for verbal interaction." (Add. 15, App. 313, R. Doc. 265, at 15). The District Court compounded its error at the post-trial motion stage, incorrectly stating Werner offered only a "conclusory assertion" the proposed accommodations would fundamentally alter its program. (Add. 75, App. 579, R. Doc. 376, at 9).

It is clear from the statement "[t]he Court is not persuaded" the District Court improperly weighed the evidence and substituted its judgment for that of the jury. *Danker v. City of Council Bluffs*, 53 F.4th 420, 423 (8th Cir. 2022); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987). Similarly, the District Court's belief Werner had more "pertinent" defenses is not a proper basis for granting summary judgment because Werner is entitled to pursue all defenses supported by law and the facts. *United States v. Hudson*, 414 F.3d 931, 933 (8th Cir. 2005) (defendant is entitled to assert defenses for which it has shown "underlying evidentiary foundation . . . regardless of how weak, inconsistent or dubious" the evidence may seem) (quotation omitted). Because there was evidence from which a reasonable jury could find the EEOC's proposed accommodations would have imposed an undue burden by fundamentally altering Werner's placement driver program, this Court should vacate the judgment and remand for a new trial. *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 (1st Cir. 2000) (citing 29 C.F.R. pt. 1630, App.) ("Undue hardships are not limited to financial impacts; the term includes accommodations that are unduly extensive, substantially disruptive, or that would fundamentally alter the nature or operation of the business.").

C. The District Court misapplied the legal standard for "direct threat" and disregarded the record evidence.

The District Court also erred in dismissing Werner's "direct threat" defense. Under the ADA, an employer may lawfully decline to hire an individual who poses

a "direct threat" to health or safety in the workplace. 42 U.S.C. §§ 12111(3), 12113(b). An employer's determination that an individual poses a direct threat must be based on an individualized assessment of his present ability to safely perform the essential job functions and the most current medical knowledge or best available objective evidence, considering the duration of the risk, the nature and severity of the potential harm, and likelihood and imminence of harm. 29 C.F.R. § 1630.2.

Werner presented evidence Hamm determined any in-cab communications between Robinson and his trainer would have to be done non-verbally, such as through sign language, and she was concerned such communications would require Robinson to take his eyes of the road, posing a threat to safety. (App. 86-88, R. Doc. 226-9, at 2-4). Werner also offered evidence that Hamm conducted an individualized assessment of Robinson's application and investigated potential accommodations to address these concerns. (App. 23, R. Doc. 226-2, at 4 (Depo. 16:14-25)). For example, Ms. Hamm contacted the Nebraska Department of Transportation ("NDOT") and spoke with the individual who completes road tests for hearing impaired individuals, but he was unable to suggest any means for communicating with a totally deaf student driver while driving, other than pulling over. (Add. 24, R. Doc. 226-2, at 5 (Depo. 18:15-20:4)). Maus also spoke with representatives from the American Trucking Association, the FMCSA, and other motor carriers but did not identify any companies training totally deaf drivers or any research addressing how

that could safely be done. (Add. 25-28, R. Doc. 226-2, at 6-9 (Depo. 21:10-26:8, 31:12-35:3)).

Werner also presented evidence Hamm participated in a 30-minute phone call with Robinson (through a relay service) to investigate potential accommodations. (App. 45-46, R. Doc. 226-2, at 26-27 (Depo. 103:18-108:17)). Robinson proposed having his trainer write notes on a whiteboard or use hand signals or having an interpreter in the cab. (App. 46, R. Doc. 226-2, at 27 (Depo. 105:1-107:8)). Robinson also informed Maus "if it's a real emergency, then I would pull off the road." (App. 155-56, R. Doc. 246-6, at 14-15 (Depo. 53:24-54:3); Trial Tr. IV, at 812:25-819:14). Hamm testified she and Robinson were not able to identify any accommodations that would allow Robinson to communicate with his trainer while driving without diverting attention from the road. (Trial Tr. IV, at 812:25-819:14).

Despite this evidence, the District Court granted summary judgment for the EEOC, stating "Werner says a deaf placement driver couldn't possibly be coached to respond to a sudden accident or emergency, meaning that the driver would be a 'direct threat' to himself or others." (Add. 12, App. 310, R. Doc. 265, at 12). The District Court then summarily concluded "Werner misapprehends the nature of the 'direct threat' defense, which demands a 'particularized enquiry' into the risks posed or faced by the employee," and "Werner's assessment of … Robinson wasn't bespoke – it was off-the-rack." (Add. 12, App. 310, R. Doc. 265, at 12). But the

District Court's conclusion was at odds with the summary judgment record, which clearly contained evidence from which a reasonable juror could find Werner conducted a specific investigation in response to Robinson's application regarding the risks posed by his participation in the program and potential accommodations. *See Witchet*, 2020 U.S. Dist. LEXIS 260843, at *18-19 (granting summary judgment for employer on direct threat defense because allowing plaintiff to continue driving "could expose [the employer] to a risk of liability that it is unwilling to take, and could expose the public to a risk of injury. Though that risk may be small, the consequences are severe."); *see also Anderson v. Norfolk S. Ry. Co.,* No. 21-1735, 2022 U.S. App. LEXIS 9604, at *9 (3d Cir. Apr. 11, 2022).

It appears the District Court concluded because Ms. Hamm's concerns could theoretically apply to other deaf applicants, that evidence could not create an issue of fact on whether Werner determined Robinson *personally* posed a direct threat. But the fact those same concerns might exist for another applicant does not change the fact Werner offered evidence Hamm determined, after an investigation specific to Robinson's application, he posed a direct threat to the safety of himself, his trainer, and the motoring public. Accordingly, the District Court erred in granting summary judgment for the EEOC on Werner's direct threat defense.

Nor does the fact Werner was able to present evidence at trial regarding the perceived safety risks render the District Court's error "harmless." as the District

Court suggested at the post-trial motion stage. (Add. 76, App. 580, R. Doc. 376, at 10 n.3). "When a proposed theory is supported by competent evidence, the trial court must instruct the jury on the applicable law, and failure to so instruct constitutes prejudicial error." *Herrick v. Monsanto Co.*, 874 F.2d 594, 598 (8th Cir. 1989). Because the District Court "deprived the jury from considering a viable defense," Werner suffered "harmful, prejudicial, and reversible" error when the District Court dismissed the direct threat defense. *Graham Constr. Servs. v. Hammer & Steel Inc.*, 755 F.3d 611, 620 (8th Cir. 2014).

For similar reasons, Werner's failure to request a jury instruction on direct threat does not excuse the District Court's error. (Add. 76, App. 580, R. Doc. 376, at 10). Clearly, because the District Court dismissed that defense months before trial, any request for a jury instruction on direct threat would have been futile and "the law does not require futile acts." *Walker v. Ark. Dep't of Corr.*, No. 4-05-CV-1336, 2007 U.S. Dist. Lexis 85914, *15 (E.D. Ark. Nov. 20, 2007); *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 961 (1st Cir. 1993) ("[A] party who forgoes an obviously futile task will not ordinarily be held thereby to have waived substantial rights."). Werner is not aware of any case law holding a party must request a jury instruction on claims or defenses dismissed months earlier to preserve an argument the dismissal was erroneous. The *Weber* case cited by the District Court is factually inapposite because there is no indication the jury instructions which the

appellant claimed should have been given in that case, but which he admittedly failed to request, related to claims the district court dismissed months earlier. *See Weber v. Strippit*, 186 F.3d 907, 915 (8th Cir. 1999). For these reasons, this Court should vacate the judgment below and remand for a new trial.

III. The District Court admitted unfairly prejudicial and irrelevant evidence and excluded highly relevant evidence.

A new trial is also warranted because the District Court abused its discretion by admitting irrelevant and unfairly prejudicial evidence of stray remarks by non-decisionmakers made years after Robinson applied to Werner and evidence of other companies' training practices *in 2021*, five years after Werner declined to hire Robinson. (Add. 39-41, App. 425-27, R. Doc. 303, at 11-13; Add. 77-78, App. 581-82, R. Doc. 376, at 11-12). The District Court compounded these errors by excluding highly relevant evidence Robinson was involved in numerous accidents while driving for other motor carriers. (Add. 31-32, App. 417-18, R. Doc. 303, at 3-4). As further detailed below, these prejudicial evidentiary rulings require reversal.

A. Standard of Review

This Court reviews a "district court's evidentiary ruling for an abuse of discretion" and will reverse "'if the evidentiary ruling was a clear and prejudicial abuse of discretion,' meaning it 'had a substantial influence on the jury's verdict.'" *Cont'l Res., Inc. v. Fisher*, 102 F.4th 918, 926 (8th Cir. 2024).

B. The District Court admitted untimely stray remarks by non-decisionmakers.

Years after Werner declined to hire Robinson, several Werner employees exchanged a handful of insensitive comments about deaf applicants. (App. 620-44, Trial Exs. 23, 25, and 26). There is no evidence those employees had any hand in the decision not to hire Robinson in 2016. Moreover, the comments were not about Robinson. This Court has cautioned district courts should "carefully distinguish[] between comments which demonstrate a discriminatory animus in the decisional process or those uttered by individuals closely involved in employment decisions, from stray remarks in the workplace, statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process." *Arraleh v. Cty. of Ramsey*, 461 F.3d 967, 975 (8th Cir. 2006). Under that authority, the District Court committed prejudicial error in overruling Werner's pretrial motion in limine and admitting Trial Exhibits 23, 25, and 26, which included stray remarks by non-decisionmakers years after Werner rejected Robinson.

Robinson applied in 2016 and Hamm informed Robinson he would not be hired in February 2016. (App. 46, R. Doc. 226-2, at 27 (Depo. 108:1-12). Over two years later, in March 2018, Jen Williams, a member of Werner's recruiting department, sent Erin Marsh, another recruiting employee, a chat message stating she was "on hold with a deaf guy," and "they must be trying to find him…you know yelling his name…but he can't hear them," to which Marsh relied "lmao." (App.

620-32, Trial Ex. 23). In April 2018, Williams sent Marsh an instant message stating "ever heard of … CDL Marco Polo LLC" and "hopefully they don't have a lot of deaf students," to which Marsh replied, "so bad." (App. 633-41, Trial Ex. 25). In May 2018, Tom Pietrzak, another Werner employee, sent Marsh an article via email indicating an inexperienced deaf driver got a commercial trucking job, to which Marsh responded, "this scares me to death." (App. 642-44, Trial Ex. 26). Marsh testified she was referring to the danger of distracted driving posed by a deaf student driver attempting to communicate with a trainer while driving. (Trial Tr. III, at 569:1-14). Pietrzak responded, via email, "Huh? Sorry, couldn't resist. There is probably a special place for me somewhere someday," to which Marsh replied "[y]ou were just waiting by your email to pounce on that one." (App. 642-44, Trial Ex. 26).

There is no question these comments were insensitive and in poor taste. However, there is also no question those comments were made in 2018, two years *after* Hamm declined to hire Robinson. Moreover, Hamm testified she alone made that hiring decision. (App. 50, R. Doc. 226-2, at 31 (Depo. 124:17-21)). There is no evidence Pietrzak or Williams had anything to do with Robinson's application. Marsh's involvement was limited to emailing Robinson to set up his call with Hamm; although Marsh remained on the phone during that call, Marsh did not speak. (App. 50, R. Doc. 226-2, at 31 (Depo. 124:17-21); App. 336, R. Doc. 281-2, at 4

(Depo. 112:22-113:7)). Hamm and Marsh both denied Marsh played any role in the actual hiring decision. *Id.*

Despite this evidentiary record, the District Court inexplicably concluded Marsh was "part of the decision-making process for Robinson's application" and the comments in 2018 were "not so far removed from the relevant period" as to be inadmissible. (Add. 77, App. 581, R. Doc. 376, at 11). The District Court further concluded, contrary to logic, that comments between Marsh, Williams, and Pietrzak *two years* after Hamm declined to hire Robinson, about other applicants, "demonstrated discriminatory animus in the decisional process" and "were relevant to the punitive damages claim and whether Werner was motived by safety or by animus in failing to hire Robinson." (Add. 39, App. 425, R. Doc. 303, at 11; Add. 77, App. 581, R. Doc. 376, at 11).

The District Court's ruling constitutes a clear abuse of discretion. Because the comments in Trial Exhibits 23, 25, and 26 were years after the hiring decision, between employees who did not make that decision, that evidence does *not* logically bear on "whether [Hamm] was motivated by safety or animus in failing to hire Robinson" in 2016. (Add. 39, App. 425, R. Doc. 303); see*, e.g.*, *Simmons v. Oce-USA*, 174 F.3d 913, 915 (8th Cir. 1999) ("Stray remarks made in the workplace are not sufficient to establish a claim of discrimination."); *DeRoche v. All Am. Bottling Corp.*, 57 F. Supp. 2d 791, 797 (D. Minn. 1999) (statements by non-decisionmakers

"uttered well after [the] decision to reject [the plaintiff's] employment application" were not relevant); *see also Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 427-28 (8th Cir. 1999) (remark by supervisor, which preceded the challenged termination by two years, was too remote to satisfy plaintiff's burden). The fact Marsh communicated with Robinson about his application does not alter that analysis, where it is undisputed Hamm was the sole decisionmaker on Robinson's application and the stray remarks were made in 2018, about other applicants.

For similar reasons, the District Court clearly abused its discretion in finding that evidence was relevant to punitive damages. "'Federal law imposes a formidable burden on plaintiffs who seek punitive damages' in employment discrimination cases." *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 903 (8th Cir. 2006); *Battle v. UPS*, 438 F.3d 856, 865 (8th Cir. 2006). Punitive damages are limited "to cases in which the employer has engaged in intentional discrimination ***and*** has done so ***'with malice or with reckless indifference*** to the federally protected rights ***of an aggrieved individual***.'" *Kolstad v. ADA*, 527 U.S. 526, 529-30 (1999) (quoting 42 U.S.C. § 1981a(b)(1)) (emphasis added); *Canny*, 439 F.3d at 903.

Contrary to that case law, the District Court held that even if Marsh, Williams and Pietrzak were not involved in the hiring decision and their comments were about other applicants, those comments "would help the jury to understand how Werner employees felt about deaf drivers generally and how they felt about their own

actions." (Add. 38, App. 424, R. Doc. 303, at 10). But under the authority cited above, how non-decisionmakers "felt" about deaf individuals generally or "about their own actions" years *after* the hiring decision is not relevant to Werner's reasons for not hiring Robinson in 2016 or the appropriateness of punitive damages, which turns on how Werner acted ***toward Robinson***.

Not only was that evidence totally irrelevant, it was inflammatory and unfairly prejudicial. By allowing the jury to consider well-after-the-fact insensitive comments by non-decisionmakers, the District Court encouraged the jury to improperly "punish [Werner], irrespective of the actual influence that [the] post-decisional views may have had upon [the] determination to reject [Robinson's] employment application." *DeRoche*, 57 F. Supp. 2d at 797-98. At the conclusion of the trial, the jury did exactly that—the jury awarded $75,000 in compensatory damages and $36,000,000.00 in punitive damages.[1] (App. 478, R. Doc. 323, at 2). Because the District Court committed a prejudicial abuse of discretion by admitting Trial Exhibits 23, 25 and 26, this Court should vacate the judgment and remand for a new trial.

[1] The District Court subsequently granted Werner's Motion to Reduce the Verdict Pursuant to the Statutory Cap. (App. 556, R. Doc. 353, at 14).

C. The District Court admitted irrelevant and prejudicial evidence regarding other companies' training practices.

The District Court similarly abused its discretion by admitting irrelevant evidence regarding other companies' training practices in 2021, years after Robinson applied to Werner. (Add. 40, App. 426, R. Doc. 303, at 12; Trial Tr. II, at 235, 317; Trial Tr. III at 468, 473). Although the District Court reasoned this evidence was "relevant to … whether Werner's refusal to train deaf drivers was reasonable," the practices of other trucking companies in 2021 do not logically bear on whether Werner's hiring decision in 2016 complies with the law. (Add. 40, App. 426, R. Doc. 303, at 12).

Werner is not bound by the safety decisions of other companies. *See* 49 C.F.R. § 390.3(d). Although all interstate motor carriers are bound by the FMCSRs, Werner may adopt "more stringent requirements relating to safety of operation and employee safety and health[.]" *Id.* Accordingly, the fact other companies decided years after Werner declined to hire Robinson to allow inexperienced drivers to divert attention from the road during training or eliminate real-time, in-cab instructions altogether is not relevant to whether Werner's hiring decision was reasonable *under its hiring and safety standards*. *See, e.g. EEOC v. Schneider Nat'l, Inc.*, 481 F.3d 507, 510 (7th Cir. 2007) ("**Schneider is entitled to determine how much risk is too great for it to be willing to bear**" and "**[t]he fact that another employer and, as in all such cases, the worker himself are willing to assume a risk does not compel**

[Schneider] to do likewise.") (emphasis added). The admission of evidence regarding other trucking companies' training practices in 2021 amounts to reversible error because the law allows Werner to base its hiring decisions, including with respect to Robinson, on how much risk *Werner* is willing to bear. For these reasons, the District Court abused its discretion by admitting irrelevant evidence regarding other companies' training practices and this Court should vacate the judgment and remand for a new trial.

D. The District Court excluded relevant evidence of Robinson's poor safety record.

Prior to trial, the District Court excluded evidence of Robinson's performance with subsequent trucking employers and the multiple accidents in which Robinson was involved after Werner declined to hire him. (Add. 31, App. 417, R. Doc. 303, at 3). The District Court reasoned "post-rejection accidents could not have effected whether Werner was reasonable in its decision not to hire Robinson." (Add. 32, App. 418, R. Doc. 303, at 4). At trial, Werner made an offer of proof that, if permitted, Werner would elicit testimony from Robinson regarding these accidents, which the District Court overruled on the same grounds. (Trial Tr. II, at 448-49). However, the District Court overlooked the fact that evidence supports Werner's position that the accommodations proposed by EEOC were not reasonable for Werner's training program. Specifically, evidence Robinson was involved in multiple accidents as a solo driver supports Werner's position that real-time communications with a trainer

are a necessary part of any effective training program for a new commercial driver and tends to show a new driver who does not receive such instructions may not be properly trained to safely operate a CMV solo. In other words, that evidence was *relevant to whether the accommodations proposed by Robinson* (allegedly implemented through his later training with other carriers) *were reasonable and effective*. *See Allen v. United States Postal Serv.*, No. 21-30699, 2022 U.S. App. LEXIS 18347, at *6 (5th Cir. July 1, 2022) (ineffective accommodation is no accommodation at all)).

In denying Werner's post-trial motion on this issue, the District Court summarily concluded "post-rejection accidents had little relevance to the safety of a deaf driver communicating with another person in the cab of a truck while training, which was the issue presented to the jury." (Add. 78, App. 582, R. Doc. 376, at 12). But *another issue* "presented to the jury" was whether "two-way communication" during "the trainer-observed over-the-road component of the placement driver program was *an essential function* of the over-the-road truck driver position." (Add. 79-80, App. 583-84, R. Doc. 376, at 13-14; App. 464-69, R. Doc. 322, at 10-15). Werner presented evidence through the testimony of Hamm and its expert that such communications were an integral and essential part of its training program. (Add. 49, 67, R. Doc. 226-2, at 30, 48 (Depo. 118:14-24, 190:12-16); App. 106-10, R. Doc. 231-2, at 2-6). The EEOC argued any necessary information could be conveyed at

predetermined stops or while pulled over. (App. 106, R. Doc. 231-2, at 2; Trial Tr. I, 168-169). The jury was instructed to consider "[t]he consequences of not requiring the person to perform the function" in deciding whether the ability to safely communicate with a trainer while driving was an essential function of Werner's program. (App. 468, R. Doc. 322, at 14).

Yet the District Court excluded Werner's evidence that Robinson was involved in multiple accidents *after* he was trained by companies that did *not* require instantaneous, in-cab communication with a trainer. (Add. 31-32, App. 417-18, R. Doc. 303, at 3-4). This ruling was an abuse of discretion because Robinson's safety record serves as evidence of the consequences of not requiring instantaneous two-way communications during new driver training and, therefore, is highly relevant. Because the District Court clearly abused its discretion by excluding this evidence, this Court should vacate the judgment and remand for a new trial.

IV. The District Court erred in submitting punitive damages to the jury.

A. Standard of Review

"Whether there is sufficient evidence to support an award of punitive damages is a question of law" reviewed de novo. *Scott v. Dyno Nobel, Inc.*, No. 22-3034, 2024 U.S. App. LEXIS 16944, at *26 (8th Cir. July 11, 2024).

B. There was no legally sufficient evidence of malice or reckless indifference.

The District Court also committed reversible error by submitting punitive damages to the jury, because there was no evidence of malice or reckless indifference to Robinson's federally protected rights. To support punitive damages in an ADA case, an employee must "show something ***more than*** intentional discrimination," *Canny*, 439 F.3d at 903-04 (emphasis added), by offering evidence the employer acted "'with malice or with reckless indifference to the federally protected rights of *an aggrieved individual*.'" *Kolstad*, 527 U.S. at 529-30 (quoting 42 U.S.C. § 1981a(b)(1)) (emphasis added). Employment decisions based on an employer's safety concerns and motivation to comply with another federal law "do not constitute the type of malicious intent or reckless indifference required to support an award of punitive damages." *Canny*, 439 F.3d at 904.

In *Canny*, the plaintiff drove a semi-truck and was required to maintain an unrestricted driver's license. *Id.* at 897. During the course of his employment, the plaintiff became legally blind. *Id.* at 898. Ultimately, his employer determined it could not accommodate Canny because all available positions required driving (whether a semi and a forklift), and the employer believed "Canny's poor vision created a safety risk to Canny and to others." *Id.* at 904. The decisionmakers testified they had "very, very serious concerns about [Canny's] safety." *Id.* at 904. On that record, this Court concluded a "decision upon safety concerns" simply "do[e]s not

constitute the type of malicious intent or reckless indifference required to support an award of punitive damages." *Id.*

Consistent with *Canny*, the District Court erred in submitting punitive damages to the jury because the EEOC did not offer any evidence Werner acted with malice or reckless indifference toward Robinson. The evidence demonstrated Hamm was the sole decisionmaker regarding Robinson's application and she declined to move him forward due to safety concerns. (App. 50, R. Doc. 226-2, at 31 (Depo. 124:17-21); Trial Tr. IV, at 816-819). Even if, as the District Court suggested, the jury determined Hamm's investigation into potential accommodations could have been more rigorous, the undisputed evidence confirms Werner's hiring decision was based on Hamm's concern that Werner "could not safely train Robinson." (Add. 48, App. 436, R. Doc. 316, at 4). In addition to Werner's repeatedly expressed and legitimate safety concerns (which were echoed by an expert witness), it is undisputed Werner *has and does* hire qualified deaf drivers who do not need to complete the placement driver program. (Trial Tr. IV, at 823:11-824:1).

At the post-trial motion stage, the District Court doubled down on its illogical determination that stray remarks by non-decisionmakers about other applicants provided support for punitive damages. (Add. 81, App. 585, R. Doc. 376, at 15). But for the reasons already discussed, a handful of insensitive comments by non-decisionmakers years after the hiring decision at issue do not demonstrate Werner—

or Hamm—intentionally discriminated or acted with animus toward Robinson. *See Arraleh*, 461 F.3d at 975; *Canny*, 439 F.3d at 904. Those comments are simply not sufficiently related to the decisional process to support punitive damages.

The fact Marsh was a "high-level" official does not change this conclusion. (Add. 39, App. 425, R. Doc. 303, at 11). By that logic, *any* insensitive comment by managerial staff could subject a company to punitive damages, regardless of the time, place, or context of the comment and its relationship (or lack thereof) to the adverse employment action. And contrary to the District Court's suggestion, Hamm's statement to Robinson that she believed he could not safely complete the placement driver program does not equate to Hamm telling Robinson he was not hired because he was deaf. (Trial Tr. IV, at 812:25-819:14; Add. 82, App. 586, R. Doc. 376, at 16). Because there was insufficient evidence to support punitive damages, the District Court erred in submitting that issue to the jury and this Court should vacate the judgment and remand for a new trial.

V. The District Court erred in granting injunctive relief.

A. Standard of Review

"The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *S.D. Voice v. Noem*, 60 F.4th 1071, 1077 (8th Cir. 2023). A court's discretion to award injunctive relief "is not unlimited," and "[p]rovisions of an

injunction may be set aside if they are broader than necessary to remedy the underlying wrong." *EEOC v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir. 1998).

B. The EEOC failed to establish pervasive discrimination or any threat of future harm.

The District Court committed reversible error by awarding broad injunctive relief despite the EEOC's failure to establish pervasive discrimination or any threat of future harm. (Add. 60-64, App. 552-56, R. Doc. 353, at 10-14; Add. 82, App. 586, R. Doc. 376, at 16; Add. 90-91, App. 594-95, R. Doc. 377, at 1-2).

Injunctive relief is a discretionary remedy and is not mandatory. 42 U.S.C. § 2000e-5(g)(1); 42 U.S.C. § 12117(a); *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 676 (8th Cir. 2006); *Johnson v. Brock*, 810 F.2d 219, 225 (D.C. Cir. 1987). Injunctive relief is generally reserved for cases involving a "consistent practice" of discrimination affecting multiple individuals. *See, e.g.*, *Briscoe v. Fred's Dollar Store*, 24 F.3d 1026, 1028-29 (8th Cir. 1994).

In determining whether to award injunctive relief, a district court should balance the threat of irreparable harm to the moving party, the harm to the nonmoving party if the court grants the injunction, and the public interest at stake. *Wedow,* 442 F.3d at 676, Applying those standards, the District Court abused its discretion by awarding injunctive. This case involved a single driver applicant who was not hired by Werner in 2016, and it is undisputed Robinson quit working as a commercial driver in 2020, due to unrelated medical issues. (Trial Tr. VI, at 94-95).

The EEOC did not identify any other qualified applicants whom Werner declined to hire as placement drivers due to their deafness. Moreover, the undisputed evidence confirmed Werner *has* hired other deaf drivers. (Trial Tr. IV, at 823:11-824:1). Accordingly, this case is a far cry from those in which courts entered injunctions after finding consistent and broad-ranging discriminatory practices. *See Briscoe*, 24 F.3d at 1028-29 (affirming injunctive relief where employer was found to have engaged in a "consistent practice" of discrimination against Black employees); *Taylor v. Jones*, 653 F.2d 1193, 1203 (8th Cir. 1981) (affirming injunctive relief based on "pervasive" and "broad-ranging" discrimination in the Arkansas National Guard). Because the EEOC failed to prove broad-ranging discriminatory practices and a threat of future irreparable harm, this Court should vacate the order for injunctive relief.

VI. Werner is entitled to judgment as a matter of law because Robinson was not a qualified individual. In the alternative, the EEOC failed to offer sufficient evidence Robinson was a qualified individual.

A. Standard of Review

Judgment as a matter of law is proper "if the evidence … would not permit reasonable jurors to differ as to the conclusions that could be drawn." *Townsend v. Bayer Corp.*, 774 F.3d 446, 456 (8th Cir. 2014).

This Court reviews a sufficiency of the evidence claim "de novo using the same standards as the district court: "the evidence is viewed in the light most

favorable to the prevailing party and the court cannot weigh or evaluate the evidence or consider questions of credibility." *Id.* (quoting *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 832 (8th Cir. 2005)).

B. As a matter of law, Robinson was not a qualified individual.

The District Court erred in submitting the EEOC's discrimination claims to the jury because, as a matter of law, Robinson was not a qualified individual. To establish its claim of disability discrimination, the EEOC was required to prove, *inter alia*, Robinson is a "qualified individual" who (1) possesses the requisite skill, education, experience, and training for the position, and (2) is able to perform the essential job functions, with or without reasonable accommodation. 42 U.S.C. § 12112(a); 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2; *Lipp*, 911 F.3d at 543; *McNeil v. Union Pac. R.R. Co.*, 936 F.3d 786, 789 (8th Cir. 2019).

Here, the evidence confirms Robinson was *not* a "qualified individual" because he did not meet the Hearing Standard in §391.41(b)(11). *See Kirkingburg*, 527 U.S. at 558. Crucially, the United States Supreme Court has held an employer does not violate the ADA by requiring compliance with a DOT qualification standard ***even if the applicant obtained a waiver from that standard***. *Kirkingburg*, 527 U.S. at 558. In *Kirkinburg*, an employer terminated a truck driver because he no longer met the DOT vision standard. *Id.* at 560. The driver sued, arguing his employer's decision to terminate—and refusal to rehire him once he obtained a

waiver from that standard—violated the ADA. *Id.* Conversely, the employer maintained it could lawfully require "the minimum level of visual acuity set forth in the DOT's Motor Carrier Safety Regulations." *Id.* at 567. The Supreme Court agreed, stating "**The question posed is whether, under the Americans with Disabilities Act … an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation must justify enforcing the regulation solely because its standard may be waived in an individual case. We answer no.**" *Id.* at 558 (emphasis added).

The *Kirkinburg* Court reasoned it was an error for lower courts "to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard," because that standard remained unchanged. *Id.* at 571. Moreover, the regulation establishing the waiver program was not "on par with the basic visual acuity regulation" because it was enacted without "empirical data to establish a link between vision disorders and commercial motor vehicle safety." *Id.* at 575. Ultimately, the Supreme Court concluded employers should not be required to justify a decision to abide by an "existing and otherwise applicable safety regulation issued by the Government itself." *Id.* at 577.

Consistent with that case law, because Robinson admittedly cannot meet the Hearing Standard, which remains in force, the EEOC cannot establish he was a "qualified individual" under the ADA. Section 391.41(b)(11) sets a minimum

hearing standard for individuals "physically qualified to drive a commercial motor vehicle," and was in effect when Robinson applied. It is undisputed Robinson cannot meet this standard. Moreover, as in *Kirkingburg*, the Hearing Exemption program was authorized without any empirical data regarding the impact of hearing loss on commercial motor vehicle safety. *See* 80 Fed. Reg. 18,924-01 (Apr. 8, 2015) (explaining the FMSCA was aware of "[n]o studies that examined the relationship between hearing loss and crash risk exclusively among CMV drivers"); *see also* 78 Fed. Reg. 7479-1 (Feb. 1, 2013). Consistent with *Kirkingburg*, Werner was entitled to require that Robinson meet the Hearing Standard codified in federal regulations, regardless of any exemption.

In rejecting this conclusion, the District Court observed that a separate portion of the regulations (49 C.F.R. § 391.41(a)) was revised post-*Kirkingburg* to allow individuals with medical variances to be considered physically qualified to drive CMVs. (Add. 7-8, App. 305-06, R. Doc. 265, at 7-8). However, the Hearing Standard in Section 391.41(b)(11) remains unchanged, outlining clear hearing standards with no requirement for an individual assessment. As in *Kirkingburg*, the Hearing Standard was issued by the Government with the understanding it was "needed for safe operation" of CMVs and Werner should be permitted to hold applicants to that standard. *Kirkingburg*, 527 U.S. at 572. To conclude otherwise would force Werner to "justify *de novo* an existing and otherwise applicable safety

regulation issued by the Government itself." *Id.* at 577. It is "simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive [hearing] acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms." *Id.* at 577-78. Because Robinson was not a qualified individual as a matter of law, this Court should vacate the judgment and render judgment for Werner.

C. The jury lacked a sufficient evidentiary basis on which to find Robinson was a qualified individual.

In the alternative, this Court should vacate the judgment and render judgment for Werner because the EEOC failed to offer sufficient evidence Robinson was a qualified individual. Robinson did not qualify for the experienced over-the-road driving position because he had no experience. It is undisputed that in 2016, when Robinson applied, Werner required at least 6 months' experience for an over-the-road driving position. (Trial Tr. IV, at 772:19-773:24, 823:7-10). Drivers with less than 6 months' experience could only be considered for the placement driving program. (Trial Tr. IV, at 772:2-773:11). Accordingly, Robinson was only eligible for a placement driver position. (App. 343, R. Doc. 286, at 2, ¶8; Add. 460, R. Doc. 322, at 6; Trial Tr. IV, at 772:2-774:21, 859:3-5).

The evidence confirmed Robinson was not hired for the placement driver role because Hamm determined he could not safely engage in contemporaneous

communications with his trainer without diverting his eyes from the road and, therefore, could not safely complete over-the-road training. (Trial Tr. IV, at 817:23-819:7-14). The evidence confirmed Werner requires placement drivers and trainers to actively discuss situations as they encounter those scenarios. (Trial Tr. IV, at 794:1-11). Werner offered evidence Werner requires these communications to occur in real-time, while the trainer and student are driving, so the student can immediately implement the trainer's instructions. (Trial Tr. IV, at 794:16-795:6). The EEOC did not offer any evidence to refute Werner's evidence that contemporaneous communication is required by Werner for all placement drivers.

Instead, the EEOC argued Robinson should not be required to engage in contemporaneous communication without diverting his eyes from the road while driving. (Add. 9, App. 307, R. Doc. 265, at 9; Trial Tr. II, at 269:20-270:8). **However, as a matter of law, eliminating an essential function is not a reasonable accommodation.** *Higgins*, 931 F.3d at 671; *Knutson v. Schwan's Home Serv., Inc.*, 711 F.3d 911, 916 (8th Cir. 2013).

The EEOC and its experts also advocated for the use of simple hand gestures or communications when Robinson was not driving, rather than in-cab instructions from his driver trainer. (Add. 23, App. 321, R. Doc. 265, at 23; Trial Tr. II, at 258, 270-71). However, Werner offered evidence that drivers who are only coached about a situation hours later may not be able to immediately implement corrective

measures when they next encounter that scenario. (Trial Tr. IV, at 794:16-795:6, 828:24-829:3). **Crucially, lowering or changing a company standard because a prospective employee cannot meet the standard due to a disability is also not a reasonable accommodation.** 29 C.F.R. pt. 1630 App'x. at 1630.2(n) ("It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment … [or] to require employers to lower such standards."); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994) (noting reasonable accommodations do not require lowering or substantially modifying standards). Moreover, the EEOC's proposed accommodations did not account for the safety concerns posed by an inexperienced driver's inability to receive verbal instruction during an emergency situation. Because Robinson could not engage in in-cab communications without diverting his eyes from the road, the EEOC'S proposed accommodations were not reasonable as a matter of law. For these reasons, the EEOC failed to offer sufficient evidence from which the jury could find Robinson was qualified and this Court should vacate the judgment and render judgment for Werner.

VII. The District Court erred in awarding prejudgment interest.

A. Standard of Review

This Court reviews an award of prejudgment interest under an abuse of discretion standard. *Smith v. World Ins. Co.*, 38 F.3d 1456, 1467 (8th Cir. 1994).

B. The EEOC waived prejudgment interest

The District Court abused its discretion in awarding prejudgment interest because the EEOC waived this theory of damages by failing to include that issue in the pretrial order. (Add. 58-60, App. 550-51, R. Doc. 353, at 8-10; Add. 87, App. 591, R. Doc. 376, at 21; App. 594, R. Doc. 377, at 1; App. 344-47, R. Doc. 286, at 3-6). Case law confirms a party's failure to raise factual issues in a pretrial order, including damages to be recovered, constitutes a waiver. *See Crabar/Gbf, Inc. v. Wright*, No. 8:16-CV-537, 2023 U.S. Dist. LEXIS 166069, at *9 (D. Neb. Sep. 19, 2023) (citing *Klingenberg v. Vulcan Ladder USA, LLC*, 936 F.3d 824, 831 (8th Cir. 2019)). Because it is undisputed the EEOC failed to list prejudgment interest as an issue in the pretrial order, the District Court abused its discretion in awarding it over Werner's objections. (App. 494, R. Doc. 350, at 11; App. 569, R. Doc. 358-1, at 1).

Despite this clear case law, the District Court erroneously concluded the EEOC was not required to request pre-judgment interest "in the final pretrial conference order, or any other pleading." (Add. 58, App. 550, R. Doc. 353, at 8). In reaching this conclusion, the District Court cited several inapposite cases in which this Court approved an award of prejudgment interest although it was not pled ***because the governing statute required prejudgment interest***. *See Leonard v. S.W. Bell Corp. Disability Income Plan*, 408 F.3d 528, 533 (8th Cir. 2005) (remanding for consideration of prejudgment interest where that relief *was required* by law on a

successful ERISA claim); *Travelers Prop. Cas. Ins. Co. of Am. v. Nat'l Union Ins. Co. of Pittsburgh, Pa.*, 735 F.3d 993, 1008 (8th Cir. 2013) (concluding a party's failure to request prejudgment interest was not fatal to its claim); *Contitech USA, Inc. v. McLaughlin Freight Servs., Inc.*, 91 F.4th 908, 915 (8th Cir. 2024) (noting prejudgment was mandatory under the statute at issue in *Travelers*). Here, there is no statutory directive mandating pre-judgment interest. (Add. 58, App. 550, R. Doc. 353, at 8). Because the EEOC failed to timely and properly preserve its claim for prejudgment interest, the District Court abused its discretion in awarding it.

VIII. The District Court erred in instructing the jury on a stand-alone failure to accommodate claim.

A. Standard of Review

This Court reviews jury instructions for abuse of discretion, *Murphy v. FedEx Nat. LTL, Inc.*, 618 F.3d 893, 898 (8th Cir. 2010), considering whether "the jury instructions, taken as a whole, fairly and adequately represent the evidence and applicable law in light of the issues presented in a particular case." *Id.*

B. The record did not support a failure to accommodate claim and the District Court's instruction invited an inconsistent verdict.

The District Court abused its discretion by instructing on a separate failure to accommodate claim which was not pled and that instruction improperly invited an inconsistent verdict. (App. 464-65, R. Doc. 322, at 10-11). The EEOC's Complaint alleged two counts: Count I, failure to hire because of a disability, and Count II,

failure to hire because of the need for accommodation. (App. 5-6, R. Doc. 1, at 5-6). Because the only alleged unlawful practice was "refusing to hire Robinson," the jury should not have been separately instructed on a failure to accommodate claim. (App. 5-7, R. Doc. 1, at 5-7). Moreover, because the District Court's instruction did not require the jury to find Robinson was a qualified individual, it necessarily invited an inconsistent verdict when given in conjunction with the failure-to-hire instruction. Specifically, the District Court incorrectly suggested that even if the jury found Robinson did not have the skill, experience, education, and other requirements for an over-the-road truck driver job, Plaintiff could still prevail on the claim for failure to accommodate. (App. 464-65, R. Doc. 322, at 10-11). If this Court vacates the judgment and remands for a new trial, the jury should not be instructed on a separate failure to accommodate claim.

CONCLUSION

Werner requests this Court vacate the judgment and render judgment for Werner on all claims. In the alternative, Werner requests the Court vacate the judgment and remand for (1) a new trial on the EEOC's discrimination claims; and (2) entry of judgment for Werner on the EEOC's claims for punitive damages, injunctive relief, and prejudgment interest.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with Fed. R. App. P. 28.1(e)(2)(B)(i) because it contains 12,871 words, exclusive of the cover page, statement regarding oral argument, tables of contents and authorities, signature block, and certificates. This brief complies with Fed. R. App. 32(a)(5)-(6) because it is in Microsoft Word, 14-point Times New Roman font. Pursuant to Fed. R. App. P. 28A(h), the undersigned certifies the brief was scanned for viruses and is virus-free.

/s/ Elizabeth A. Culhane

CERTIFICATE OF SERVICE

The undersigned certifies a copy of the foregoing was filed electronically using the CM/ECF system, on August 20, 2024, which filing sent notification to:

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