Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

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| PATRICIA KELLY and MICHAEL FISHNICK, Complainants, | ) | DIA No. 14ICRC009-10 |
| -and- | ) | |
| IOWA CIVIL RIGHTS COMMISSION | ) | |
| v. | ) | |
| DUBUQUE FRATERNAL ORDER OF EAGLES #568 and STEVE KUHLE, Respondents. | ) | **PROPOSED DECISION** |

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This case involves complaints filed by Complainants Patricia Kelly and Michael Fishnick with the Iowa Civil Rights Commission (the Commission) against Respondents Dubuque Fraternal Order of Eagles #568 and Steve Kuhle. Kelly's complaint alleges that she was subject to disparate treatment on the basis of age and that she was constructively discharged by Respondents. Fishnick's complaint alleges that he was subject to disparate treatment by Respondents on the basis of age and sex. After an investigation, the Commission determined that probable cause existed with regard to the allegations contained in the complaints. On September 25, 2014, the Commission filed a Statement of Charges with regard to each complaint and transferred the matters to the Department of Inspections and Appeals for contested case hearings. Pursuant to a motion by the Commission, the matters were consolidated for hearing.

Hearing in this matter was held on March 10, 2015 in Dubuque, Iowa before Administrative Law Judge Laura Lockard. Attorneys Benjamin Flickinger and Christine Louis represented the Iowa Civil Rights Commission (the Commission). Attorney Robert Sabers represented Complainants Patricia Kelly and Michael Fishnick. Attorney Allan Richards represented Respondents Dubuque Fraternal Order of Eagles #568 (FOE) and Steve Kuhle. Complainants Patricia Kelly and Michael Fishnick appeared and testified. Respondent Steve Kuhle appeared and testified. In addition to Complainants, the Commission called the following witnesses: Robert Baker; Melody Barry; and Susan Kline. In addition to Kuhle, Respondents called Paul Radabaugh as a witness.

Commission Exhibits 11 through 16 were admitted as evidence.

Attorney Robert Sabers filed a Request for Attorney Fees/Affidavit for Attorney Fees on the date of hearing. Sabers requested an award of attorney fees in the amount of $12,138.75.

Arrangements were made at hearing to hold the record open until March 31, 2015 for the Commission to submit a post-hearing brief; until April 21, 2015 for Respondents to submit a post-hearing brief; and until April 28, 2015 for the Commission to submit a reply brief. The Commission timely submitted a post-hearing brief and a reply brief. Respondents timely submitted a post-hearing brief.

## FINDINGS OF FACT

*Background*

Respondent Dubuque Fraternal Order of Eagles #568 (FOE) is an organization run by a volunteer board of trustees. At the time of the events underlying this matter, the trustees were Respondent Steve Kuhle, Paul Radabaugh, Larry Lee, Russ Bickel, and Mike Baumgartner. FOE operates a bar, or "social room." FOE employs bartenders in the bar. Kuhle was a professional bartender for eight years; on that basis, he was in charge of overseeing the bartenders. When necessary, Kuhle would report to the trustees at the Monday night trustee meeting regarding the bartenders. (Kelly; Kuhle testimony).

There was conflicting evidence at hearing regarding the trustees' decisionmaking processes with respect to employment decisions. Trustee Radabaugh testified that a majority vote of the trustees is required to take any action regarding employment decisions. Kuhle also testified that the trustees as a group are responsible for hiring and firing bartenders and that employment decisions are made at trustee meetings. At times, however, these processes were not followed. Kuhle hired at least one bartender, Jamie Fransen, without any vote by the trustees. (Radabaugh, Kuhle testimony).

Complainant Michael Fishnick, a male, was born on January 22, 1947. Fishnick was 66 years old at the time of the events underlying his complaint. Fishnick began working for FOE as a bartender in September 2002. At some point after that, Fishnick was promoted to bar manager. As bar manager, his responsibilities included bartending, making the work schedule, and placing orders for liquor and other bar supplies. Fishnick reported directly to FOE's board of trustees. He earned $7.75 per hour as bar manager, which was a 25 cent raise over what he earned as a bartender with FOE. Fishnick was the only male employee working for Respondents during the relevant time period. (Fishnick testimony; Exh. 12).

Complainant Patricia Kelly, a female, was born on November 2, 1934. Kelly was 78 years old at the time of the events underlying her complaint. Kelly began working for FOE as a bartender in April 1997. Kelly's job duties included setting up and stocking the

bar in the morning, serving bar patrons, and cleaning the bar. At some point during her tenure, FOE began serving lunch. Kelly would occasionally help the cook, Maggie Huffman, if Huffman got busy during lunch. Kelly's immediate supervisor was Fishnick, but the board of trustees had final say over her employment. Kelly earned $7.50 per hour as a bartender. (Kelly testimony).

The bartenders employed by FOE typically had regular shifts; that is, each bartender worked the same or a very similar schedule from week to week. Fishnick typically worked Monday night, Wednesday night, Friday afternoon, and Saturday. Kelly typically worked Monday through Thursday on the day shift, from 11 AM until 6 PM. Kelly never worked nights during her employment with FOE. In February 2013, FOE had four bartenders who were working regular shifts.[1] At four shifts per week, Kelly and Fishnick each had more shifts than the other bartenders who were employed during the same time period. Jane Noble, who was younger than Kelly, worked a Saturday evening and a Sunday evening shift; she also occasionally worked a Friday evening shift. Diane,[2] a bartender Kelly estimated to be in her mid-50s, worked a Thursday evening shift and a Saturday shift. (Fishnick, Kelly testimony; Exh. 15).

During 2013, Melody Barry, a 10-year member and former trustee of the FOE's ladies auxiliary, overheard Kuhle and Baumgartner talking in the bar about needing younger bartenders and "eye candy." FOE was attempting to attract a younger crowd during that time period. (Barry testimony).

At a deposition taken in conjunction with this proceeding, Radabaugh testified that he had heard Baumgartner make comments about bringing in "eye candy" to work at the bar. At hearing, Radabaugh affirmed it was "possible" that Baumgartner had made those comments. (Radabaugh testimony).

Susan Kline, a member and officer of the FOE's ladies auxiliary, heard Kuhle make comments about Kelly slowing down. Kline did not know what Kuhle was referring to as she had not personally observed that Kelly was slowing down in her job duties. Kline had also heard Kuhle make comments about wanting younger bartenders in the bar as "eye candy." (Kline testimony).

At some point, Kuhle told Robert Baker, a 30-year member of FOE, that Kelly was going to be working nights because she was too slow to work days. Baker did not understand Kuhle's rationale, as nights are the bar's busiest times. (Baker testimony).

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1 In response to a questionnaire from the Commission issued during its investigation and prior to a probable cause finding in these matters, Kuhle responded that FOE had six total employees on February 19, 2013. (Kuhle testimony). It is not entirely clear from the record who the additional two employees were; Kelly referenced in her testimony a cook, Maggie Huffman, and an "off and on" bartender named Kay Conners. (Kelly testimony).
2 Diane's last name does not appear in the record.

*Fishnick's Termination*

FOE was scheduled to hold a large anniversary party on February 9, 2013. Kuhle informed Fishnick after the February 4, 2013 trustee meeting that the couple who booked the party wanted a female bartender. During his employment with FOE, Fishnick had never heard of anyone else specifically requesting a female bartender for an event. Kuhle told Fishnick that he could work as a bartender in the back room during the party. (Fishnick testimony).

When Fishnick arrived to work the party on February 9, a female bartender, Jane Noble, was working the front bar. Noble, who is Kuhle's girlfriend, had been scheduled by Kuhle to work the front bar. When Fishnick went to the back bar, he discovered that John Overbrockland was already working at that bar. Overbrockland had previously worked at FOE, but his employment had been terminated. Overbrockland told Fishnick that Dan Burkhart, an FOE member, had hired him to work. Fishnick asked Burkhart why Overbrockland was working at the back bar. Burkhart said he had no idea. (Fishnick testimony).

Once Fishnick determined that both the front and back bars were staffed, he left the bar. At the time Fishnick left, there were only six to eight patrons at the front bar. Fishnick did not think it made sense for FOE to pay him to stand around. Additionally, he felt it was a waste of his time. Fishnick went home. No one from FOE, including any trustee, called him that day after he left the bar. (Fishnick testimony).

Kuhle testified at hearing that he did not tell Fishnick that the anniversary couple had requested a female bartender for their party, but rather that they had requested a "special" bartender. According to Kuhle, the couple's son specifically requested that Noble bartend at the party. Kuhle testified that the couple knew Noble's parents, who had run a bar across from the couple in East Dubuque. (Kuhle testimony).

The following Monday, February 11, Fishnick went to work as scheduled. The trustees called him into a meeting and asked why he left the party on February 9. Fishnick explained that he left because both jobs, front bartender and back bartender, were already filled when he arrived. Fishnick worked the rest of the week without incident. (Fishnick testimony).

On the following Tuesday, February 19, Fishnick was informed that the trustees had voted to terminate his employment at their meeting on Monday, February 18. Lee informed Fishnick that the vote was 3 to 2 to terminate him, with Lee and Radabaugh voting to retain Fishnick as an employee. Prior to his termination, Fishnick had never been disciplined or reprimanded during his employment at FOE. Likewise, he had never received any negative comments or feedback from the trustees regarding his performance. (Fishnick testimony).

Barry, who visited FOE approximately three to five nights a week prior to Fishnick's employment ending, rated Fishnick's work performance as very good. Baker rated Fishnick as excellent in his performance as bar manager; he was friendly and took care of business behind the bar. Kline also found Fishnick to be a good bartender and very pleasant and personable. (Barry, Baker, Kline testimony).

At hearing, Kuhle testified that he heard that Fishnick was "offered" to work the front or back bar on February 9, but did not want to do so. Kuhle did not testify as to who told him this information. Kuhle also testified that if Fishnick had wanted to work the front bar on February 9, he could have done so. (Kuhle testimony).

According to Kuhle, Fishnick was terminated because he walked off the job. Kuhle testified that he felt that Fishnick acted as if he ran the show. Kuhle perceived that Fishnick had an "attitude" and if he did not agree with the trustees, he would voice his opinion. Kuhle also testified at hearing that he had heard Baumgartner say that he wanted to get rid of Fishnick and Kelly. According to Kuhle, Fishnick's and Kelly's personalities played more of a part in the employment decisions made about them than did their ages. (Kuhle testimony).

*Change in Kelly's Shifts and End of Employment*

During the February 18 trustee meeting, the same meeting at which the trustees voted to terminate Fishnick, the trustees voted to change Kelly's schedule. Kuhle informed Kelly on Thursday, February 21 that she would now be working Monday and Wednesday nights and Saturdays. The Monday and Wednesday night shifts lasted from 6 PM until closing time. The Saturday shift Kelly was scheduled to work lasted from noon until closing time. The bar's official closing time was 9 PM. If enough patrons were in the bar, the bartender could keep the bar open as late as 2 AM. Typically, four or more patrons had to be present in order to justify keeping the bar open past 9 PM. (Fishnick, Kelly, Kuhle testimony).

Kelly had never worked nights during her tenure at FOE. She preferred not to work nights because she has steps at her home that she has to climb upon returning home. Additionally, Kelly prefers not to be out alone at night. Kelly would not have been able to pay her bills with the reduced hours in the new schedule. (Kelly testimony).

When Kuhle informed Kelly of the new schedule, Kelly replied, "I don't think so." Kelly also asked Kuhle if he was too chicken to fire her and was attempting to force her to quit. Kuhle shrugged his shoulders and did not respond verbally. Kuhle acknowledges that he understood during their conversation that Kelly did not wish to quit, but that she also did not want to work the new hours. Trustee Lee informed Kelly that he and Radabaugh had voted for her hours to stay the same. (Kelly, Kuhle testimony).

Kelly never worked under the new schedule; she did not come into work after she was told her schedule had changed. She did not discuss the schedule change further with the trustees after hearing from Kuhle about the change. Kelly was "furious" about the schedule change; she believed that she had worked for FOE long enough to be allowed to stay on the same schedule she had always had. Kelly had her daughter call the bar after the schedule change and ask for her. According to Kelly, Jamie Fransen, another bartender, answered the phone and told Kelly's daughter that Kelly had retired. (Kelly testimony).

*New Hires*

Jamie Fransen, a 27 year-old female, was hired to work as a bartender at FOE in January 2013. Her first paycheck was issued on February 5, 2013. Kuhle testified that Fransen was an experienced bartender and he received a good recommendation for her from a friend. Kuhle asserts that he made the decision to hire Fransen and that he presented the issue to the trustees and they voted on it. The vote to hire Fransen is not recorded anywhere in the trustee meeting minutes. Radabaugh denies any involvement in hiring Fransen. (Kuhle, Radabaugh testimony; Exh. 14).

When Fransen was first hired, she introduced herself to Fishnick as the new full-time bartender. Fishnick told Fransen he did not know how that would work as he did not have the hours to accommodate a new full-time bartender. When Fransen was hired, there was no bartender who would have been classified as full-time based on the number of hours worked. Even Fishnick and Kelly, who had the most shifts, did not work full-time hours. Fransen also introduced herself to Kelly as the new full-time day bartender. (Fishnick, Kelly testimony).

At the start of her employment, Fransen worked Tuesday and Friday nights. Kuhle testified that Fransen was hired in January so that the requisite shifts at FOE would be filled. During her first month, Fransen worked an average of 17.75 hours per week. After Kelly and Fishnick left in February, Fransen worked between 38.75 and 40 hours per week through May 28, 2013. (Exh. 13, 14; Kelly, Kuhle testimony).

Fishnick observed that Fransen wore low-cut tops that exposed a portion of her breasts. Kelly noted that Fransen sometimes did not wear underwear and wore clothing that revealed her breasts. Another bar patron testified that when Fransen reached into the cooler to get beers, she got the attention of the men sitting at the bar. (Fishnick, Kelly, Baker testimony).

Kuhle asserts that after Fishnick was terminated, there was a hole in the schedule. His solution was to change Kelly's schedule so that she would work the nights that Fishnick had been working since there was a bigger crowd and she was an experienced bartender. When asked at hearing why Fransen – who had been working Tuesday and Friday nights already – could not have taken over Fishnick's night shifts on Monday and

Wednesdays, Kuhle testified that Fransen might have been able to do that if they had had time. Kuhle got on the phone with the other trustees after his conversation with Kelly and thereafter conferred with Fransen and asked her to begin working Kelly's old day shifts. Fransen did so. (Kuhle testimony).

Sarah Paxton, another young female bartender, was hired a couple of weeks before Fishnick's termination. Paxton is no longer employed by FOE. Radabaugh testified that there were also other younger "girls" who were in their early 20s hired after Fransen. (Radabaugh, Fishnick, Kuhle testimony).

*Damages*

During the full pay periods in 2013 prior to his termination, Fishnick worked an average of 26.8 hours per week at $7.75 per hour.[3] Fishnick was unemployed following his termination from FOE until approximately May or June 2013. When Fishnick became reemployed, he made the same salary that he earned at FOE. Prior to his termination, Fishnick had planned to continue working at FOE as long as he was healthy. Fishnick is diabetic and working helps to hold his numbers down. Fishnick was worried when he was terminated about where he would find another job at his age and worried about how to explain why he was fired. Fishnick was under a great deal of stress regarding his future. Fishnick did not experience financial distress as a result of the termination; he is retired from John Deere and receives a pension based on his employment there. (Exh. 12; Fishnick testimony).

Kelly looked for other jobs in the downtown Dubuque area where she lives after her employment at FOE ended; she did not look elsewhere because she did not want to drive during the winter. Around August 2013, she went to work at All Things Sweet, a shop in the downtown area. Kelly earned minimum wage, $7.25 per hour,[4] and worked approximately 15 hours per week. The owner told Kelly she could get more hours later when a shop opened in Galena, but Kelly did not stay with the job long enough for that to happen. Kelly was unsatisfied with the job because it was not busy and she had nothing to do. She quit her employment there. (Kelly testimony).

Kelly sold her home on August 1, 2014 and is currently living in a one-bedroom apartment. Kelly had to sell her home because she did not have enough income to support it. The quality of life she enjoys in her apartment is not the same as she had when she lived in her house downtown and was heavily involved in her neighborhood association and neighborhood events. Additionally, Kelly has not felt as comfortable driving since her employment at FOE ended, meaning that she is not able to engage with her downtown neighborhood in the same way she could when she lived there. When

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3 This number was arrived at by reviewing the number of hours that Fishnick worked in each full pay period for which he was paid in 2013 from Exhibit 12. Fishnick worked a total of 188 hours during 7 full pay periods, for an average of 26.8 hours per week.
4 *See* Iowa Code § 91D.1(1)(a) (2013).

Kelly put her home on the market, it sold quickly and she received a fair price for it. (Kelly testimony).

Kelly felt very isolated after her employment ended at FOE, where she had planned to work as long as possible. Bartending at FOE was her dream bartending job; she loved tending bar and talking to people. Additionally, Kelly would have had a hard time working an eight-hour shift where she was constantly busy, but at FOE she had busy periods interspersed with intermittent slower periods, an ideal situation for her. (Kelly testimony).

Kelly eventually gave up and has not been looking for work recently. She does not believe anyone will hire an 80 year-old to tend bar. This experience has been the most humiliating she has ever gone through. (Kelly testimony).

## CONCLUSIONS OF LAW

Under the Iowa Civil Rights Act of 1965 ("ICRA"),

1. It shall be an unfair or discriminatory practice for any:
   a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation.[5]

While Iowa courts and this tribunal are not bound by federal cases construing federal discrimination statutes when interpreting and applying the ICRA, the Iowa Supreme Court has recognized that the ICRA only establishes a general proscription against discrimination, therefore the Court has looked at times to corresponding federal statutes as a guide in applying the state Act.[6]

A. *Respondents' Motion to Dismiss Based Upon Threshold Number of Employees*

At the close of the Commission's case at hearing, Respondents made a motion to dismiss, asserting that the Commission had failed to prove that Respondents regularly employ four or more individuals. The ICRA's prohibitions against unfair employment practices do not apply to "[a]ny employer who regularly employs less than four

5 Iowa Code § 216.6(1) (2013).
6 *Goodpaster v. Schwan's Home Service, Inc.*, 849 N.W.2d 1, 9 (Iowa 2014) (*citing Casey's General Stores v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003) and *Loras College v. Iowa Civil Rights Comm'n*, 285 N.W.2d 148, 147 (Iowa 1979)); *see also Vivian v. Madison*, 601 N.W. 2d 872, 873 (Iowa 1999).

individuals."[7] In response, the Commission argues that: 1) this is an affirmative defense that Respondents waived by not raising it prior to hearing; and 2) the evidence presented by the Commission establishes that Respondents regularly employ more than four individuals.

The Commission's regulations governing contested case hearings require the Commission to prepare a statement of charges to initiate a contested case proceeding. The statement of charges must contain, among other things, "[a]n allegation that the respondent is a proper respondent within the meaning of and subject to provisions of the Iowa civil rights Act."[8] While respondents are generally "encouraged" to file an answer to the allegations contained within the statement of charges within 20 days of the service of the notice of hearing, an answer is not required.[9] The Commission's regulations provide that failure to file an answer does not by itself constitute a waiver of any argument. The regulations also provide that

> [t]he optional nature of the answer, however, does not affect the respondent's obligations to raise issues in a timely fashion, to reply to discovery, or to fulfill any other obligation which is imposed upon respondent by law.[10]

Respondents here were not obligated to file an answer to the charges upon receipt of the notice of hearing or at any time afterward. The Commission presented no evidence that it inquired about defenses through discovery and that Respondents failed to respond or responded inaccurately regarding the numerosity exemption and their intent to invoke it at hearing. Respondents have not waived their claim to the numerosity exemption through a failure to raise it prior to hearing.

While Respondents are entitled to raise the issue of whether they employed enough employees to fall under the purview of the ICRA, the evidence establishes that they did. Kuhle acknowledged at hearing that he filled out a questionnaire during the Commission's investigation in which he answered that FOE employed six employees as of February 19, 2013. At hearing, Kuhle testified that FOE does not have 14 employees; the ICRA, however, only requires that an employer regularly employ four or more employees in order to be subject to the prohibitions of Iowa Code section 216.6, which is at issue here. Fishnick's credible testimony established that during the time period leading up to his termination and Kelly leaving her employment, FOE employed at least four bartenders, including himself. In addition, Kelly testified that during the lunch hour she often assisted the cook, Maggie Huffman. Respondents presented no evidence

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7 Iowa Code § 216.6(6)(a) (2013).
8 161 Iowa Administrative Code 4.2(1)(b)(1).
9 161 IAC 4.2(4).
10 161 IAC 4.2(4)(c).

to demonstrate that they do not regularly employ four or more individuals. Consequently, Respondent's motion to dismiss on this basis is denied.

B. *Fishnick Claim: Discrimination Based on Age and Sex*

In its Statement of Charges regarding Fishnick, the Commission alleges a single count of disparate treatment, asserting that Respondent terminated Fishnick's employment due to "his age, sex, and/or a combination of his age and sex." In its post-hearing brief, the Commission makes the assertion that Respondents terminated Fishnick's employment based on "age and sex." The Commission has not set forth an argument that a cognizable claim can be made based on either ground independently; consequently, the Fishnick claim will be analyzed on the basis of age and sex together to determine whether Respondents engaged in a discriminatory practice.[11] Respondents have set forth no argument that such a claim is not recognized under the ICRA.

The Commission can establish a claim of intentional discrimination through either direct or indirect evidence. Direct evidence may include remarks by a decisionmaker that show a specific link between a discriminatory bias and the adverse employment action, sufficient to support a finding that the bias motivated the action.[12] The Commission has not argued that direct evidence of discrimination exists here.

Where the Commission presents indirect evidence of discrimination, the claim is analyzed under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.[13] Under that framework, the Commission has the initial burden to establish a prima facie case of discrimination. Once it has done so, the burden of production shifts to the Respondents to articulate a legitimate non-discriminatory reason for the employment action. If they do so, the burden shifts back to the Commission to demonstrate by a preponderance of the evidence that the stated non-discriminatory reason was merely a pretext for discrimination.[14]

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11 *See Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1032-35 (5th Cir. 1980). In this case, the plaintiff, a black female, alleged that the district court erred in failing to address her claim that she was discriminated against by her employer based on "a combination of race and sex." A panel of the 5th Circuit laid out the history of so-called "sex plus" discrimination cases, which had, prior to that point, addressed only factual scenarios in which plaintiffs alleged that they were discriminated against based upon sex plus another *neutral* characteristic. The panel concluded that under Title VII Congress intended to prohibit employment discrimination based on any or all of the characteristics listed in that statute, including race and sex. The court recognized a prima facie case that would encompass black females as a distinct protected subgroup.
12 *Doucette v. Morrison County, Minn.*, 763 F.3d 978, 985-86 (8th Cir. 2014).
13 *Tusing v. Des Moines Independent Community School Dist.*, 639 F.3d 507, 515 (8th Cir. 2011).
14 *Id.*

The Iowa Supreme Court has recognized that the test for a prima facie case may differ from case to case; for example, a case where an employee claims failure to promote or termination based on discrimination will have different prima facie elements than a case where an applicant alleges failure to hire.[15] In order to establish a prima facie case of age discrimination, a plaintiff typically must prove that: 1) he was in the protected class (over age 40); 2) he was qualified for the position; 3) he was terminated; and 4) he was replaced by an individual who was substantially younger.[16] To establish a prima facie case of employment discrimination against an existing employee on the basis of sex, the Commission must typically prove: 1) that the employee belongs to a protected class; 2) that he was qualified for the employment at issue; 3) that he suffered an adverse employment action; and 4) it is more likely than not that the adverse action was based on sex.[17]

Synthesizing the elements of a prima facie case of age discrimination and a prima facie case of sex discrimination, the Commission must generally prove that: 1) Fishnick belonged to a protected class; 2) he was qualified for the employment at issue; 3) he suffered an adverse employment action; and 4) that the adverse action occurred under such circumstances that an inference of discrimination is fairly raised.[18]

Fishnick is in a protected class; he is a male and was over the age of 40 at the time of the events underlying the claim of discrimination against Respondents. There is likewise no dispute that Fishnick was subject to an adverse employment action; he was terminated.

With regard to whether Fishnick was qualified for his position, the Eighth Circuit has acknowledged conflicting case law within the circuit regarding this element of the prima facie case. In a relatively recent case, a panel of the Eighth Circuit concluded that under the more sound line of cases a complainant must show only that he possesses the basic skills necessary for performance of the job, not that he was performing it satisfactorily. Under this reasoning, a complainant is not "tasked with anticipating and disproving his employer's reasons for termination during the prima facie case."[19] The undisputed facts here establish that Fishnick was qualified for the position, for purposes of establishing a prima facie case. Fishnick had been bar manager for several years and had worked for FOE for 11 years; during that time, he had never been disciplined. Several bar patrons testified to his competence as a bartender. Respondents have not presented any evidence to establish that Fishnick was not qualified for his position.

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15 *Hamer v. Iowa Civil Rights Com'n*, 472 N.W.2d 259, 264 (Iowa 1991).
16 *Haigh v. Gelita USA, Inc.,* 532 F.3d 464, 468 (8th Cir. 2011) (*citing Roeben v. BG Excelsior Ltd. P'ship*, 545 F.3d 639, 542 (8th Cir. 2008)).
17 *See Hamer*, 472 N.W.2d at 263-64 (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).
18 *Jones v. University of Iowa*, 836 N.W.2d 127, 147-48 (Iowa 2013); *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 6-7 (Iowa 2009).
19 *Haigh,* 532 F.3d at 469-70.

There is no evidence regarding who, if anyone, replaced Fishnick as bar manager. While Fransen's hours were increased after Fishnick was terminated and Kelly's employment ended, there is no evidence that she took on the role of bar manager. Fransen was paid $7.50 per hour both before and after Fishnick's termination. She did not receive the 25 cent per hour salary increase that Fishnick received when he became bar manager. Radabaugh testified that several younger women were hired as bartenders after Fransen was hired, but there is no evidence that any of those bartenders was hired to replace Fishnick as bar manager.

Notwithstanding the lack of clarity in the record regarding Fishnick's replacement, the Commission has presented evidence that permits an inference of discrimination. Two separate individuals – Melody Barry and Susan Kline – provided credible testimony at hearing that they heard Kuhle and/or Baumgartner make comments around the time that Fishnick was terminated that they wanted to hire younger bartenders as "eye candy" to attract more people to the bar. Radabaugh, a trustee for FOE, also testified that Baumgartner made such comments. Fransen, a young woman in her 20s hired prior to Fishnick's termination, had her hours increase after Fishnick's termination. In addition, several other younger women in their 20s were hired to tend bar around or after Fishnick's termination.

In response, Respondents assert that they terminated Fishnick for a legitimate, nondiscriminatory reason; namely, that he walked off the job on February 9 when he was scheduled to work the back bar at an anniversary event. Under the burden-shifting framework, after the Commission proffers its evidence supporting an inference of discrimination and the employer meets its burden of production by proffering a legitimate, nondiscriminatory reason for the action, the burden of persuasion shifts back to the Commission to prove that the legitimate, nondiscriminatory reason was a pretext for discrimination.

As an initial matter, Respondents offered no evidence to contradict Fishnick's testimony that he was never disciplined prior to his termination in February 2013. This fact is not in dispute. While Kuhle testified that he did not like Fishnick's attitude and did not appreciate Fishnick voicing his opinion when he disagreed with trustees' decisions regarding the bar, there is no evidence that Kuhle or any trustee ever informed Fishnick of this or complained about this prior to Fishnick's termination.

Respondents' actions on the day of the party do not suggest that Fishnick leaving the party after determining that it was fully staffed created any problem for Respondents or for the other bartenders who were already working. Respondents presented no evidence that the party was short-staffed or that any negative consequences resulted from Fishnick's decision to leave. While it may have been more prudent for Fishnick to let a trustee know about his decision to leave before doing so, termination on the basis of this offense alone seems grossly disproportionate to the conduct itself.

While Kuhle testified that Fishnick was offered the opportunity to work at the front bar on the day of the anniversary party, I do not find his testimony on this point credible. Upon questioning, Kuhle could not state who informed him that Fishnick was offered this opportunity. Kuhle's assertion that Fishnick should have stayed and worked at the front bar upon discovering that both bars were staffed is puzzling, given his testimony that the anniversary couple specifically requested that Jane Noble, who was already bartending at the front bar, work the party that day. The general credibility of Kuhle's testimony was also undermined by his insistence that Fransen was hired only after the trustees voted on the matter, despite credible testimony by Radabaugh that he was not involved in the hiring process for Fransen and despite the fact that Fransen's hire does not appear anywhere in the trustee meeting minutes. These inconsistencies call into question the veracity of Kuhle's testimony.

In addition to the disproportionality of Respondents' response to Fishnick's conduct on the day of the anniversary party, there was credible testimony from bar patrons and trustee Radabaugh about various trustees expressing the opinion that FOE needed to hire younger bartenders, or "eye candy," comments that reflect a discriminatory animus. Such comments, when made by trustees, who are the decisionmakers with regard to employment of FOE's bartenders, provide a basis from which pretext can be found.[20] Respondents in fact acted upon these comments in hiring Fransen, increasing her hours after Fishnick's termination, and hiring other younger women to work at the FOE bar around the time period that Fransen was terminated.

It is important to note that there was additional testimony from various witnesses, including Fishnick and Kelly, that there were rumors circulating at the bar about the trustees wanting them gone, or that it was "common knowledge" that certain trustees wanted them gone. I did not rely on any of this testimony in making the determination regarding pretext, nor on any testimony from any witnesses who did not directly hear a trustee make a statement about wanting to hire younger bartenders or "eye candy." The only testimony on which I relied in making the finding of pretext was firsthand testimony from witnesses who heard specific, named trustees make comments expressing a discriminatory animus. Testimony regarding idle bar chatter and rumors did not factor into the decisionmaking process regarding pretext.

In combination with the credible testimony from bar patrons and Radabaugh about various trustees expressing the opinion that FOE needed to hire younger bartenders, or "eye candy," the disproportionality of Respondents' response to its stated reason for termination supports the conclusion that Respondents' actions in firing Fishnick were merely a pretext for discrimination based on age and sex. The overall picture painted by Respondents' actions in regard to Fishnick is one of a group desperate to find any excuse

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20 *See Roberts v. Park Nicollet Health Services*, 528 F.3d 1123, 1129 (8th Cir. 2008) (citations omitted).

to fire a competent employee who engaged in, at most, a minor employment transgression.

In this case, rather than having one group against which Respondents intended to discriminate, the evidence supports the conclusion that Respondents wanted to employ as bartenders a group that had specific characteristics; that is, young females. Individuals outside of that class were disadvantaged based on the characteristics that took them outside the class: age, sex, or both. In Fishnick's case, both his age and his sex worked against him in Respondents' decision to terminate him. The fact that neither factor independently was the determinative factor should not defeat a claim under the ICRA that Respondents relied on Fishnick's age and sex in making an adverse employment decision against him.

Finally, Respondents argued in their post-hearing brief that Fishnick and Kelly were at-will employees. Regarding Fishnick specifically, Respondents argue that the law does not require that an employer discipline an at-will employee prior to terminating him or her; in Respondents' words, the employee may be "let go on the spot." While Respondents are correct that Fishnick was an at-will employee, the fact of at-will employment does not obviate an employer's responsibility to comply with the ICRA. "[T]he traditional doctrine of termination 'at any time, for any reason, or no reason at all,' is now more properly stated as permitting 'termination at any time for any *lawful* reason."[21] As discussed in detail above, Respondents' stated reason for terminating Fishnick was pretext for unlawful discrimination. The Commission has proven that Respondents committed an unfair or discriminatory practice.

C. *Kelly Claims*

1. Age Discrimination: Disparate Treatment

Both of the claims the Commission makes on behalf of Kelly are premised on Respondents having discriminated against her on the basis of age. The Commission's first claim is a disparate treatment claim: Kelly's hours were reduced based on her age.

As discussed above with regard to Fishnick's claim, and modified to reflect the specific adverse action that the Commission alleges on Kelly's behalf, the prima facie elements of the disparate treatment claim that the Commission seeks to prove are: 1) Kelly was in the protected class (over age 40); 2) she was qualified for the position; 3) an adverse employment action was taken against her; and 4) the circumstances under which the adverse action was taken give rise to an inference of discrimination.

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21 *Fitzgerald v. Salsbury Chemical, Inc.*, 513 N.W.2d 275, 281 (citations omitted) (emphasis in original); *see also Ledbetter v. Alltel Corporate Services, Inc.*, 437 F.3d 717, 723 ("While a district court may not second-guess an employer's *valid, non-discriminatory* employment decisions, the court still must analyze whether the proffered reasons are a pretext for intentional discrimination.") (Emphasis added).

At age 78 during the relevant time period, Kelly was in the protected class. She was also qualified for the position, which Respondents do not dispute. She had been employed by FOE as a bartender since 1997. As testament to her competence, Respondents assert that they wanted to move her to take over Fishnick's night shift after his termination based on her experience and belief that she could handle the busier night shift. Several bar patrons testified positively regarding Kelly's job performance.

The parties dispute whether an adverse employment action was taken against Kelly. An adverse employment action is an action that detrimentally affects the terms, conditions, or privileges of employment.[22] Adverse employment actions can include disciplinary demotion, termination, unjustified evaluations and reports, loss of normal work assignments, or extension of a probationary period. An adverse employment action can occur even where an employee does not directly lose money or benefits. Changes in duties or working conditions that cause no materially significant disadvantage to the employee, however, are not adverse employment actions.[23]

The Commission argues that the adverse employment action was the reduction of Kelly's hours under the new schedule. Respondents assert that Kelly's pay was not reduced, therefore there was no adverse action.[24]

Under the set schedule that Kelly had in place for a number of years prior to the change, she worked 11 AM to 6 PM, Monday through Thursday, for a total of 28 hours per week. Under the new schedule that Kuhle outlined to Kelly, she would have been guaranteed to work Mondays and Wednesdays from 6 PM until 9 PM and Saturdays from 11 AM to 9 PM. The new schedule represents 15 guaranteed hours per week. While both parties agree that the bar could stay open later than 9 PM on days when there were enough patrons to justify the expanded hours, there is no indication in the record regarding how often this occurred. Even if the bar stayed open routinely until midnight on Saturdays, as Kelly testified would be "normal," that would only add three more hours to Kelly's set schedule, for a total of 18 hours.

Under these circumstances, Kelly did suffer an adverse employment action. Her guaranteed weekly hours were reduced by almost half. Even considering the three extra hours on Saturdays, Kelly's new schedule would only have her working approximately 65% of the hours she previously worked; in other words, her hours were cut by approximately 35%. A 35 to 50% reduction in the number of hours an employee is

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22 *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 679 (Iowa 2004) (citations omitted).
23 *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 862-63 (Iowa 2001).
24 Respondents assert in their post-hearing brief, "There was not a reduction in the pay of the applicant, as she did not even attempt to work any hours, she decided that was it, and did nothing more then [sic] leave her employment." It is unclear whether Respondents are conceding that if Kelly had worked the new schedule her pay would have been reduced.

scheduled to work causes a materially significant disadvantage and is therefore properly categorized as an adverse employment action.

As discussed above, credible testimony at hearing established that at least two trustees, including Kuhle, made comments regarding their desire to hire some younger bartenders, or "eye candy," to draw in younger patrons to FOE's bar. Fransen, a bartender in her 20s, took over Kelly's day shift and began working almost full-time hours immediately after Kelly's employment ended. Under these circumstances, the Commission has established that the circumstances surrounding the reduction in hours permit an inference of discrimination. The Commission has established a prima facie case.

Having established a prima facie case, the burden shifts to Respondents to establish a legitimate, nondiscriminatory reason for the extreme reduction in Kelly's hours. Kuhle asserted at hearing that Kelly's schedule was changed in order to fill the holes being left by Fishnick's termination; Kelly was scheduled to fill Fishnick's Monday night, Wednesday night, and Saturday shifts. According to Kuhle, he made the decision to move Kelly to nights based on her experience and the fact that the night shifts tended to be busier.

Turning to whether Respondents' stated nondiscriminatory reason is a pretext for discrimination, several items jump out. First, Kuhle's explanation entirely fails to account for the reduction in hours. Even accepting Respondents' explanation that they wanted Kelly to work nights because of her experience, Respondents have provided no explanation for the extreme reduction in Kelly's hours. Respondents could have slotted Kelly into Fishnick's shifts on Monday nights, Wednesday nights, and Saturdays, as they planned to do, and given her additional shifts to make up for the reduction in hours. They did not do so. Respondent was far more senior than Fransen and, according to Respondents, competent enough to handle the busy night shifts, therefore it is puzzling that they would not have attempted to give her the same number of hours she had been working for years if they actually wanted her to continue in her employment with FOE.

Second, Respondents' explanation ignores the fact that Fransen could have filled Fishnick's shifts. Fransen was already working nights and Kuhle viewed her as an experienced bartender; a friend of Kuhle's had provided a good recommendation of Fransen during the hiring process. When asked at hearing about why Respondents did not ask Fransen to cover Fishnick's shifts, Kuhle stated that they might have done that if they had had time. There is no indication that Respondents were under any time pressure with regard to this decision. They waited over a week from the time of the incident that they alleged gave rise to Fishnick's termination to actually terminate Fishnick. Kuhle offered no plausible explanation as to why, instead of asking a long-time employee to completely change her schedule, he would not have asked an employee who was already working the night shift and had only been employed for approximately one month to take over the shifts that were open after Fishnick's termination.

Third, when Kuhle told Baker about the change in Kelly's schedule, he asserted that it was made because Kelly was slowing down. Kline had also heard Kuhle make comments about Kelly slowing down. Kuhle's comments regarding Kelly slowing down directly contradict the assertion he made at hearing that he was moving Kelly to the busier night shift because of her experience. Changing and inconsistent explanations on the part of the decisionmaker support a finding of pretext.[25]

Finally, the statements that Kuhle and Baumgartner made regarding wanting to hire younger bartenders as "eye candy" are critical in the determination regarding pretext. Those statements, combined with the discrepancies discussed above, establish that Respondents' allegedly legitimate, nondiscriminatory reason for reducing Kelly's hours was nothing more than pretext for age discrimination. The Commission has proven that Respondents committed an unfair or discriminatory practice.

2. Age Discrimination: Constructive Discharge

The second claim that the Commission asserts regarding Kelly is that Respondents terminated Kelly through constructive discharge on the basis of her age. An employee is constructively discharged when an employer deliberately makes the employee's working conditions intolerable, thus forcing the employee to quit. The intolerable working conditions must be a result of unlawful discrimination. The employer must act with the intention of forcing the employee to quit; this can be proven by showing that resignation was a reasonably foreseeable consequence of an employer's discriminatory actions. With regard to whether the working conditions are intolerable, an objective, or reasonable person, standard is applied. A finding of constructive discharge requires that an employee have given her employer a reasonable opportunity to correct the intolerable condition prior to quitting.[26] The Commission has a "substantial burden" to show that a reasonable person would have found the conditions intolerable and that the employer either intended to force resignation or could reasonably have foreseen such a result. This is a high bar.[27]

As discussed in detail above, the evidence presented here demonstrates that Respondents reduced Kelly's schedule from a guaranteed 28 hours per week to a guaranteed 15 hours per week. A reduction in salary of roughly 50% has been found to constitute an intolerable working condition sufficient to support a finding of constructive discharge.[28] A reasonable person would find a salary reduction of nearly

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25 *Edwards v. U.S. Postal Service*, 909 F.2d 320, 324 (8th Cir. 1990).
26 *Wilkie v. Department of Health and Human Services*, 638 F.3d 944, 954 (8th Cir. 2011) (*quoting Anda v. Wickes Furniture Co.*, 517 F.3d 526, 534 (8th Cir. 2008)); *Bergstrom-Ek v. Best Oil Co.,* 153 F.3d 851, 858 (8th Cir. 1998).
27 *Trierweiler v. Wells Fargo Bank*, 639 F.3d 456, 459-60 (8th Cir. 2011) (*citing Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1087 (8th Cir. 2011)).
28 *Kinsch v. Fleet Street, Ltd.*, 148 F.3d 149, 161 (2d Cir. 1998) (compensation reduced from

50% intolerable. Under these circumstances, the Commission has met its burden of proving an intolerable working condition caused by the employer. Additionally, as discussed above, the intolerable working condition was a result of unlawful age discrimination.

With regard to the second prong, whether the employer acted with the intent of forcing the employee to quit, the Commission has presented sufficient evidence to support this conclusion. In addition to the comments that trustees made about wanting younger bartenders and "eye candy" to attract a younger crowd, the timing of the shift in Kelly's hours is suspicious. Having just terminated Fishnick for a discriminatory reason, Respondents then sought to totally revamp the schedule of another long-time, older employee, reducing her hours by nearly half. As noted above, Respondents have failed entirely to explain why – even if they wanted Kelly to work the busier night shifts because of her experience – they did not offer a schedule commensurate with the number of hours she had worked for many years.

When Kelly made her concerns known to Kuhle, including the fact that she was being shifted to nights and that she would not be scheduled as many hours as she had been previously, Kuhle made no move to work with Kelly to address her legitimate concerns. These factors prove that Respondents acted with the intent of forcing Kelly to quit.

Finally, Respondents had a reasonable opportunity to correct the condition before Kelly quit. Kelly announced her intention not to work the new schedule as soon as Kuhle told her about it. Kuhle's testimony at hearing demonstrates that he was well aware of Kelly's displeasure with the new schedule and her intent to quit if she were forced to work reduced hours on the night shift. Kuhle testified that he got on the phone with the other trustees after his conversation with Kelly and thereafter conferred with Fransen and asked her to begin working Kelly's old day shifts. Despite fully understanding Kelly's complaints, the trustees took no action to offer her additional shifts that would have brought her back up to the number of hours she previously worked.

In *Anda v. Wickes Furniture Co., Inc.*, 517 F.3d 526, 535 (8th Cir. 2008), the court found that the plaintiff did not give the defendant reasonable opportunity to correct the intolerable working conditions due to the fact that she had not reported all of the incidents that she alleged constituted discrimination at the time she quit. In contrast, Respondents here were fully aware of Kelly's dissatisfaction, which was caused by actions that the trustees took. Under these circumstances, Kelly provided Respondents with reasonable opportunity to correct the conditions before quitting. The Commission has proven that Respondents constructively discharged Kelly based on her age.

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$60,000 with the possibility of 2% commission on sales to customers in excess of $2 million to $26,000 with no realistic possibility of commission); *Nielsen v. Revcor, Inc.*, 770 F.Supp. 404, 407 (N.D. Ill. 1991) (salary reduced by half accompanied by ineligibility for executive bonus pay totaling approximately $10,000 per year).

D. *Damages*

Under the ICRA, a respondent who is found to have engaged in a discriminatory or unfair practice shall be ordered to cease and desist from the discriminatory or unfair practice and to take necessary remedial action. Remedial action includes, but is not limited to, payment to the complainant of damages for an injury caused by the discriminatory practice, including actual damages, court costs, and reasonable attorney fees.[29]

1. Fishnick

Fishnick seeks an award of $2,604 for lost wages and an award for damages for emotional distress in an amount between $10,000 and $25,000.

Actual damages under the ICRA include damages for lost wages.[30] Fishnick was terminated on February 18, 2013. He credibly testified that he was unable to find other work until May or June of 2013. Fishnick did not pinpoint an exact date that his new employment began. The Commission estimates that Fishnick was out of work for 3.5 months, or 14 weeks. The Commission asserts that Fishnick was working an average of 24 hours per week prior to his termination. This conclusion is supported by the available evidence.

Fourteen weeks would take Fishnick's time of unemployment from February 18, 2013 until approximately the end of May 2013. At 24 hours per week, Fishnick would have earned $186 per week had he continued working for FOE. For fourteen weeks, he would have earned $2,604. An award of $2,604 in lost wages is appropriate.

The Iowa Supreme Court has recognized that emotional distress damages are allowed under the ICRA.[31] An award of emotional distress damages is appropriate even without a showing of physical injury, severe distress, or outrageous conduct.[32] The Iowa Supreme Court has held that the adequacy of the award in a particular case depends upon the unique facts of the case.[33]

In *City of Hampton v. Iowa Civil Rights Commission*,[34] the Iowa Supreme Court found that the Commission abused its discretion in making an award of $50,000 for emotional

29 Iowa Code § 216.15(9) (2013).
30 *See, e.g., Hamer*, 472 N.W.2d at 265.
31 *Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission*, 394 N.W.2d 375, 383 (Iowa 1986).
32 *City of Hampton v. Iowa Civil Rights Commission*, 554 N.W.2d 532, 537 (Iowa 1996) (*citing Hy-Vee Food Stores, Inc., v. Iowa Civil Rights Commission*, 453 N.W.2d 512, 526 (Iowa 1990).
33 *Lynch v. City of Des Moines*, 454 N.W.2d 827, 836-37 (Iowa 1990) (internal citations omitted).
34 554 N.W.2d 532, 537 (Iowa 1996).

distress in a case where there was a "relatively small amount of evidence supporting the award and [a] total lack of any medical or psychiatric evidence to support it." In that case, the Court reduced the damages for emotional distress to $20,000.[35]

Fishnick credibly testified that he experienced stress regarding his future when he was terminated by Respondents; he worried that he would not be able to find another job at his age. Fishnick acknowledged that he did not experience financial distress as a result of the termination, as he receives a pension from his employment at John Deere. Fishnick did not submit any medical or psychiatric evidence regarding emotional distress he suffered. Under these circumstances, an award of $10,000 for emotional distress is appropriate.

2. Kelly

Kelly seeks an award of $21,840 for lost wages and an award for damages for emotional distress in the amount of $25,000 for each count, or $50,000 total.

Kelly was constructively discharged on or about February 21, 2013. Kelly took a job in approximately August 2013 at a downtown Dubuque shop at which she was making $7.25 per hour and was working 15 hours per week. The owner told Kelly that she could likely get more hours when a new shop opened in Galena. Kelly quit before the offer of more hours materialized; she felt that taking the job was a mistake, as there was not much for her to do. She was not as busy as she had been when she was employed by FOE.

At a minimum, the Commission argues that Kelly is entitled to lost wages for the seven months, or 30 weeks, prior to her being hired for the new position. At 28 hours per week, Kelly would have earned $210 per week had she remained working for Respondents. For 30 weeks, this totals $6,300 in lost wages.

The Commission also argues that since Complainant has been unable to find comparable work to the present day, she is entitled to lost wages to the date of the hearing. The Commission argues that, discounting a few weeks when Kelly worked for the shop in downtown Dubuque, she is entitled to 74 additional weeks of lost wages up to the hearing date of March 10, 2015, for an additional $15,540.

When a complainant finds employment that is equivalent to or better than the position he or she was wrongly denied, the right to damages ends because it is no longer necessary to achieve an equitable purpose; the plaintiff at that point has been restored to the position she would have been in absent the discrimination.[36] The fact that a

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35 *Id.*
36 *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 84 (3d Cir. 2009) (*citing Ford Motor Co. v. EEOC*, 458 U.S. 219, 236 (1982).

complainant finds a job is insufficient by itself to demonstrate that she reestablished herself in the workplace such that she should be ineligible for back pay damages; rather, the new employment must be better or substantially equivalent. The new employment must afford virtually identical promotional opportunities, compensation, job responsibilities, and status as the position from which the complainant was discriminatorily discharged.[37]

While Kelly did not enjoy the new employment that she found to the same degree she enjoyed her work bartending at FOE, the wage was similar and the job generally involved retail customer service, which is similar to bartending. Where the new job differed substantially was in the number of hours that Kelly was scheduled; as opposed to 28 hours per week, she was only able to work 15 hours. Kelly quit her employment at All Things Sweet after just a few weeks, but there is no indication that she would have been unable to continue working there if she had wished to do so.

Accordingly, I find that Kelly's damages for lost wages should be reduced by the amount that she could have earned had she continued employment at All Things Sweet. At $7.25 per hour for 15 hours per week, Kelly would have earned $108.75 per week at the new job. The difference between what she would have earned at FOE and that amount is $101.25. Kelly is entitled to $101.25 for the additional 74 weeks prior to hearing, or $7,492.50. Under these circumstances, Kelly's total damages award for lost wages is $13,792.50.

With regard to emotional distress, Kelly credibly testified that she has become more socially isolated as a result of her discharge by Respondents. Without her earnings from employment at FOE, she did not have the income to support her historic home in downtown Dubuque and has sold it and moved to a one-bedroom apartment further from the city center.[38] At 80 years of age, Kelly does not believe she will be able to find another job tending bar, which brought her great satisfaction. She struggles to keep busy and maintain the activity level to which she was accustomed when employed by Respondents. In addition to the social isolation, Kelly provided credible testimony regarding the humiliation she experienced upon being discharged from a job that she had performed with competence and pride. The Commission did not present any medical or psychiatric evidence regarding emotional distress that Kelly has suffered.

Under these circumstances, an emotional distress award of $20,000 is appropriate. The higher amount awarded to Kelly takes into account her age and the resultant greater difficulty in finding suitable employment that she has experienced. In addition, Kelly's testimony reflected a greater degree of change and turmoil as a result of her discharge.

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37 *Id.* at 85 (citations omitted).

38 Kelly acknowledged at hearing that she sold her home for a fair price; she did not "lose" her home in the sense of losing the value of the home. The emotional distress related to the loss of her home is connected with her relocation and sense of social isolation from the neighborhood community in which she had so extensively participated.

While the Commission argued for $25,000 in emotional distress damages for each count, such award is not supported by the evidence in the case. Kelly has proven two separate violations – disparate treatment and constructive discharge – but the conduct by Respondents and its impact on Kelly were identical for each. The ICRA allows damages to be awarded for emotional distress under the category of "actual damages"; the $20,000 figure reflects the actual emotional distress damages that Kelly suffered as a result of the discriminatory actions by Respondents.

E. *Attorney Fees*

Pursuant to Iowa Code section 216.15(9), upon a finding that a respondent has engaged in a discriminatory or unfair practice, a complainant is entitled to recover "reasonable attorney fees." At hearing, Robert Sabers, attorney for both Fishnick and Kelly, submitted a Request for Attorney Fees/Affidavit for Attorney Fees, which included an itemized statement showing fees incurred in the total amount of $12,138.75. Respondents submitted no evidence at hearing to demonstrate that Sabers' attorney fees are excessive or other than reasonable. Fishnick and Kelly are entitled to an award of attorney fees in the total amount of $12,138.75.

**ORDER**

The Commission has proven that Respondents Dubuque Fraternal Order of Eagles #568 and Steve Kuhle committed unfair and discriminatory practices with regard to Complainants Michael Fishnick and Patricia Kelly. Respondents are ordered to pay $2,604 to Michael Fishnick and $13,792.50 to Patricia Kelly as compensation for lost wages. Respondents are further ordered to pay $10,000 to Michael Fishnick and $20,000 to Patricia Kelly as compensation for emotional distress. Respondents shall pay Fishnick and Kelly the total amount of $12,138.75 in attorney fees.

Dated this 2nd day of September, 2015.

Laura E. Lockard
Administrative Law Judge

cc: Benjamin Flickinger, ICRC (ELECTRONIC MAIL)
Robert Sabers, Attorney for Complainant (ELECTRONIC & FIRST CLASS MAIL)
Patricia Kelly, Complainant (FIRST CLASS MAIL)
Michael Fishnick, Complainant (FIRST CLASS MAIL)
Dubuque Fraternal Order of Eagles #568, Respondent (FIRST CLASS MAIL)
Steve Kuhle, Respondent (FIRST CLASS MAIL)
Allan Richards, Attorney for Respondents (ELECTRONIC & FIRST CLASS MAIL)

**NOTICE**

Any adversely affected party may appeal this proposed decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.[39] The appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. In addition, the appeal shall specify:

a. The parties initiating the appeal;
b. The proposed decision or order appealed from;
c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
d. The relief sought;
e. The grounds for relief.[40]

The Commission may also initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of the decision.[41]

39 161 IAC 4.23(1).
40 161 IAC 4.23(3).
41 161 IAC 4.23(2).