2011 WL 844675 (Iowa Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Iowa,
First Judicial District.
Allamakee County

Matthew G. COX, Plaintiff,
v.
INTERSTATE POWER & LIGHT COMPANY, a wholly owned subsidiary of Alliant Energy Corporation, a/k/a Alliant Energy, Defendant.

No. LACV025023.
January 28, 2011.

Plaintiff's Resistance to Defendant's Motion for Judgment Nov with Authorities

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Plaintiff Matthew G. Cox, by and through his attorneys, Katz, Huntoon & Fieweger, P.C., pursuant Rule of Civil procedure 1.1003 and 1.431(4), states as follows for his Resistance to Defendant Interstate Power & Light Company's Motion for Judgment Notwithstanding Verdict:

1. This jury's verdict in favor of plaintiff Matt Cox was sustained by sufficient evidence that his report of safety concerns was the determinative factor in defendant Alliant Energy's decision to terminate his employment.

2. Contrary to its arguments in its Motion for Judgment Notwithstanding the Verdict, not only did Alliant fail to provide "substantial evidence" to support its alleged "overriding business justification" for the discharge, it instead presented this jury with a group of witnesses who at best could not agree on a reason, or, viewed favorably to plaintiff as this court is required to do, outright contradicted each other.

3. Finally, as to punitive damages, defendant incorrectly attempts to restrict plaintiff to showing actual malice, when this court correctly instructed the jury that plaintiff could prevail by showing *either* actual malice *or* legal malice. Plaintiff provided sufficient evidence to support his claim for punitive damages based on *legal* malice: "the wrongful conduct is committed with a reckless or willful disregard for the consequences of the conduct."

4. Plaintiff respectfully provides supporting authority below.

WHEREFORE, plaintiff Matt Cox respectfully asks that this court deny defendant's Motion for New Trial.

ARGUMENT

A. Standard of Review: Evidence Viewed in the Light Most Favorable to Prevailing Party

As summarized in *Springer v. Weeks & Leo Co.*, 475 N.W.2d 630, 631 (Iowa 1991): "In considering the propriety of a motion for directed verdict or a motion for judgment notwithstanding the verdict, we, like the trial court, must view the evidence in the light most favorable to the party against whom the motion is made regardless of whether it is contradicted and every legitimate

inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. If there is substantial evidence in support of each element of plaintiffs claim, the motion should be denied." See also *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 353 (Iowa 1989): "When considering the propriety of a motion for directed verdict, the court views the evidence in the light most favorable to the party against whom the motion was made. Iowa R. App. P. 14(f)(2). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). If reasonable minds might draw different inferences from the facts, whether they are in dispute or contradicted, a jury question is engendered. Iowa R. App. P. 14(f)(17)."

B. Plaintiff Produced Substantial Evidence That His Protected Activity Was the Determinative Reason for His Discharge

Notably, defendant makes *no* argument (and therefore continues to concede as it did in the summary judgment proceedings) as to the two initial elements of a claim for wrongful discharge: "1) the existence of a clearly defined public policy that protects employee activity; and 2) the public policy would be jeopardized by the discharge from employment." *Ballalatak v. All Iowa Agric. Ass'n*, 781 N.W.2d 272, 275 (Iowa 2010). Briefly for the record, as held in *Kohrt v. Midamerican Energy Co.*, 364 F.3d 894, 899-900 (8th Cir. 2004):

> After a careful review of Iowa law and the statute involved, we hold that IOSHA presents a clear and well-recognized statement of public policy. In enacting IOSHA, the Iowa legislature has explicitly stated that it *is the public* policy of Iowa to encourage employees to improve workplace safety.

Likewise, Alliant does not contest the first portion of the third element: "(3) the employee engaged in the protected activity." (*Ballalatak*, 781 N.W.2d at 275) Instead, defendant focuses solely on the remaining portion of the third element as well as the fourth element: "... and this conduct was the reason for the employee's discharge; and (4) there was no overriding business justification for the termination." (Id.)

Plaintiffs short response to defendant's argument as to the third element is that he did produce substantial evidence that his protected activity was the determinative factor in his discharge: he was fired for voicing his concerns regarding a safety issue on which he was not receiving the support from plant manager Hank Sangster that he was supposed to receive. There was certainly disputed testimony - crucially, even disputes between the testimony of defendant's alleged decision makers - as to why he was terminated if not for his complaints. It was proper for this jury to settle these disputes, and it did so in favor of Matt Cox.

In its motion, defendant views this case most favorably to itself and mischaracterizes the very nature of this case. At pages 6-7, Alliant provides a litany of "facts" which were absolutely disputed at trial, and which this court is required to view in favor of Matt Cox. (See *Niblo, supra*, 445 N.W.2d at 353) Defendant recites at page 6 that "in March of 2007, Cox was counseled by his supervisor, Hank Sangster, about doing better on addressing and fixing safety problems and improving his working relationship with co-workers." This was flatly contradicted by plaintiff, who testified he never received any such counseling, and contradicted by Sangster himself who admitted the true source of any problem was Greg Pecore and Pecore's written statement that safety did not come first. Further, Sangster admitted any such notations by him were not in Cox's personnel file and no formal personnel action was taken in March, 2007.

Next also at page 6, Alliant claims that Doug Rosenbaum and Linda Poe "determined that Cox had simply written down safety problems in his log and had not taken adequate steps to address and correct safety concerns with plant employees." Again, plaintiff explicitly denied this, testifying that he did not "simply" write down these problems but made repeated attempts to get Pecore to cease his OHSA violations, to instruct Pecore and all plant employees on safety issues and training requests, and repeated his efforts to secure Sangster's support in preventing Pecore's violations. Further, the testimony of the two corporate safety specialists from Alliant, Bill Bunke and Bob McCracken, supported plaintiff, testifying that his log was appropriate and proper procedure. Tellingly, Doug Rosenbaum faulted plaintiff for not logging enough, and Linda Poe faulted plaintiff for even having such a log.

Defendant then asserts as a fallback position in its Motion a new reason *not* highlighted at trial, that perhaps the reason for termination was "Cox's failure to appropriately investigate and correct Greg Pecore's possible work inside a boiler on April 26, 2007 without proper training and a permit.... Cox ... acknowledged that he took no action to correct the situation." (Alliant Brief at 6) To the contrary, viewed favorably to plaintiff and this jury's verdict, Cox explained that he did take action to "correct the situation."

First, Cox testified he went to Hank Sangster regarding this very issue (a disputed fact at trial the jury apparently resolved in plaintiff's favor), but received no support from Hank. He then sent e-mails to all employees re-emphasizing the training requirement, then identified who needed the training and informed them. Cox explained that he was specifically trying *not* to cause any additional problems by singling out Pecore and adding to any perception that there was a personality conflict with Pecore, but was relying on Sangster to address Pecore.

Second, the record does not support Alliant. Rosenbaum and Poe admitted the investigative report indicates that Pecore admitted to them that Cox had, in fact, done something "to correct the situation." Pecore had been counseled by Cox not to go into confined spaces and to complete his training. See Plaintiffs Exhibit 8, the investigative notes from the interview with Pecore on May 8, 2007: "Matt *has asked* Greg to stay out of confined spaces until he has completed his training."

Finally, defendant cites at page 6-7 "after raising concerns about Pecore to Hank Sangster on May 7, 2007, Cox refused to discuss the matter with Sangster but walked out of the meeting even though Sangster directed him to stay and discuss the appropriate corrective action." This is the most blatant example of defendant asking this court to view disputed facts in its favor, because Sangster himself admitted that Cox's action was *not* insubordination and was not only appropriate given the circumstances, but mandated by company policy.

Of course, Matt Cox testified to a completely different version of what occurred on May 7, 2007. He explained that it was Sangster who refused to discuss the actual safety concerns and appropriate corrective action to what is now an entirely undisputed OSHA violation by Pecore. Instead, Sangster chose to yell at plaintiff and turn this into a "personality conflict" and ignore the (now admitted) safety violation. Not only is it enough that plaintiff contradicted this point, but, most damningly to defendant, the last witness called by defendant, Al Steiber, essentially corroborated Cox's version!

C. Ultimate Issue

Instead, at its heart, this is an employment case, albeit a wrongful discharge suit under Iowa Public Policy. Defendant essentially attempts to hold plaintiff to a standard of proving his case by direct evidence, which, as repeatedly recognized, is rarely found. Instead, plaintiff can, and did, reply upon circumstantial evidence. The bottom line in resisting both this Motion for New Trial and the Motion for Judgment Notwithstanding the Verdict is that, as recognized by this court in its ruling denying defendant's Motion for Summary Judgment, this is not merely a case in which the timing of Matt Cox's termination supports the jury's finding of causation- following immediately upon his reporting these OSHA violations to Hank Sangster and Hank's response reported to Linda Mattes. Instead, this case also blatantly demonstrates defendant's witnesses' hopelessly inconsistent and futile efforts to provide this jury an explanation for the termination other than the fact that Cox engaged in this protective activity. As this court recognized in its summary judgment order of December 29, 2010:

> "The employer's reason for termination of the employee's job is not clearly established by undisputed facts on the present record. The circumstances are disputed. The reasons given by the employer representatives are inconsistent. Causation and motive are at issue. Credibility questions are involved. The overriding business justification issue is intertwined with the evidence and issues regarding the reasons for the discharge."

As this court will hopefully agree, if anything, these "employer representatives" were even more inconsistent at trial. They could not agree on why there was an investigation, why the decision was made, whether any facts contained in the termination letter were accurate, and, if so, when Hank Sangster had knowledge of any such inaccuracy. They could not agree whether Matt Cox did the absolute correct thing in keeping documentation of Pecore's violations or not, they could not agree whether he was too gung-ho in doing his job or just the opposite, they could not agree on what their alleged "overriding business justification" even was! Given this hopeless inconsistency, it obviously was not, in fact, a difficult task for this jury to find in favor of plaintiff Matt Cox.

As stated in *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 289 (Iowa 2000): "Generally, causation presents a question of fact. Thus, if there is a dispute over the conduct or the reasonable inferences to be drawn from the conduct, the jury must resolve the dispute. Perritt § 7.21, at 54. Additionally, any dispute over the employer's knowledge of the conduct is generally for the jury, as well as the existence of other justifiable reasons for the termination."

See also *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 353 (Iowa 1989): "When considering the propriety of a motion for directed verdict, the court views the evidence in the light most favorable to the party against whom the motion was made. Iowa R. App. P. 14(f)(2). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). If reasonable minds might draw different inferences from the facts, whether they are in dispute or contradicted, a jury question is engendered. Iowa R. App. P. 14(f)(17)."

Tuttle v. Keystone Nursing Care Ctr., Inc., 2009 Iowa App. LEXIS 200 (Iowa Ct. App. Mar. 26, 2009) is also instructive. First, generally, the court recognized that "the elements of causation and motive are factual in nature and generally more suitable for resolution by the finder of fact." Likewise, the court noted that the jury decides "the actual questions of what conduct the employee engaged in and what the employer's motivation was," citing Perritt, 58 U. Cin. L. Rev. at 402, and *Fitzgerald v. Salsbury* Chemical, Inc., 613 N.W.2d 275, 282: "stating the elements of causation and motive are factual in nature and generally more suitable for resolution by the finder of fact. The district court in this case ... correctly allowed the jury to determine whether Tuttle was actually engaged in that conduct and what Keystone's motivation was in discharging her."

The Tuttle court concluded:
Meyer testified that Tuttle was terminated due to her conduct on August 31, 2006, in arguing with the CNAs about the proper placement of the chux on residents' beds. She believed Tuttle acted in a "disrespectful" manner "to both the residents and the staff" and Tuttle "had other alternatives" available to her to correct the CNAs' behavior. Tuttle, however, testified that she had to take corrective action immediately or "by morning [the resident] could actually have an open sore and that sore could ultimately lead to ... an infection." Tuttle also testified that she had complained to Allen on multiple occasions throughout her tenure as the night shift charge nurse about the quality of care these CNAs provided to Keystone's residents and that Allen "rarely followed through." Her personnel records are replete with instances of her complaints about the CNAs in her charge and their failure to provide adequate care to their **elderly** patients. In response to her complaints, Meyer told her at one point that she "would appreciate [Tuttle] not making the staff feel inferior in the future."

Although the "causation standard is high," it generally "presents a question of fact." *Fitzgerald*, 613 N.W.2d at 289. Thus, if there is a dispute, as here, "over the conduct or the reasonable inferences to be drawn from the conduct, the jury must resolve the dispute." *Id.* Based on the above-mentioned facts in the record, we conclude a reasonable jury could find that Tuttle's conduct in attempting to prevent the CNAs from **abusing** the **elderly** patients in their care was the "reason which tip[ped] the scales decisively" towards terminating her employment. See *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 686 (Iowa 1990). Because the heart of this case involved a dispute over the reasonable inferences that could be drawn from Tuttle's conduct, the jury was the proper entity to resolve the dispute. See *Fitzgerald*, 613 N.W.2d at 289.

Tuttle, 2009 Iowa App. LEXIS 200, 22-23

Here, the issue of whether plaintiff was terminated for raising these OSHA violations and taking them to the next corporate level was for the jury. Plaintiff Matt Cox supplied evidence supporting this by testifying that Hank Sangster essentially yelled at him for raising these safety concerns, testifying that he reported these OSHA violations to Linda Mattes and, within a day, he was suspended, never to return to work except to be fired. And, these facts did not occur in a vacuum. The jury was presented the full picture of how this termination developed and the jury had the opportunity, through the adversarial system, to evaluate each witness's motives, body language, credibility, and the logic and/or fallacy of positions advocated. "A jury could deduce from this evidence that the plaintiff was discharged because" he was stating his intent to contact OSHA to raise these safety concerns.

As this court correctly found in its summary judgment ruling, reasonable minds can draw different inferences from these facts where defendant's own witnesses disputed and contradicted its alleged business justification. As concluded in *Niblo*, 445 N.W.2d at 353, "applying these principles:"

... a jury could have inferred from the evidence that plaintiffs discharge resulted from something more than a dispute over doctor bills. Plaintiff contacted her supervisor about going to a doctor. The supervisor ignored her first inquiry and responded to her second request by stating that he did not care what she did, but that defendant was not going to pay for her to go to a doctor. After plaintiff went to a dermatologist, she told the president of the defendant company of her visit and of the doctor's opinion that her skin condition was work-related. After a follow-up visit with the doctor, plaintiff was informed that she had a severe case of chloracne, caused by contact with chemicals at work. When she told the president that she needed goggles, protective cream and continued treatment, the president became irate. He told plaintiff that he was not going to pay workmen's compensation or unemployment benefits and that he did not think that her skin problem was his fault, or "factory related." He said that he was not going to pay to have plaintiffs face worked on at all. At the conclusion of this outburst, he fired plaintiff.

The issue of whether plaintiff threatened to file a compensation claim was for the jury. Plaintiff need not personally testify of her threat or intent. She supplied this evidence by testimony setting out the president's statements concerning compensation. A jury could deduce from this evidence that the plaintiff was discharged because she was threatening to file a claim for these benefits. The trial court did not **abuse** its discretion in denying a motion for a new trial based on the sufficiency of the evidence.

Moreover, throughout its Motions, defendant repeatedly attempts to misstate this record by claiming that the employment decision did not immediately follow upon plaintiffs report of his safety concerns. While it is true that his formal discharge did not occur until May 16, 2007, it is equally undisputed that plaintiff was suspended immediately on the heels of his report of the safety violations on May 7, 2007. Thus, contrary to defendant's repeated characterization of this as a "nine day" period of time between the report and the ultimate decision, the initial adverse employment action was taken less than a day later, thus establishing temporal proximity which supports this jury's verdict. In support, see *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 768 (Iowa 2009):

In this case, there was sufficient circumstantial evidence that Kid University wanted Jasper to reduce staff below the minimum state requirements. Hussain repeatedly urged Jasper to cut staff after Jasper had repeatedly told him the staff ratios were at the minimum levels. The repeated nature of the discussions over the reduction of staff, under the circumstances, was circumstantial evidence that Kid University wanted Jasper to disregard the requirements. Similarly, Zakia Hussain's comment about failing to disclose staff levels to the department of human services could be viewed as an implied demand to disregard the minimum ratios. Likewise, the evidence that Jasper was discharged within a short time after a discussion over staffing levels, as well as evidence that the center violated the staffing level shortly after Jasper was discharged, circumstantially shows Kid University wanted Jasper to violate the state requirements.

This same evidence supports a finding by the jury that Jasper was discharged because she refused to violate the state requirements. We have said that the timing between the protected activity and the discharge is insufficient, by itself, to support the causation element of the tort. *Hulme v. Barrett*, 480 N.W.2d 40, 43 (Iowa 1992). However, there was ample circumstantial evidence for the jury to conclude Jasper was discharged for refusing to staff at a level below the minimum requirements. Kid University contends it offered ample evidence to justify the decision on grounds that did not violate public policy, but the jury was free to conclude those reasons were merely pretextual. We conclude there was sufficient evidence that Jasper's refusal

to violate the administrative regulations was a cause of her discharge and that there was no overriding justification for the termination.

See also *Hansen v. Sioux By-Products*, 988 F. Supp. 1255, 1268-1269 (N.D. Iowa 1997):
The causal connection between allegedly retaliatory action by the employer and protected activity by the employee can be established by proof that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996);... *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993) (stating this rule in a case in which a discharge followed a report to OSHA by only four days).... Although the Iowa Supreme Court has stated that "the mere fact that an adverse employment decision occurs after [protected activity] is not, standing alone, sufficient to support a finding that the adverse employment decision was in retaliation to the discrimination claim," *Hulme II*, 480 N.W.2d at 43, the inference arising from such temporal proximity may be sufficient to preclude summary judgment, however hotly the issue may be contested at trial, particularly where temporal proximity is coupled with other evidence giving rise to an inference of illegal motive. See *Walters v. U.S. Gypsum Co.*, 537 N.W.2d 708, 712 (Iowa 1995) (holding that the trial court erred in granting summary judgment on a retaliatory discharge claim, because, although the issue would "no doubt be hotly disputed during a full trial," there was a genuine issue of material fact as to causal connection where the employee's termination followed on the heels of her discrimination complaint and she had never been disciplined for any of the reasons the employer gave for firing her). Consequently, Hansen's termination the same day as he engaged in protected activity--reporting a work-related injury and seeking medical treatment under his employer's workers' compensation coverage-- raises inferences that may be sufficient to defeat a summary judgment motion by the employer.

But there is more. Hansen has generated genuine issues of material fact that Sioux By-Products' "business judgment" reason for terminating Hansen--his allegedly poor performance and the imminent end of his probationary period--are suspect ... there is no evidence in the record that Hansen had received any prior notice that his work performance was inadequate.... The obvious inference is that poor work performance is an after-the-fact justification, with little or no prior evidence in Hansen's employment record, for a retaliatory discharge motivated by something other than Hansen's job performance. Compare *Walters*, 537 N.W.2d at 712 (the district court erred in granting summary judgment on a retaliatory discharge claim based on lack of evidence of a causal connection where the termination followed closely after the employee filed a civil rights claim and she had never been disciplined for any of the reasons the employer gave for firing her).

Importantly, as the Hansen court noted: "caution is appropriate in retaliatory discharge cases, because the employer's motivation is also critical and proof of that motivation usually depends upon inferences derived from the circumstances, not upon direct evidence. See, e.g., *City of Hampton*, 554 N.W.2d at 536 (applying a burden-shifting analysis in retaliatory discharge cases to determine the inferences from circumstantial evidence); *Yockey*, 540 N.W.2d at 422 (same); *Hulme I*, 449 N.W.2d at 633 (same)." (*Hansen*, 988 F. Supp. at 1270.)

Here, plaintiff provided abundant evidence of Alliant Energy's motivation, coupled with both the temporal proximity of the employment decision as well as the hopeless inconsistency of defendant's witnesses' attempts to explain a reason other than plaintiffs reporting of safety violations. In further support, see *Kohrt v. Midamerican* Energy Co., 364 F.3d 894, 902 (8th Cir. Iowa 2004):
We also determine that the public policy expressed in IOSHA would be undermined if MEC were permitted to discharge an employee for voicing safety concerns. If employers were permitted to discharge employees for such conduct, then employees would be hesitant to articulate safety concerns because to do so would potentially put their jobs at risk. Clearly, a public policy that encourages employees "to institute new and [to] perfect existing safety programs" is undermined when an employee can be discharged for doing exactly what the policy encourages.

Kohrt made a protected complaint under the statute, both orally and by submitting a written statement to Tew. We note that the protection of § 88.9(3) extends to internal, good faith complaints made by an employee directly to an employer. Iowa Admin.

Code. § 875-9.9(3). The definition of "complaint" under § 88.9(3) is "commensurate with the broad remedial purposes of [the] legislation and the sweeping scope of its application." Iowa Admin. Code. § 875-9.9(1).

The facts in *Kohrt* are strikingly similar to the facts of this case; see 364 F.3d at 896-897:

In 1997, Kohrt became the safety and training coordinator at MEC with responsibility for promoting safety, investigating accidents, and serving as an information resource on occupational safety and health issues. Kohrt openly disagreed with two existing MEC policies: the one-man crew policy and the body belt policy. Under the one-man crew policy, only one utility lineman was initially sent to respond to service calls. Kohrt believed that two linemen were always necessary because of the inherent risk of injury when working on high voltage, overhead power lines. A body belt with a two foot lanyard was one of two devices available for use by linemen. The other permissible device was called a body harness. Both were designed (1) to prevent them from falling out of an aerial bucket and (2) to protect them from injury by arresting their descent if they did fall out while doing their high work. Kohrt believed the body harness was the only safe method because, when using a body belt, a lineman could still fall out of the bucket and hang suspended from his waist. The one-man crew policy and the body belt policy were related; if an accident were to occur, a second lineman would be needed to rescue the imperiled one.

Kohrt also had problems with his supervisor, Jane Tew. Tew became Kohrt's supervisor in May 1998, and she began documenting her problems and discussions with Kohrt. MEC and Tew expected Kohrt to support and promote MEC's one-man crew and body belt policies as part of Kohrt's work as the safety and training coordinator. Kohrt did not do so. At Tew's request, Kohrt prepared a written statement of his views on the policies. Kohrt was fired on December 7, 1998, allegedly for performance reasons, including a failure to communicate with his supervisor and a failure to follow directions. Kohrt argues that he was fired because of his stance on one-man crews and the body belt policy, and he denies that he was ever told that his performance was not satisfactory.

It is worth noting Mr. Kohrt's wrongful discharge claim actually went to trial twice, with plaintiff prevailing both times: "The wrongful discharge claim went to trial. A jury found for Mr. Kohrt and awarded him $ 720,000 in damages. MEC's posttrial motion for a new trial was granted on damages issues. A second jury awarded Mr. Kohrt $920,000." (*Id.* at 896.)

D. Overriding Business Justification

At page 6 of its Motion for Judgment Notwithstanding the Verdict, defendant argues: "Interstate Power produced substantial evidence demonstrating that Cox's inadequate work performance was the overriding justification for his discharge." Not only was this disputed by plaintiff, but frankly contradicted by defendant's own witnesses! As stated in *Tuttle,* (supra), 2009 Iowa App. LEXIS 200 at *23: "Because the heart of this case involved a dispute over the reasonable inferences that could be drawn from Tuttle's conduct, the jury was the proper entity to resolve the dispute."

Doug Rosenbaum admitted he was not even aware that this entire investigation initiated because Hank Sangster himself had to essentially recuse himself because of the claim of harassment. Additionally, Rosenbaum was not even aware that plaintiff did not have authority to discipline Greg Pecore. Rosenbaum admitted that had he been aware of this, his entire opinion would have changed.

Hank Sangster attempted futilely to disavow his deposition testimony where he denied knowledge of virtually every reason in the termination letter. These contradictions and inconsistencies must be construed against defendant, and Cox is entitled "to all favorable inferences that the false reason[s] given mask [] the real reason of intentional discrimination." See *Loeb v. Best Buy Co.,* 537 F.3d 867, 873 (8th Cir. 2008):

Loeb argues that the six reasons given for Loeb's termination are inconsistent and false and, therefore, show pretext. Pretext may be shown with evidence that the employer's reason for the termination has changed substantially over time. *Morris v. City of Chillicothe,* 512 F.3d 1013, 1019 (8th Cir. 2008). The falsity of a nondiscriminatory basis for the employment action may also

support a finding of pretext--"[I]f the proffered reason is shown by conflicting evidence to be untrue, then the nonmoving party is entitled to all favorable inferences that the false reason given masks the real reason of intentional discrimination." *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1107 (8th Cir. 2000).

Not only did defendant's witnesses contradict each other, but defendant itself has presented this court with completely different reasons between its May 16, 2007 termination letter, then in its summary judgment response, and finally yet again its proffered jury instructions. At summary judgment, Alliant argued plaintiff was terminated for "not adequately performing his job" (defendant's Brief at 2) At trial, Alliant attempted to shift to three new reasons: "Failure to properly administer safety policies; failure to work well with other employees, and insubordination." (See Instruction No. 11) The jury obviously noted the fact that Alliant's reasons kept shifting and its witnesses could not support or even agree on these alleged reasons. See also *Jones* v. Nat'l Am. Univ., 608 F.3d 1039 (8th Cir. 2010):

Viewing the evidence in the light most favorable to Jones, we conclude that she presented sufficient evidence for the jury to conclude that NAU's proffered reason for the failure to promote was a pretext for age discrimination. Jones presented evidence that between the time of its EEOC charge response and the trial, NAU shifted its reasons for failing to promote her to the director position. NAU's response to the EEOC charge provided that throughout her employment, "Ms. Jones struggled with her performance. She consistently received moderate to low scores on her semiannual reviews ... She has consistently mediocre performance." By contrast, at trial NAU asserted that its primary reason for not promoting Jones was her lack of managerial and marketing experience. The university did not present evidence at trial that Jones was deficient in her performance.

See also *Perfetti v. First Nat'l Bank*, 950 F.2d 449, 456 (7th Cir. 1991):

In some circumtances, of course, a decision-maker's testimony may be so riddled with blatant inconsistencies or negative admissions that it could lend much support to a verdict for the plaintiff. If at the time of the adverse employment decision the decision-maker gave one reason, but at the time of the trial gave a different reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification. E.g., *Graefenhain*, 827 F.2d at 16, 21

... if a decision-maker made damaging admissions at trial, these could certainly support a finding of pretext. E.g., *Tye v. Polaris Joint Voc. Sch. Dist. Bd. of* Educ., 811 F.2d 315, 319 n. 2 (6th Cir.) (decision-maker admitted that he did not have any reasons for adverse employment decision ...)

On the conflicting testimony of Sangster, Rosenbaum and Poe, who could not even agree on who made the decision, let alone the reason(s) for it, this jury was entitled to find, as it did, that these false, inconsistent reasons masked the true reason: he was fired for voicing his concerns regarding OSHA safety issues.

E. Plaintiff Provided Satisfactory Evidence to Support the Award of Punitive Damages

Finally, Defendant argues "the record does not contain substantial evidence of willful, wanton, or reckless behavior on the part of Interstate Power with respect to the plaintiff." (Motion JNOV at p. 7) However, plaintiff was not required to show willful or wanton behavior. Defendant incorrectly attempts to restrict plaintiff to showing *actual* malice, when this court correctly instructed the jury that plaintiff could prevail by showing *either* actual malice *or* legal malice. Plaintiff provided sufficient evidence to support his claim for punitive damages based on *legal* malice: "the wrongful conduct is committed with a reckless or willful disregard for the consequences of the conduct."

See *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 773 (Iowa 2009):

> Generally, punitive damages may be awarded in an action for wrongful discharge from employment in violation of public policy. See *Tullis*, 584 N.W.2d at 241. Wrongful discharge in violation of public policy

> involves intentional conduct and will give rise to a claim for punitive damages when the discharge is committed with either actual or legal malice. See *Cawthorn v. Catholic Health* Initiatives Iowa Corp., 743 N.W.2d 525, 529 (Iowa 2007) (holding punitive damages are recoverable only when the defendant acts with actual or legal malice). Legal malice is shown when the wrongful conduct is committed with a reckless or willful disregard for the consequences of the conduct. Id.

The test on which this jury was properly instructed and which it found met in this case was whether the termination of Matt Cox under these circumstances demonstrated a "reckless or wilful disregard for the consequences of the conduct." (*Id.*) And this record does contain sufficient evidence of such reckless or wilful disregard.

Viewed favorably to Matt Cox, despite any of its protestations to the contrary, Alliant clearly did not consider safety the number one priority when Hank Sangster refused to support plaintiffs attempts to prevent Greg Pecore from repeatedly violating the confined space policy, thus violating OSHA regulations. Instead, as the jury apparently found and believed, Sangster terminated plaintiff for the very reason that he was reporting these violations, and, in fact, immediately got angry and yelled at plaintiff instead of supporting him in preventing the safety violation.

The termination itself demonstrates Alliant's reckless disregard for the consequences of its conduct. Defendant documented the fact that Cox had informed it that he intended to and had in fact contacted OSHA. Yet it continued in blatant violation of Iowa public policy to terminate Matt Cox when it knew he was raising safety issues. And then Alliant presents Sangster and Rosenbaum to this jury who completely contradict each other as to what the investigation was about, who wrote the termination letter, what the reasons for termination were!

And Alliant not only has shown a reckless and wilful disregard for the consequences of his conduct in terminating Matt Cox, but a reckless and wilful disregard for the safety of its own employees, including Greg Pecore, in failing to support Matt Cox in his efforts to enforce this policy. A natural consequence of an employee violating this policy could be, ultimately, that employee's death. At the end of the day, this jury clearly believed that Matt Cox was making a sincere effort to get Hank Sangster to enforce these safety regulations and require Greg Pecore to (a) get the proper training to go into confined spaces, (b) file the proper tagout procedures, and (c) do the proper testing before entering a confined space. Again, it was undisputed at trial that Greg Pecore not only violated the confined space policy on May 7, 2007, but previously as well. Of course, one of the purposes of punitive damages, as this jury was instructed, is "to punish and discourage the defendant and others from like conduct in the future." Moreover, one of the items the jury was required to consider was evidence that "the amount of punitive damages which will punish and discourage like conduct by the defendant in view of its financial condition." Therefore, it is not "passion or prejudice" but the proper following of this instruction which fully justified this jury verdict on punitive damages.

Moreover, there is an implicit argument that an award of punitive damages in the amount of approximately three times the amount of compensatory damages is somehow excessive. This is contrary to Iowa law. In support, see *Condon Auto Sales & Serv. v. Crick*, 604 N.W.2d 587, 595 (Iowa 1999):

In *BMW of North America, Inc. v. Gore*, the Supreme Court refused to establish a mathematical formula, or a bright line test, to determine the constitutionality of a punitive damage award. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585, 116 S. Ct. 1589, 1604, 134 L. Ed. 2d 809, 833 (1996). Instead, the decision is made by considering factors such as 1) the reprehensibility of the conduct, 2) the profitability for the company in the conduct, 3) the impact of the judgment on the financial position of the party, 4) the expense of the litigation, 5) the lack of criminal charges filed against the party, and (6) the award bore a "reasonable relationship" to "the harm that was likely to occur from [BMW's] conduct as well as ... the harm that actually occurred." *BMW*, 517 U.S. at 566-67, 116 S. Ct. at 1594-95, 134 L. Ed. 2d at 821 ... The Court adopted a "grossly excessive" standard, and found "in most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis ... [but that a ratio of 500 to 1] must surely 'raise a suspicious judicial eyebrow.' " Id. at 583, 116 S. Ct. at 1603, 134 L. Ed. 2d at 831 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481, 113 S. Ct. 2711, 2732, 125 L. Ed. 2d 366, 394 (1993)).

We find that the ratio of actual damages to punitive damages in this case, nearly 43 to 1, falls within a constitutionally acceptable range based upon the reprehensibility of the act of converting money belonging to an employer, as well as the other relevant factors. As in the *Haslip* and *BMW* cases, we similarly refuse to draw concrete limits on the amount of punitive damage other than to emphasize that the punitive damage award in this case was not "grossly excessive."

Obviously, if the Iowa Supreme Court has found a ratio 43 to 1 falls within a constitutionally acceptable range, a ratio of 3 to 1 must also fall within that range.

CONCLUSION

For all the foregoing reasons, plaintiff respectfully asks that this court deny defendant Interstate Power & Light Company, a/k/a Alliant Energy's Motion for Judgment Notwithstanding the Verdict.

KATZ, HUNTOON & FIEWEGER, P.C.

By: <<signature>>

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