BEFORE THE IOWA CIVIL RIGHTS COMMISSION

ALICE J. PEYTON, Complainant, and IOWA CIVIL RIGHTS COMMISSION,
vs.
BOARD OF SUPERVISORS OF BUCHANAN COUNTY, Respondent.

CP # 01-90-19528

SUMMARY

This matter came before the Iowa Civil Rights Commission on the Complaint, alleging discrimination in employment on the basis of sex, filed by Alice Peyton against the Respondent Board of Supervisors of Buchanan County.

Complainant Peyton alleges that the Respondent failed to provide her with equal pay because of her sex. **Through her complaint, she alleges that she was subjected to different treatment onthe basis of her sex as both the male who preceded her in the position of jail administrator, and the male who succeeded her in that position, were paid more than she was.**

A public hearing on this complaint was held on March 12-13, 1992 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Buchanan County Courthouse in Independence, Iowa. The Respondent was represented by Allan W. Vander Hart, Buchanan County Attorney. The Iowa Civil Rights Commission was represented by Teresa Baustian. Assistant Attorney General. The Complainant, Alice Peyton, was not represented by counsel.

The Respondent's Brief and Commission's Brief were received on June 1, 1992.

Respondent raised two procedural and jurisdictional issues: (1) Whether the complaint was timely filed? (2) Whether the Respondent was Complainant Peyton's employer? Both issues are resolved in the affirmative. See Findings of Fact Nos. 2-20. See Conclusions of Law Nos. 2-23.

Complainant Peyton proved her allegation of discrimination in pay because of her sex under the disparate treatment theory.

The Complainant established prima facie cases of discrimination of disparate treatment by establishing that her predecessor and successor, both males, in the position were paid more for doing work which was substantially equal in terms of skill, effort, and responsibility and which was performed under similar working conditions. Proof of these facts with regard to either her predecessor or successor would have been sufficient to establish a prima facie case. See Findings of Fact Nos. 30-35, 36-97. See Conclusions of Law Nos. 31-33.

The employer set forth a number of reasons on brief for the unequal pay. Several of these reasons either (a) were not legitimate, nondiscriminatory reasons, or (b) were not articulated through the production of evidence which was specific and clear enough for the complainant to address. See Findings of Fact Nos. 100-01, 112-15. See Conclusions of Law Nos. 53-58.

Those legitimate, nondiscriminatory reasons which were articulated through the production of evidence were shown to be pretexts for discrimination. See Findings of Fact Nos. 102-08, 116-120. See Conclusions of Law Nos. 59-63. (If the reasons relating to either her predecessor or successor's position were shown to be pretextual, that would have been sufficient to establish the case.) See Conclusion of Law No. 33, 63. Reasons that addressed the elements of the prima facie case were considered in the discussion of the prima facie case. See Findings of Fact Nos. 58-79, 84- 96. See Conclusions of Law Nos. 31-47.

Remedies awarded include $23134.37 in back pay, $2000.00 in damages for emotional distress, and interest. Injunctive relief includes a cease and desist order and the development of written policies to ensure that sex discrimination in pay is corrected.

FINDINGS OF FACT:

I. Jurisdictional and Procedural Facts:

A. Subject Matter Jurisdiction:

1. The complainant alleges, and the record shows, that, throughout her employment in that position, she was paid substantially less as jail administrator than a male predecessor and a male successor. (Notice of Hearing - Complaint). See Findings of Facts Nos. 30-35. Her allegation that this discrepancy was due to her sex brings her complaint within the subject matter jurisdiction of the commission.

1A. Certain statutory prerequisites for hearing, such as filing and investigation of a verified complaint, probable cause finding, attempted conciliation, and determination to bypass conciliation have been met as admitted by Respondent. (Request for Admissions; Respondent's Motion for Leave to Amend Admission).

B. Timeliness:

1. *Continuing Violation Alleged:*

2. Alice Peyton filed her complaint alleging sex discrimination in pay on January 10, 1990. The dates of "most recent or continuing discrimination" given in the complaint are from "June 1984 through October 31, 1989." (Notice of Hearing-Complaint). From this language it is clear that Alice Peyton's complaint alleges a discriminatory practice or policy of a continuing nature which began in June of 1984 and terminated on October 31, 1989. Official notice is taken that January 10, 1990 is seventy-one days after October 31, 1989. Fairness to the parties does not require that they be given an opportunity to contest this fact.

3. Throughout her employment as jail administrator, Peyton's hourly rate was based on recommendations made by the sheriff which were considered by the Board of Supervisors. The ultimate determination of her hourly rate was made by the Board. (Tr. at 26-29, 81-82, 87-91, 296, 298, 195-97, 201, 207, 216-21, 209-14, 277-78, 282-83). The last of these determinations

by the Board of Supervisors was made on June 19, 1989. (R. EX. S; Tr. at 29). Wage payments made to her based on these determinations continued through the end of her employment on October 31, 1989, which is less than 180 days prior to the filing of her complaint. (C. EX. 14; Tr. at 53). See Finding of Fact No. 2. Nonetheless, because the last determination of Complainant Peyton's salary by the board occurred more than 180 days prior to the filing of her complaint, the Respondent asserts that the complaint was not timely filed. (Respondent's Brief at 16).

2. Official Notice Taken That Equal Pay Violations Are Continuing in Nature:

4. Official notice is taken of the following facts which are within the specialized knowledge of this agency. Equal pay violations constitute a form of discrimination which is continuing in nature. Each time an employee, because of the employee's sex, receives a paycheck which is less than that a person of the opposite sex would receive, the payment constitutes an act which is a continuation of the original discriminatory pay practice or policy. Although discriminatory pay may be in accordance with past salary determinations, such pay is not merely an effect of the determination. Although the effects of discriminatory pay for an employee, such as a lower standard of living or fewer assets, may continue long after his or her employment with the employer has ended, each such payment during employment represents a present continuing violation. The violation is continuing from the time of initiation of the policy or practice until the time the practice is lawfully terminated or the affected employee, if there is only one employee affected, leaves his or her employment. These facts are not only within the specialized knowledge of this agency, but are also established as a matter of law. See Conclusions of Law Nos. 3-6. Therefore, fairness to the parties does not require that they be given an opportunity to contest these facts.

3. Relatedness of Allegedly Discriminatory Salary Determinations and Wage Payments Shown By the Subject Matter and Frequency of the Violations:

5. In determining whether a continuing violation exists, it is important to ascertain if the allegedly discriminatory wage payments made to the complainant and the hourly rate determinations by the Board are related to each other. An examination of the three factors of subject matter, frequency, and permanence will reveal whether these are related events. See Conclusion of Law No. 9. First, the wage payments made to complainant and the wage determinations are related because they involve the same subject matter or type of discrimination, i.e. unequal pay. Second, both the payments and salary determinations are recurring and not one- time events. They are not in the nature of isolated, complete employment decisions.

4. Permanence: The Complainant Would Not Be Expected to Realize She Was Being Subjected to Sex Discrimination in Pay Until the Appointment of Mark Fettkether As Her Successor:

6. Third, these events are related because, under these facts, there is no degree of permanence evident in the failure to increase Complainant Peyton's wages to that of David Kuhn, her predecessor as jail administrator, which would alert Peyton that she was being subjected to continued sex discrimination. See Conclusion of Law No. 12. Peyton was aware of the lower pay, but was assured by Ralph Kremer, a member of the Board of Supervisors, that she was not

being paid as much as Mr. Kuhn because Kuhn had been paid too much. (Tr. at 24, 59, 80). This exchange occurred in the fall of 1984. (Tr. at 80). This would give her no reason to suspect that sex discrimination was the reason for her continued low pay.

7. Peyton had also received her full-time lead jailer position, which was later denominated "jail administrator," as a result of the settlement of a sex discrimination complaint with the Iowa Civil Rights Commission. (R. EX. H; Tr. at 34-35, 87, 178, 183, 228). Ms. Peyton had written the Board in order to apply for a full-time jailer position. The Board informed her that she could not be hired for the position. She asked the supervisors why she could not be hired, since she was qualified due to her part-time employment at the jail. Supervisor Kremer told her, in the presence of the other supervisors, that she would not be hired as a full-time jailer because there were enough women in the jail. Ms. Peyton then filed a complaint with respect to the failure to hire. (Tr. at 18-19). The settlement took place in March or April of 1984. (R. EX. H; Tr. at 18, 73).

8. As part of the settlement, the Buchanan County Board of Supervisors promulgated a "Nondiscrimination Resolution" which was posted at county employee worksites. The Resolution stated, in part, "with respect to all employment. . . and all other terms and conditions of employment, Buchanan County, Iowa will not discriminate on the basis of . . . sex." (R. EX. H). Complainant Peyton was aware of these notices as well as the Equal Opportunity Employer statement in the jail manual. The settlement and the policy statements could reasonably lead Peyton to believe that she would not be subjected to further sex discrimination. (R. EX. H; C. EX. # 13 at 2250.00; Tr. at 20, 38-39).

9. Alice Peyton did not realize that she was being denied equal pay because of her sex until Mark Fettkether, a male, was given the position when she left. (Tr. at 64-65). Fettkether, a deputy sheriff, was already paid substantially more than Peyton. (Tr. at 114, 242). As part of Fettkether's assignment to the jail administrator position, he was promoted from sergeant to lieutenant. His pay was also increased to the equivalent of eighty-two and five- tenths percent of the sheriff's salary or $20,790 by Board action taken on November 6, 1989. This increase in salary and promotion was effective retroactive to October 20, 1989. (C. EX. # 15; Tr. at 59, 224, 262). The percentage of the sheriff's salary initially paid to Fettkether is seven and one half percent greater than the seventy-five percent initially requested for Kuhn on December 31, 1981. (R. EX. 6). It is two and five tenths percent greater than the percentage of the sheriff's salary paid to Kuhn after an increase to eighty percent approved by the Board on August 3, 1982. (C. EX. 6).

10. Given the inherent nature of equal pay violations, and the relatedness of the salary determinations and the wage payments received by Complainant Peyton, it is clear that the violation alleged here is a continuing equal pay violation. This violation did not terminate until the end of Complainant Peyton's employment on October 31, 1989, a date well within the statutory 180 day limitations period. See Finding of Fact No. 3.

C. Buchanan County is a Political Subdivision of the State of Iowa and is the "Employer" of Complainant Peyton:

11. On brief, Respondent Board of Supervisors of Buchanan County has argued that it was not Complainant Peyton's employer. Respondent argues that the charge should have been filed

against the sheriff's department. (Respondent's Brief at 9-12). While much of this argument is legal, there are facts which shed light on this issue.

12. As previously noted, Complainant Peyton received her position as jail administrator as the result of a settlement of a discrimination complaint. See Finding of Fact No. 7. As part of that settlement, Gary Schweitzer, chairperson of the Board of Supervisors swore out an affidavit on April 24, 1984. This affidavit confirmed that "**Alice Peyton is currently employed by BuchananCounty** at a rate of pay of $5.00 per hour and is working **as lead jailer.**" (R. EX. H-emphasis added).

13. Official notice is taken that Buchanan County is a political subdivision of the state of Iowa. Fairness to the parties does not require that they be given an opportunity to contest that fact.
14. The Buchanan County Board of Supervisors is the chief governing body of the county, i.e. it is "in charge of the county's operation". (Tr. at 194). The Board has a direct supervisory role over county government. (Tr. at 209).

15. As part of that role, the Board either approves or modifies the annual budget requests of departments, including the sheriff's department. (Tr. at 81-82, 208). A single line item in department budget requests encompasses an aggregate amount for all salaries to be paid by the department. (Tr. at 86-87, 203-04, 216).

16. In addition, the Board makes the ultimate determination with respect to specific salary changes for individual employees of the various departments. (R. EX. A, G, I, L-S; C. EX. 15; Tr. at 26-27, 29, 88-92, 99, 196-97, 203-04, 205-06, 213, 218-20, 221-22, 224-25, 262, 277-78, 261, 282). It has frequently rejected or reduced salary increase requests from the sheriff's department and other departments, including some requests made by or on behalf of Complainant Peyton. (R. EX. **N, O**; Tr. at 28-29, 90-91, 201, **205-06**, 214, 219, 221-22, 277-78, 282-83, 296, 298).

17. The Board has also asked Peyton to conduct a salary survey. (Tr. at 28, 278-80). Complainant Peyton brought to the Board's attention that jailers under her supervision, who were covered by a union contract, would surpass her salary once contract raises came into effect. In response, the Board asked her to conduct a survey of jail administrator's salaries for counties of similar size, with jail populations of similar size, in the northeast section of the state. (Tr. at 28). Peyton conducted such a survey, of seven to nine counties, which found that the lowest paid jail administrator in these other counties earned $20,600. (Tr. at 29). The Board's response was to laugh and inform Peyton that there was no way they were going to pay her this much money. (Tr. at 28-29).

18. The Board also makes the final decision in regard to other employment matters such as hirings, promotions, and dismissals. (R. EX. H - Job Description for "lead jailer"; C. EX. 6; Tr. at 40-41, 195-96, 197, 217, 223, 224, 281). Department heads also obtain approval to fill positions from the Board prior to beginning the hiring process. (Tr. at 195). The Board made the final decision to place David Kuhn, Alice Peyton, and Mark Fettkether into the jail administrator position. (R. EX. A, H; Tr. at 197, 217, 223, 224, 262, 276). As previously noted, the Board also

enacted an extensive nondiscrimination policy which was applicable to all officers and employees of Buchanan County. See Finding of Fact No. 8.

19. It is true that, with respect to salary changes, hirings and promotions, the Board's role is often a reactive one. That is, the department head recommends that action be taken and the Board makes the final decision. (R. EX. H -Job Description for "lead jailer"; Tr. at 40-41, 195-96, 197, 209-10, 217, 219, 221-24, 281, 296). Official notice is taken that it is a common practice among many large employers, both public and private, for such recommendations to be made by officers at one level of authority which are then ultimately considered, accepted, rejected or modified by those at a higher level of authority. Fairness to the parties does not require that they be given the opportunity to contest this fact. The fact that the Board makes the ultimate determination on these matters, as opposed to the initial recommendation, does not render it any less of an "employer."

20. The Board of Supervisors, as an entity which makes final decisions on hiring, promotions, and salary increases, and sets countywide nondiscrimination employment policies is an "employer." The Board, as the entity which (a) is in charge of the operations of the county, (b) admits Peyton was a county employee as jail administrator, (c) initially received, considered and rejected the application of Alice Peyton for full-time jailer, (d) made the final determination on hiring Alice Peyton as jail administrator, (e) requested, considered, and rejected the results of a salary survey by her on jail administrator positions while she was in that position, and (f) considered recommendations and made the ultimate determinations on her hourly wage, was Alice Peyton's employer. See Findings of Fact Nos. 7, 12, 14-19.

II. Background:

21. Complainant Peyton's employment at the jail began on September 29, 1982 when she was asked to serve as a parttime on-call matron so a female inmate could be searched. (C. EX. # 1, 14; Tr. at 7-8). At this time, Peyton's hours would vary from week to week as she only worked when there were female prisoners. (Tr. at 8, 69, 180). Her wage was $4.00 per hour. (Tr. at 10).

22. Peyton began her service as a jail employee under David Kuhn, the first jail administrator for Buchanan County. (Tr. at 7-8, 167-68, 170). Kuhn's employment with the county had been recommended by Sheriff David L. Herrick and approved by the Board of Supervisors by January 1982. (R. EX. 6; Tr. at 170). Herrick resigned effective January 1, 1984. (Tr. at 180). He was replaced by Sheriff Joel Dryer, who held the office from January 19, 1984 to November 1984. (Tr. at 165). Dryer was sheriff at the time Complainant Peyton became jail administrator. (Tr. at 25). Sheriff Dryer was succeeded by Sheriff Leonard Davis, in 1984, who was still sheriff as of the date of hearing. (Tr. at 256).

23. Complainant Peyton applied for two new full-time jailer positions which were filled in March of 1983. Although she was not hired, a male, Mike Donohoe, and a female, Sandy Briggs, were. (Tr. at 16, 178-79).

24. Peyton continued to work on an on-call basis until Mike Donohoe was terminated approximately two to four weeks after his hire. (Tr. at 16, 69-70). At that time, Complainant

Peyton began to work full-time, by taking over the hours of Mr. Donohoe. (Tr. at 69, 71). She again applied for the full-time jailer position. (Tr. at 18). It was at this time she was told by the Board that she could not have the position because there were enough women in the jail. See Finding of Fact No. 7.

25. As previously noted, Ms. Peyton filed a sex discrimination complaint concerning this failure to hire which was settled in March 1984. See Finding of Fact No. 7. After she filed this complaint, her hours were reduced from 40 hours per week to one day (8 hours) per week allegedly in retaliation for filing of the complaint. Therefore, she also filed a retaliation complaint. (Tr. at 19). This complaint was also settled. (Tr. at 20).

26. David Kuhn, the jail administrator, was terminated in August 1983, allegedly because he assisted Complainant Peyton with her sex discrimination complaint. (Tr. at 19, 71, 76, 146-47, 178). This termination led to a successful effort by the Commission and Kuhn to obtain a court injunction against the Buchanan County Board of Supervisors and Sheriff David L. Herrick. A settlement was subsequently effected. Through these means, Kuhn obtained back pay and reinstatement in his position. (R. EX. A; Tr. at 19-20, 76, 180). Kuhn subsequently resigned in February or March of 1984 and took other employment. (Tr. at 20, 181).

27. Alice Peyton became "lead jailer" or "jail administrator" in March or April of 1984. See Finding of Fact No. 7. During the course of her employment in the position formerly held by David Kuhn, Peyton's title changed from "lead jailer" or "head jailer" to "chief jailer" to "jail administrator." The title change was made from "lead jailer" or "head jailer" to "chief jailer" because the complainant was teased about the other title. (Tr. at 21, 87-88). The title change from "chief jailer" to "jail administrator", effective August 1, 1986, reflected that Peyton was an administrator, with the same responsibilities she had as "chief jailer". (R. EX. A, P). To avoid confusion, her title will be referred to as "jail administrator" for the entire time in that position.

28. For a period from David Kuhn's resignation until shortly after Alice Peyton's assignment to the jail administrator position, sheriff's deputy Hansel was assigned to perform the jail administrative duties. This period did not exceed two months. In actuality, many of these duties were performed by or with the assistance of Peyton. Hansel's time in this position was not successful. He was eventually reassigned to road patrol where he could do less harm. (Tr. at 74, 78, 181-83).

29. Peyton left her employment effective October 31, 1989 to take a higher paying position as dispatcher in Black Hawk County. (C. EX. 14; Tr. at 53). As previously noted, deputy sheriff Mark Fettkether was assigned to her former position as jail administrator. See Finding of Fact No. 9.

III. Unequal Pay:

30. Respondent admits Peyton was paid less as jail administrator than either her predecessor, David Kuhn, or her successor, Mark Fettkether, both of whom were male. Respondent's Brief at 6. Both Fettkether, who was a deputy sheriff, and Kuhn, who was not, were paid a salary which was a percentage of the sheriff's salary.

31. From approximately August 3, 1982, David Kuhn was paid a salary which was fixed at eighty percent (80%) of the sheriff's salary. This represented a five percent increase from what was initially requested when he was hired, a salary of seventy-five percent (75%) of the sheriff's salary. See Finding of Fact No. 9. 32. Sergeant Mark Fettkether's salary was fixed at eighty two and two-tenths percent (82.2%) of the sheriff's salary before he accepted the jail administrator position. As part of his assignment to the position, Fettkether was promoted to Lieutenant. His salary was also increased to eighty-two and one-half percent (82.5%) of the sheriff's salary or $20,790 per year. See Finding of Fact No. 9.

33. The complainant was paid an hourly wage. Her initial wage as jail administrator was $5.00 per hour. (Tr. at 22). Her pay was increased to $5.16 per hour on July 22, 1985. (R. EX. L). On April 8, 1986, her pay was increased by $.16 per hour. (R. EX. M). A salary increase requested by the sheriff was denied by the Board effective May 6, 1986. (R. EX. N). A recommended increase to $6.00 per hour was denied by the Board on June 3, 1986. (R. EX. O). Her hourly rate was increased to $6.00 per hour on August 5, 1986. (R. EX. P). A three and one-half percent (3.5%) raise for Peyton was approved effective July 1, 1987. (R. EX. Q). Her salary was raised to $6.52 per hour by Board action taken on June 30, 1988. (R. EX. R). In the spring or summer of 1989, Peyton presented her salary survey to the Board. The Board made it clear that she would not be paid the equivalent of even the lowest salary found for comparable counties' jail administrators in the survey, i.e. $20,600. (Tr. at 28-29). Her final hourly rate increase by the Board was to $7.27 on June 19, 1989. (R. EX. S).

34. On two or more occasions, Complainant Peyton calculated how her combined regular and overtime compared to the sheriff's salary. Her income from Buchanan County was less than sixty percent (60%) of what the sheriff earned. (Tr. at 29).

35. The annual difference in pay between the eighty percent (80%) of the sheriff's salary which Kuhn received and the combined regular and overtime wages which Complainant Peyton received is shown here for the last five years of complainant's employment as jail administrator from 1985 to 1989 inclusive:

Year	1985	1986	1987	1988	1989* Partial Year (1/1-10/31)
80% of Sheriff	$17800.00	$18422.40	$18422.40	$19360.00	$16800.00
CP's Comb. Overtime & Regular	$11190.91	$11555.22	$14287.07	$15147.86	$14744.36
****Difference**	$6609.09	$6867.18	$4135.33	$4212.14	$2055.64

* Takes into account only Buchanan county earnings and 80% of sheriff's salary for 10 months of the year.

** Difference will vary from results in Complainant's Exhibit 17 which failed to subtract both her regular and overtime earnings from 80% of sheriff's salary. The subtraction of gross earnings was what was intended to be shown. (Tr. at 63-64).

(C. EX. # 16, 17).

IV. Prima Facie Case: The Job Performed by Complainant Peyton Became Substantially Equal in Terms of Skill, Effort, and Responsibility **Required by the Job** to That Performed by David Kuhn and Was Performed Under Similar Working Conditions:

A. Overview:

36. There was a common core of duties performed by Peyton at the beginning of her time as jail administrator which had also been performed by David Kuhn. There were also, however, substantial differences between the duties held by Alice Peyton at that time and those held by David Kuhn during his employment. Over time, however, Alice Peyton took on additional duties which were either the same as or different than those held by David Kuhn. Her duties expanded to equal or exceed those required of David Kuhn with respect to skill, effort and responsibility. These duties included supervision of over twice as many employees as were ever supervised by Kuhn. More difficult work requirements also resulted from the near tripling of the daily average inmate population. By mid-1985, at the latest, Peyton's duties were substantially equal to those performed by David Kuhn in terms of the skill, effort and responsibility required. These duties had always been performed under similar working conditions.

B. Common Core of Duties for Kuhn and Peyton:

37. There was a common core of duties performed by Alice Peyton, when she initially entered the position in 1984, which had also been performed by David Kuhn. Both were in charge of the administrative responsibilities for the jail. (Tr. at 21-22).

38. The administrative duties included:

a. Ensuring that all applicable rules and regulations governing jail operations are followed.

b. Preparing a work schedule for correctional officers and reporting actual hours worked to the county auditor.

c. Maintaining all records, files, accounts, and books required state, federal or local regulations. This included updating the jail policy manual.

d. Training and managing the jail staff.

e. Reporting all irregular or unusual occurrences in the jail to the sheriff.

f. Reporting needs for commodities and supplies required for operation of the jail, and ordering such supplies subject to the approval of the sheriff.

g. Assisting the sheriff with handling correspondence relating to the jail.

h. Being on call 24 hours a day for consultation with jail staff or for taking other action to handle problems which arose at the jail.

i. Transporting inmates to the doctor's or dentist's office.

j. Updating the jail policies and procedures manual.

k. Working on budgeting. This included such functions as determining whether line items in the jail budget need to be decreased or increased.

(R. EX. H; Tr. at 35, 43-44, 103-04, 108, 186).

C. Comparison of Kuhn's Duties With Peyton's Duties at the Beginning of Her Employment as Jail Administrator:

39. David Kuhn was employed as jail administrator from approximately January of 1982. He was terminated in August of 1983 and subsequently reinstated by 1984. He resigned in February or March of 1984. See Findings of Fact Nos. 22, 26.

1. Need to Modernize the Jail:

40. Prior to Kuhn's hire as jail administrator, the jail operated in an old-fashioned mode whereby the sheriff or his designee lived on the premises. (Tr. at 167). This individual and his family were responsible for operating the jail, including the care and feeding of inmates. The sheriff had an apartment adjacent to the jail. (Tr. at 167- 68, 230). There was no division of authority between regular sheriff's deputies and jail staff. The deputies booked inmates in, released them, and made their meals if the sheriff and his spouse were not available. (Tr. at 168, 229). They also conducted periodic checks on the inmates. (Tr. at 229). Because of increased federal and state regulation, the county found it was necessary to modernize the jail operations in order to keep the jail open. (Tr. at 169).

2. Creation of a Policy Manual:

41. Kuhn was given a broad mandate to get the jail working properly. (Tr. at 171). He developed policies and incorporated them in a jail manual. (C. EX. 13; Tr. at 172- 73, 230). This function was cited by Sheriff Dryer as the major difference in job duties which accounted for why Peyton was not paid as much as Kuhn. (Tr. at 186). The manual covered such items as food service, laundry, guidelines as to who is allowed into the jail, screening, classification and housing of inmates, and dealing with their health problems. (Tr. at 172).

42. The basic policy manual was in place when Peyton started as jail administrator. She was responsible for updating and fine-tuning old policies as well as making some new policies on visitation and other areas not specifically addressed by state regulation. (Tr. at 103). See Finding of Fact No. 38.

3. Physical Renovation of the Jail:

43. Kuhn was also in charge of a physical renovation of the jail. This involved extensive rebuilding in the jail itself. Locks were taken apart and cleaned or rendered inoperative if not needed. Windows were changed. Bunks and tables, made out of steel and hooked into the floor, were changed. (Tr. at 171). While much of this physical renovation was completed by the time Peyton became jail administrator, substantial physical modifications were eventually also made under her supervision. (Tr. at 293-95). This did not happen, however, until after Sheriff Dryer's term ended in November of 1984. (Tr. at 165, 187).

4. Hiring and Contracting Authority:

44. There is some controversy in the record concerning whether Kuhn actually had independent authority with respect to hiring and contracting. Sheriff Dryer, who was chief deputy under Sheriff Herrick, suggested that Kuhn had been given the authority by Sheriff Herrick to hire and fire personnel and order goods and services without consulting the sheriff. (Tr. at 167, 171, 176, 186). At another point, Dryer testified that Kuhn gave himself the authority to hire without consulting the sheriff by putting such authority in the jail manual. (Tr. at 176). It is not explained how Kuhn had the power to increase his own authority in this manner.

45. Dryer also testified, however, that most hiring done by Kuhn was actually done in consultation with Sheriff Herrick. (Tr. at 176). The one time indicated in the record where Kuhn actually did hire without consulting Sheriff Herrick is in the hiring of the complainant. (Tr. at 176). This was thought to be in violation of an anti-nepotism policy by Sheriff Herrick, who directed Kuhn to terminate her. (Tr. at 177). (Peyton's sister was a dispatcher for Buchanan County). (Tr. at 7). Kuhn asked Herrick to get a county attorney's opinion on whether the anti-nepotism policy was properly applied to the complainant. The matter was then dropped. (Tr. at 177).

46. Further problems arose over Kuhn's ordering of some goods. (Tr. at 177). Herrick discovered that Kuhn's actions had taken so much control over the jail that Iowa law, which required that the sheriff control jail operations, was being violated. (C. EX. 13 [Chap. 356 Iowa Code]; Tr. at 177). Sheriff Herrick, therefore, tried to discharge Kuhn. (Tr. at 177).

47. The greater weight of the evidence suggests that Kuhn did not actually have completely independent authority with respect to hiring and contracting for the jail. If he had such authority, the sheriff could not have attempted to discharge Kuhn for acting beyond his legal authority. It appears that this authority was actually subject to the approval of the sheriff. It can hardly be said that exercising authority beyond what an employee actually has, or which the law allows, represents part of the skill, effort or responsibility required by the job.

48. At the outset of her job as jail administrator, Peyton had the authority to order supplies with the approval of the sheriff. (R. EX. H; Tr. at 191). She did not initially have hiring or other contracting authority. (Tr. at 41, 49, 292). She was allowed to do grocery shopping for the jail on a daily basis from the beginning. (Tr. at 293).

5. Supervisory Duties:

49. When Kuhn was first hired he had no supervisory duties because there were no jail employees for him to supervise. (Tr. at 10, 174). It became necessary to hire some part-time employees for the jail in early 1982 because an inmate began to show signs of serious mental disease and had to be monitored around the clock. This resulted in hirings prior to those originally planned by the sheriff and the Board. (Tr. at 174-75).

50. The next hiring shown in the record was that of Complainant Peyton in September of 1982 as an on-call matron. See Finding of Fact No. 21. Two full-time jailers, Sandy Briggs and Mike Donohoe were hired in March of 1983. See Finding of Fact No. 23. After Donohoe was discharged in March or April of 1983, Peyton became a part-time employee. She was technically part-time although she worked Donohoe's full-time schedule. (Tr. at 71-72, 93-95, 179). Two other part-time jailers were also hired at this time. (Tr. at 72, 78). Thus, from April of 1983 to the end of his employment, Kuhn was supervising one full-time and three part-time jailers. (Tr. at 78, 179).

51. When Peyton began as jail administrator, she supervised one full-time and two part-time jailers. (Tr. at 22).

6. Additional Jail Operations Duties Performed by Peyton:

52. In addition to the administrative duties, Peyton also performed basic jail operations identical to those performed by the jailers she supervised. (Tr. at 21-22). Correctional officer duties performed by Peyton, as well as the jailers, included:

> Supervision of inmates held in jail . . . including the making of required headcounts.
>
> The maintenance of a written log sheet of the activities taking place in the jail. . . .
>
> The preparation of meals regularly served. . ..
>
> The distribution of medications. . . .
>
> The maintenance of a neat and orderly operation, which shall include such housekeeping chores as may be required.

(R. EX. H; C. EX. 13; Tr. at 21).

7. Comparison of Skill, Effort, Responsibility and Working Conditions:

53. It is important to remember that what is being compared are the skill, effort, and responsibility requirements and the similarity of the working conditions of the job, and not the qualifications of employees. See Conclusion of Law No. 32.

54. The skills involved in creating a jail policy manual include having sufficient knowledge of jail operations and sufficient writing ability to create such a manual. Such skills would also be utilized in revising the manual and updating it with new policies. The physical and mental efforts involved in both of these tasks would be similar. However, authoring a completely new policy manual is a substantially greater responsibility than merely updating or revising such a manual.

55. Peyton's responsibilities also did not initially include supervising the physical renovation of the jail, hiring employees with approval of the sheriff or contracting out. These are substantial differences in responsibility. The skills and mental and physical effort associated with such duties were, therefore, also not utilized.

56. If Peyton's supervisory responsibilities when she first became jail administrator are compared to Kuhn's varying responsibilities at different times in his employment, they might well be considered substantially equal. Kuhn supervised four employees, one more than Peyton, at the end of his term of employment. However, at earlier times, he supervised fewer than three employees. On the whole, the skill, effort, and responsibility exercised with respect to supervisory efforts may be considered to be substantially equal between the two positions. This is particularly true if Peyton's continued responsibility for directly participating in basic jail operations, which were also performed by those she supervised, are taken into account.

57. On the whole, Complainant Peyton's position was not substantially equal in terms of skill, effort and responsibility with that held by David Kuhn at the beginning of her employment as jail administrator. The working conditions, i.e. the surroundings and hazards, were similar. See Conclusion of Law No. 38.

D. By Mid-1985, Complainant Peyton's Position Was Still Performed Under Similar Working Conditions and Became Substantially Equal to the Position Formerly Held by David KuhnWith Respect to the Skill, Effort, and Responsibility Required to Perform the Job:

1. *Complainant Peyton Supervised Further Renovation of the Jail:*

58. Sheriff Dryer testified that physical renovation of the jail had ended during Kuhn's tenure as jail administrator. (Tr. at 187). It appears that Dryer stated the facts as he knew them to exist through the end of his term in November of 1984. (Tr. at 165). Nonetheless, there definitely was further renovation and construction in the jail which took place under Peyton's supervision. Apparently, this occurred after Dryer left. (Tr. at 293-95).

59. Under Peyton's supervision, a work release cell with a capacity of four inmates was added to the jail. (Tr. at 293). This involved installing toilet facilities, bunks and a table into a bare room.

(Tr. 293-94). In all cells that had top bunks, the bunks were removed, the walls sanded and everything repainted. (Tr. at 294). The entire jail was repainted during this process. (Tr. at 294).
60. In the female cell, the top bunk and a large table were removed. A new bunk and two fold-down tables were installed. (Tr. at 294).

61. A visitation room was installed which allowed inmates and their visitors to sit down and visit. Prior to this, the inmates would stand in the cell area and talk to a visitor by telephone. (Tr. at 294-95).

62. A new booking room was installed. This enhanced safety because knives and utensils were at hand in the kitchen area, where booking was formerly done. (Tr. at 295).

63. Peyton was responsible for accomplishing all of this either by contracting with local contractors or by overseeing the work being done by individuals as part of their sentences. (Tr. at 295).

2. Complainant Peyton Interviewed and Hired Correctional Officers While Jail Administrator:

64. As the designee of the sheriff, Complainant Peyton interviewed and hired, subject to the approval of the Board of Supervisors, correctional officers (jailers) as the sheriff's designee. (C. EX. 13; Tr. at 41, 49, 151-52, 297). Approximately six months to a year after her hire as jail administrator, Complainant Peyton began to perform both hiring and discipline functions with respect to jailers. (Tr. at 293). One year after her entry into the position would be March or April of 1985. See Finding of Fact Nos. 7, 27. Because of staff turnover, interviewing and hiring took an increasing amount of Peyton's time and effort. (C. EX. 19; Tr. at 49).

3. Complainant Peyton's Supervisory Responsibilities Eventually Exceeded Those Required When David Kuhn Was Jail Administrator:

65. The supervisory responsibilities required of Complainant Peyton in the job grew to be over twice as great as those required of David Kuhn. During Kuhn's term, he supervised a maximum of four jail employees. See Finding of Fact No. 50. By the end of Alice Peyton's employment, she was supervising nine jail employees. (Tr. at 35, 49). The jail was staffed for 24 hours a day after Peyton became administrator. Prior to that, the jail was staffed 20 hours a day. (Tr. at 145). Such a difference in numbers of employees supervised represents a substantial difference in the responsibility and mental effort required by the job. See Conclusion of Law No. 40-41.

66. Because of the larger staff and the constant turnover, training required an increased amount of time and effort over what David Kuhn was required to do. (Tr. at 49). The training function also became more complex as she provided jailers with much more training in basic jail operations, personal safety and the use of electronic devices, such as the Intoxilizer. (Tr. at 145).

Complainant Peyton's Administrative Responsibilities Eventually Exceeded Those Required When David Kuhn Was Jail Administrator:

67. Two factors led to a near tripling of the daily average inmate population at the Buchanan County jail. The increase in daily average inmate population and an increase from staffing 20 hours a day to 24 hours a day largely accounted for the increase in staff. (Tr. at 49, 51-52, 145). "The responsibilities grew as the jail population grew." (Tr. at 49). It is well-recognized in a jail setting that an increase in inmate population may connote a substantial increase in effort and responsibility. See Conclusion of Law No. 41.

68. First, there was an increase in the contracting of prisoners for other counties. That is, other counties would pay Buchanan County to incarcerate their inmates in its jail. By mid-1985, contracting of prisoners was a regular practice at the jail. (Tr. at 51). During the fiscal year from July 1, 1985 to June 30, 1986, Buchanan County was bringing in $64,000.00 from such contracts. (C. EX. 19; Tr. at 84). This reduced the amount of Buchanan County jail costs paid by other revenues to $8,000.00 per year. (C. EX. 19).

69. Second, a legal requirement for mandatory sentencing to 48 hours in jail for persons convicted of operating a motor vehicle while under the influence also led to an increase in the inmate population. This requirement led to the construction of the work release cell which raised the capacity of the jail by four inmates. (Tr. at 51-52).

70. Because of these factors, the daily average inmate population grew from between 4 and 5 inmates for the period from 1982 to the end of 1984 or beginning of 1985 to an average of between 10 and 12 inmates. (Tr. at 52-53).

71. This evidence alone is sufficient to demonstrate a dramatic increase in the administrative responsibilities and effort required for the jail administrator position by mid- 1985.

72. The increase in jail staff and inmate population impacted other jail administrator duties. Recordkeeping requirements increased as there was a file for each inmate. (Tr. at 49). Other record keeping requirements included end of the month reports, ordering supplies, work-release accounts, work-release agreements, billing for contract inmates, budget work, jail schedules, payroll, filing bills with the auditor's office, and updating the policies and procedures manual. (Tr. at 35-36).

73. Since Peyton was on-call for 24 hours a day, she would be called to jail to handle problems 10 to 15 times a month. (Tr. at 41, 104). Peyton also approved work release contracts, authorized travel passes for inmates, and determined which inmates would be allowed to help out around the jail as trustees. (Tr. at 44-46). She would also, with approval of the sheriff, calculate the "good time" for an inmate. This is credit on an inmate's for sentence for good behavior. She would prepare the necessary documents and submit it to the courts. (Tr. at 46-47). There was also an increased amount of work to ensure that prisoner rights were protected and that the jail was shielded from liability. (Tr. at 49-50).

74. Peyton was also in charge of disciplining inmates. She would arrange discussions on whether the infraction was serious enough to be heard by a disciplinary board or could be handled by a verbal or written warning. She would ask three persons to sit on the board and have a hearing. If the inmate was found guilty, the board would determine appropriate punishment. (Tr. at 47).

75. During this time, a computer system was installed at the jail. Peyton entered all of the data pertinent to jail operations into the computer. (Tr. at 35, 50). This included data entered as part of the booking procedure. (Tr. at 50). Peyton also had the responsibility of entering all changes, updates and corrections on the system. (Tr. at 35, 50). The jail administrator also became responsible for completing fingerprint cards and sending them to the FBI or the state. (Tr. at 49).

76. When Kuhn was jail administrator, the chain of command was: Sheriff--->jail administrator---->jailer. (Tr. at 71). See Findings of Fact Nos. 44-47. When Peyton was jail administrator, the chain of command for the first part of Sheriff Dryer's term was: Sheriff--->deputy Hansel--- >jail administrator--->jailer. Eventually, Hansel was removed and Peyton reported directly to Dryer. (Tr. at 183). This continued until September or October of 1984 when Dryer assigned his jail functions to his chief deputy. This was done as Dryer needed to devote more of his time to the election. (Tr. at 183-84, 188). After Sheriff Dryer's term ended in November of 1984, the chain of command was once again and remained: Sheriff--->jail administrator--- >jailer. (Tr. at 75, 78).

77. During the time that Peyton was jail administrator, the Buchanan County jail was inspected bystate correctional services representative John McSweeney. (Tr. at 117-18, 122-23). He noted that the actual duties assigned to jail administrators may vary from county to county. Therefore, there is a range of authority and responsibility which may be associated with the position. (Tr. at 120). He credibly testified: (a) that the complainant's authority and responsibility were at the upper end of that range, and; (b) that Peyton ran a well-administered jail. (Tr. at 123, 125, 139).

78. Throughout the time Peyton was jail administrator the working conditions with respect to hazards and surroundings were at least similar to those facing David Kuhn. It could be inferred that the hazards were somewhat greater with the increase in the number of inmates.

79. By mid-1985, the responsibilities, and, consequently, the mental and physical effort and skill required of the jail administrator job performed by Alice Peyton either equaled or exceeded those required of David Kuhn. See Findings of Fact Nos. 64, 68, 70-71. This continued through the remainder of her time as jail administrator.

80. The combination of (a) unequal pay between Complainant Peyton, a female, and David Kuhn, a male; for (b) a position performed under similar working conditions, where (c) the skill, effort, and responsibility required to perform the job are substantially equal, is sufficient in itself to establish a prima facie case of equal pay discrimination on the basis of sex. See Conclusion of Law No. 31, 33.

V. Prima Facie Case: The Job Performed by Complainant Peyton Was Substantially Equal in Terms of Skill, Effort, and Responsibility **Required by the Job** to that Performed by Mark Fettkether and Was Performed Under Similar Working Conditions:

A. Overview:

81. When Peyton left the position of jail administrator, Mark Fettkether stepped into a position where the duties with respect to the jail were, in many respects, not only substantially equal, but virtually identical to those held by Peyton. The Respondent argues that Fettkether had greater

autonomy and authority which justifies the higher pay. This appears to be based, in part, on Fettkether's continuing authority as a deputy. It is also based on differences with respect to budget, on-call, and transportation duties at the jail. The evidence shows however that Fettkether's authority as a deputy sheriff was actually exercised on only an occasional basis after he became jail administrator. The other differences in authority either did not arise until long after Fettkether took the position or were otherwise insufficient to show that his duties and Peyton's were not substantially equal with respect to the skill, effort and responsibility or performed under similar working conditions.

B. Common Core of Duties for Fettkether and Peyton:

82. Complainant Peyton decided to leave the jail administrator position for a higher paying position as dispatcher in Black Hawk County. See Finding of Fact No. 29. She informed Sheriff Davis that she was leaving two weeks prior to her termination date. (Tr. at 55). He requested her recommendations as to who should replace her. Based on their knowledge of the jail and their capability to be trained in eight working days, she named deputies Jack Straw, Mark Fettkether, Sam Mason as well as former jail employees Teresa Rasmussen and Jane Hertzberg. (Tr. at 55, 112). Fettkether was selected and offered the position at much higher pay than Peyton had received. See Findings of Fact Nos. 9, 32.

83. When Fettkether accepted the position, he essentially stepped into a position which was, in many respects, not only substantially equal but virtually identical with that held by Peyton. (Tr. at 108, 112, 139, 156, 263, 243-44, 273). Respondents have argued on brief that Fettkether's higher pay was justified because he had greater autonomy, authority and responsibilities than Peyton. (Respondent's Brief at 7-8).

C. Fettkether's Status as Deputy Sheriff and Third in Command:

84. Lieutenant Fettkether was a regular civil service deputy at the time he became jail administrator. Complainant Peyton was not. (Tr. at 107, 239-40, 266). Classification as a peace officer or civil service deputy is not a requirement or qualification for a jail administrator at a county jail.. (C. EX. 18 - section 50.10; Tr. at 125, 130, 133-34, 140). As correctional services representative McSweeney credibly testified, there is nothing in the job of jail administrator to suggest that being a peace officer should be a requirement for the position. (Tr. at 125).

85. Fettkether had been a patrol supervisor prior to taking the position of jail administrator. (Tr. at 240). Once Fettkether was assigned to the jail administrator position, which is considered to be a full-time job, another deputy was hired to take on patrol duties. (Tr. at 266). Once he became jail administrator, a regular road patrol shift was not a part of Fettkether's job. (Tr. at 266).

86. On occasion, after he became jail administrator, Lieutenant Fettkether would assist in some patrol situations where he was the closest officer available. (Tr. at 234-35, 266). Two specific instances where this occurred were identified in the record for the two year and five month period between the date Fettkether became jail administrator and the date of the hearing. On one occasion, he provided back-up for a call concerning an individual involved in a possible shooting in another county. On another occasion, he answered an early morning motor vehicle accident

call which was only ten miles from his home. (Tr. at 235, 236, 246-47, 265). A possible third occasion involved his answering a call while on the way out to the jail in the morning. (Tr. at 236). There appear to have been other occasions, but the greater weight of the evidence indicates that Fettkether's patrol duties were occasional, incidental events which occurred when he was closest to the scene or when extra help was needed. (Tr. at 234-35, 246, 266).

87. Lieutenant Fettkether was third in command of the sheriff's department prior to becoming jail administrator. He remained third in command after assuming that position. (Tr. at 108, 234-35, 245). As a practical matter, this means that Fettkether runs the department when the sheriff and the chief deputy are out of the county. (Tr. at 235, 265). There have been times when this has happened, but there is no evidence in the record to indicate that this is anything more than an occasional occurrence. (Tr. at 234-35, 245-46, 265).

D. Differences in Fettkether's and Peyton's Duties Either Did Not Occur Until Long After Fettkether Was in the Position or Were Insignificant:

1. *Budgeting:*

88. Respondent's brief suggested that Fettkether "possesses more autonomy and authority in his position as jail administrator than did Peyton, particularly in the area of budgeting and claims." Respondent's Brief at 7. Fettkether, however, testified that, with respect to the budget, "[P]resently, I have a little bit, shall we say, more freedom of control than what Ms. Peyton had." (Tr. at 244). One aspect of this "little bit more of freedom of control" involved making out his own budget request and presenting it to the Board of Supervisors. (Tr. at 244, 270).

89. Fettkether, however, did not do this independently until the budget request submitted in January of 1991. (Tr. at 271-72). This was one year and two months after he entered the position and one year after the filing of this complaint. See Findings of Fact Nos. 2, 9. The first year's budget request was prepared by the sheriff and Fettkether together, just as the sheriff and Alice Peyton had done when she was jail administrator. (Tr. at 83-84, 257, 271-72).

90. Lieutenant Fettkether was paid a substantially higher salary than Alice Peyton for over a year before he had sole responsibility for this duty. There is no evidence in the record indicating that Complainant Peyton was ever given the opportunity to independently prepare and present the budget during her term as jail administrator or that she would be incapable of doing so. Under these circumstances, this is not a significant difference with respect to skill, effort, responsibility or working conditions in the job requirements for Peyton and Fettkether.

2. Claims:

91. Another aspect of the "little bit more of freedom of control" held by Fettkether involved claims. (Tr. at 244). When Peyton was jail administrator, claim forms, which involved bills submitted to the sheriff's department, were initially prepared by Pam Fitzgerald, the office administrative secretary. When Ms. Fitzgerald left on maternity leave, Peyton volunteered to prepare the claim forms for the jail. Peyton continued to perform this function throughout her

employment. Once she prepared the claim forms for Sheriff Davis's signature, they would be submitted to the Board of Supervisors for payment. (Tr. at 244-45. 257-58).

92. The difference between what Peyton did and what Fettkether did is that Fettkether was permitted to sign the claim forms for the jail and submit them directly to the Board without obtaining the sheriff's signature. (Tr. at 244-45, 263). There is no evidence that Peyton was ever given the chance to perform this function in this manner or would have been incapable of doing so. Under these circumstances, this is not a significant difference with respect to skill, effort, responsibility or working conditions in the job requirements for Peyton and Fettkether.

3. On Call Status:

93. Both Complainant Peyton and Lieutenant Fettkether were required to be on call 24 hours a day for problems at the jail. See Finding of Fact No. 37. (C. EX. 13; Tr. at 43, 103-05, 267-68). If the jail administrator cannot be reached, the jailer is to call the sheriff. (Tr. at 43, 267). Six months after his assignment to the jail administrator position, Fettkether was given a pager to wear. (Tr. at 265). Because Fettkether was given this pager, he could be contacted with greater success than if contact were limited to the telephone system, as it had been with Peyton. Thus, the number of calls handled by Fettkether was increased and the number of calls to the sheriff was reduced. (Tr. at 267-68).

94. The pager system was instituted because Sheriff Davis anticipated making approximately 20 simultaneous arrests due to the drug war. Since he could not predict when these arrests would be made, day or night, he gave Fettkether a pager so he would be available at the time of the arrests. This is not so much a change in responsibility, skill, or effort as it is a change in communications. (Tr. at 265-66). If Peyton had been given a pager, there is no reason to believe that the impact on her job requirements would not have been identical.

4. Transportation:

95. The last distinction brought up with respect to Peyton's and Fettkether's duties is the transportation of prisoners. Both Peyton, as jail administrator, and jailers transported inmates to local destinations, such as the doctor or dentist. (Tr. at 108, 157). Jailers continued to transport prisoners to local destinations after Fettkether became jail administrator. (Tr. at 234).

96. The only difference with respect to transportation duties involves long distance transportation to Oakdale or Ft. Madison. The complainant would have to call for a deputy to conduct the transport and ride along. (Tr. at 108). Fettkether, being a deputy, was able to conduct the long-distance transports by himself. (Tr. at 157, 246). There is no evidence in the record indicating how often such trips were undertaken. Under these facts, this difference does not constitute a significant change in the skill, effort, or responsibility required by the jobs or in similarity of working conditions.

97. The combination of (a) unequal pay between Complainant Peyton, a female, and Mark Fettkether, a male; for (b) a position performed under similar working conditions, where (c) the skill, effort, and responsibility required to perform the job are substantially equal, is sufficient in

itself to establish a prima facie case of equal pay discrimination on the basis of sex. See Conclusion of Law No. 31, 33.

VI. The Respondent Failed to Produce Evidence Which is Sufficient to Articulate A Legitimate, Nondiscriminatory Reason Asserted on Brief, i.e. That Complainant Peyton Was Paid Less Than David Kuhn Because Kuhn Had Lengthy Experience and Training In Jail Operations At the Start of His Employment While Complainant Peyton Had None At All at the Start of Hers:

1. Reasons Identified As Legitimate Non-Discriminatory Reasons Have Already Been Considered and Rejected:

98. On brief, Respondent identified several reasons which it described as legitimate, nondiscriminatory reasons for the failure to pay Complainant Peyton what it paid David Kuhn in the position of jail administrator. (Respondent's Brief at 6-7). Respondent's argument that these all should be viewed as legitimate, nondiscriminatory reasons for the action was based on the erroneous premise that "the fact that [Peyton] was paid less than her male predecessor and her male successor" was, by itself, sufficient to establish a prima facie case. See Conclusion of Law No. 34.

99. Several reasons dealt with asserted differences in authority and autonomy between Kuhn and Peyton. These included Kuhn's responsibility for policy development, a reason for the difference in pay which was articulated through the production of evidence to that effect. (Tr. at 186). These reasons were directed toward the elements of the prima facie case, i.e. did the jobs require substantially equal skill, effort, and responsibility? Such reasons have already been considered and rejected. See Findings of Fact Nos. 40-48, 54-55, 58-64.

2. Denial That Sex Was a Factor In Determining Pay Does Not Rebut a Prima Facie Case:

100. The Board of Supervisors' denials that sex was a factor in their determinations of Peyton's pay, do not rebut a prima facie case. (Tr. at 206, 212, 220). See Conclusion of Law No. 52.

3. Respondent Failed to Produce Evidence That Peyton Was Paid Less Than Kuhn Because Kuhn Had Lengthy Experience and Training In Jail Operations At the Start of His Employment WhileComplainant Peyton Had None at the Start of Hers:

101. Respondent also asserted that Peyton was paid less than Kuhn because "[w]hile it is true that both Kuhn and Peyton were civilian employees within the sheriff's department and both operated the jail, **Kuhn had lengthy experience and considerable training in [jail operations] at the start of his employment, where Peyton had none at all."** Respondent's Brief at 6. While there is evidence showing their experience, training, and pay, there is no evidence in the record where it is specifically articulated that Peyton was paid less because she did not have Kuhn's experience and training. (R. EX. F, G; C. EX. 1-5; Tr. at 6-7, 10, 12, 15, 17-18, 31-33, 67). There is no testimonial or documentary evidence in the record stating that Peyton was paid less than Kuhn because of their respective experience or training.

VI. Ruling In the Alternative: Even If The Respondent Had Articulated That Complainant Peyton Was Paid Less Than David Kuhn Because Kuhn Had Lengthy Experience and Training In Jail Operations At the Start of His Employment While Complainant Peyton Had None At All at the Start of Her Employment, This Reason is Either Not a Legitimate, Nondiscriminatory Reason or is a Pretext for Discrimination:

102. Assuming that evidence was produced showing that the stated difference in experience and training between Kuhn and Peyton was a reason for reduced pay for the complainant, it is not a legitimate and nondiscriminatory reason. By its statements on brief, Respondent has admitted that the comparison drawn was between Kuhn's experience and training when he started employment as jail administrator and Peyton's lack of experience and training when she started employment as an on-call matron. Respondent's Brief at 6. See Conclusion of Law No. 48-51. It is neither legitimate, nondiscriminatory, nor plausible for an employer to determine the pay of a new male jail administrator based on his experience and training at the time of entering that position, while determining the pay of a new female jail administrator based on her experience and training, or lack of same, as it existed a year and a half prior to entering the jail administrator position. A practice of taking into account all of a male's job related experience and training at the time of making a salary determination, while excluding all of a female's job related experience and training when making such determinations, is obviously discriminatory. Such a determination would disregard Peyton's experience and training in jail operations acquired from September of 1982 to April of 1984.

103. Such training included:

a. The twenty-four hours of initial orientation training provided to Peyton as a new jailer in September and October of 1982. (C. EX. # 2).

b. Intoxilyzer training in May of 1983. (C. EX. # 3).

c. Completion of a 40 hour American Correctional Association's Correctional Officer's Correspondence Course in May of 1983. (C. EX. # 4). This was a course which Peyton took and paid for on her own initiative. (Tr. at 10, 15, 17). When Peyton committed volunteer unpaid time to work on this course, she was also taught by Kuhn how to handle the paperwork in the office. (Tr. at 15).

d. Completion of the National Sheriff's Association's Jail Officer's Correspondence Course in June of 1983. (C. EX. # 5). This was a required 40 hour course. (Tr. at 10, 18).

104. After she became jail administrator, Peyton took another six classroom training courses on jail operations. (C. EX. 7-12).

105. Pretext is shown for two separate and independent reasons. First, the experience and training reason differs dramatically from what the complainant was told by Supervisor Kremer when she asked why she was not being paid as much as David Kuhn. She was told that she was not being paid as much as Kuhn because Kuhn was paid too much. Kremer made no mention of their comparative qualifications. The clear message sent by Kremer was that the position wasn't

worth what Kuhn had been paid. (Tr. at 24, 59, 80). This message was reinforced by the Board's refusal to pay Peyton even the lowest amount shown in the salary survey of comparable county jail administrators. See Finding of Fact No. 17.

106. Second, there is no testimonial or documentary evidence in the record where it is stated that Kuhn's pay as jail administrator was based on his particular experience and training. There were negotiations between Kuhn and Herrick concerning salary, but it is unknown what factors those negotiations addressed. (Tr. at 173). The closest which the Respondent came to producing evidence which articulated this position was in the testimony of Sheriff Dryer and in Sheriff Herrick's letter to the Board of Supervisors recommending the hire of Kuhn. (R. EX. G; Tr. at 170).

107. Dryer testified that once Sheriff Herrick had applied for the necessary grants to physically renovate the jail, he looked for "somebody with a fair amount of jail expertise" and hired Kuhn. (Tr. at 170). The letter sent by Herrick to the Board simply recited Kuhn's experience and training and requested the Board's approval of hiring Kuhn and approval of the recommended salary:

> David D. Kuhn has over ten years experience in law enforcement and is a 1974 graduate of the Iowa Law Enforcement Academy. Kuhn is a 1978 and 1981 graduate of North Iowa Area Community College, Mason City, Iowa. In 1978 Kuhn received a two year degree in Liberal Arts, and in 1981 received a two year degree in Police Science.
>
> Kuhn has been employed since February 1, 1977, with the Floyd County Sheriff's Department as Jail Administrator.
>
> Therefore, I request your approval of Kuhn as Chief Jail Administrator, in and for Buchanan County.
>
> I would also request that Kuhn receive 75% of my salary, which would be $14,781.00 a year, beginning January 1, 1982.

(R. EX. G).

108. There is nothing in this evidence specifically stating that the pay was based on Kuhn's experience. It is quite possible under these facts that there was no adjustment based on Kuhn's experience and training. Sheriff Herrick may have decided what the job was worth and then looked for the best qualified person who would accept that pay. But even this is more than can be stated from the record. There is no evidence setting forth the specific relationship, if any, between Kuhn's pay and his experience.

VII. Did the Board Articulate, Through the Production of Evidence, Legitimate Non-Discriminatory Reasons for the Difference in Pay Between Complainant Peyton and Lieutenant Mark Fettkether?:

1. Reasons Identified As Legitimate Non-Discriminatory Reasons Have Already Been Considered and Rejected:

109. On brief, Respondent identified several reasons which it described as legitimate, nondiscriminatory reasons for the failure to pay Complainant Peyton what it paid Mark Fettkether in the position of jail administrator. (Respondent's Brief at 7-8). Respondent's argument that these all should be viewed legitimate, nondiscriminatory reasons for the action was based on the erroneous premise that "the fact that [Peyton] was paid less than her male predecessor and her male successor" was, by itself, sufficient to establish a prima facie case. See Conclusion of Law No. 31, 33.

110. All, but the three reasons set forth below, dealt with asserted differences in authority and autonomy between Fettkether and Peyton. Such reasons were directed toward the elements of the prima facie case, i.e. did the jobs require substantially equal skill, effort, and responsibility? Those reasons have already been considered and rejected. See Findings of Fact Nos. 81-98.

2. Fettkether's Prior Salary History:

111. The first reason set forth by Respondent was that the Respondent took Fettkether's prior salary history into consideration in determining his salary. Respondent's Brief at 8. Sheriff Davis testified that Fettkether was given a raise and promotion to Lieutenant at the time of his assignment to jail administrator for two reasons. First, because these actions would ensure that the change in assignment from a road position to a jail position would not be seen as a demotion by the law enforcement community. Second, this change would help ensure that Fettkether would earn approximately as much as he would if he had remained a sergeant and under the bargaining agreement. (Tr. at 261- 62).

112. In a sense, therefore, this reason was articulated with respect to the sheriff through the production of evidence in the record. There is no evidence, however, that the Respondent Board of Supervisors relied on such salary history in approving Fettkether's promotion and salary increase.

113. For reasons discussed in the conclusions of law, prior salary history alone may not constitute a legitimate reason for a difference in pay. This is particularly true when the evidence indicates, as it does here, that a law enforcement background is not necessarily predictive of success as a jail administrator. See Findings of Fact Nos. 28, 84. See Conclusion of Law No. 57.

3. Recommendation By Complainant Peyton:

114. The second reason suggested by Respondent was that the selection of Fettkether and, by implication, his higher pay, was justified because he was recommended for the position by Peyton. (Respondent's Brief at 9). Peyton, at the request of the sheriff, recommended Fettkether and others for the position. See Finding of Fact No. 82. However, she made the recommendations without regard to the salaries currently earned by these individuals. (Tr. at 115). There is no evidence that she made any recommendation with respect to salaries of her

possible successors. Again, there is no evidence that the Respondent Board relied on such recommendation in giving its approval.

4. Complaint Peyton's Pay Was Initially Set at an Hourly Rate As Part of the Settlement of Her Civil Rights Complaint:

115. The third reason set forth on brief is that Peyton's pay as jail administrator was initially set at an hourly rate as part of the settlement of her complaint alleging a discriminatory failure to hire. (Respondent's Brief at 9). For reasons set forth in the conclusions of law, this is not a legitimate reason for failure to provide equal pay. See Conclusion of Law No. 58. Also, this reason does not address the failure to provide Complainant Peyton with equal pay after her job became substantially equal to Kuhn's.

VIII. Ruling In the Alternative: Respondent's Salary History and Peyton Recommendation Reasons for the Difference in Pay Between Complainant Peyton and Lieutenant Mark Fettkether Are Pretexts for Discrimination:

116. For three separate and independent reasons, it appears that the Respondent's asserted reliance on Fettkether's past salary history and on Peyton's recommendation of Fettkether are pretexts for discrimination.

117. First, a strong inference of sex discrimination is created by the showing that a female was paid less than both her male predecessor and male successor for work which was substantially equal in skill, effort, and responsibility, and performed under similar conditions. This inference may still be relied upon in determining that the Respondent's reasons are pretexts for discrimination. See Conclusion of Law No. 63.

118. Second, the hire of Fettkether was not consistent with the averred policy of the Respondent Board of Supervisors throughout the Complainant's employment. This policy was that the Buchanan County jail administrator position was worth neither what Kuhn had been paid or what the salary survey indicated was paid jail administrators in similar counties. See Findings of Fact Nos. 17, 33, 102. The Board rejected the sheriff's proposed raises for Peyton which would have resulted in salaries far smaller than those given to Kuhn or Fettkether. See Finding of Fact No. 33. There is no evidence that the value of the position to the county had increased at the time of Fettkether's assignment to the position. Yet, it approved a promotion and salary increase for Fettkether upon his taking the position. See Finding of Fact No. 9. If the Board actually made its decisions based on the value of the position to the county, as it had communicated to Peyton, and there was no sex discrimination involved, it seems unlikely that it would approve the placement of Fettkether in the position at the salary he was given simply because of his prior salary history.

119. The record suggests an alternative may have been available. The evidence in the record suggests that, when Buchanan County hired its first jail administrator, Mr. Kuhn, it had accepted applications for the position, considered them, and made a selection. (R. EX. F; Tr. at 170). During the interim after Kuhn's resignation, Deputy Hansel was assigned to administer the jail. See Finding of Fact No. 28. It may have been possible to temporarily assign Fettkether to the jail,

while seeking a new jail administrator at Peyton's salary. This assumes, of course, that someone with adequate experience and training could be found to take the position at Peyton's salary.

120. Third, it has already been noted that there is no evidence that the Board relied on Peyton's recommendation of Fettkether in making its salary decision with respect to him. In any event, the assertion that the Board would give significant weight to Peyton's recommendation in approving Fettkether's salary, when it gave no weight to her prior salary survey recommendation, is implausible.

120A. In light of the strong inferences of sex discrimination shown by the prima facie case, the failure to articulate some reasons asserted on brief, the illegitimate or discriminatory nature of other reasons, and the disbelief of yet other reasons, Peyton and the Commission have established sex discrimination in pay with respect to the complainant.

IX. Remedies:

A. Back Pay:

121. The highest paid comparable employee should be used when determining back pay. See Conclusion of Law No. 67. Therefore, back pay should be determined by subtracting Complainant's combined regular pay and overtime for the period from July 1, 1985 (when her duties became substantially equal to Kuhn's) to October 31, 1989 (her date of termination) from what she would have earned if she had been paid 82.5% of the sheriff's salary during that period:

Year	1985 Partial Year (7/1-12/31)	1986	1987	1988	1989* Partial Year (1/1-10/31)
82.5% of Sheriff	$9178.13	$18998.10	$18998.10	$19965.00	$17325.00
CP's Comb. Overtime & Regular	$5595.45	$11555.22	$14287.07	$15147.86	$14744.36
****Difference**	$3582.68	$7442.88	$4711.03	$4817.14	$2580.64

* Takes into account only Buchanan county earnings and 82.5% of sheriff's salary for 10 months of the year.

** Difference will vary from results in Complainant's Exhibit 17 which failed to subtract both her regular and overtime earnings. The subtraction of gross earnings was what was intended to be shown. (Tr. at 63-64). This will also vary from what is shown in Finding of Fact No. 35 as

here the pay is established at 82.5% of the sheriff's salary, not 80%. Also, back pay is provided for only one-half of 1985.

(C. EX. # 16, 17). See Finding of Fact No. 35.

122. The **TOTAL NET BACK PAY** due Complainant Peyton for the period from July 1, 1985, by which time her job had become substantially equal to that of Kuhn, until October 31, 1985, the end of her employment, is: [$3582.68 + $7442.88 + $4711.03 + $4817.14 + $2580.64] = **$23134.37**.

123. The back pay ends as of the date of Complainant's last day of employment here as Complainant has not alleged or proven that she was constructively discharged. See Conclusion of Law No. 69. The Commission and Respondent have stipulated that constructive discharge is not an issue here. (Prehearing Conference Order).

B. Emotional Distress:

124. All of the evidence in the record on the issue of emotional distress in this case supports the conclusion that Complainant Peyton suffered emotional distress as a result of the sex discrimination in pay practiced against her. There is absolutely no evidence to the contrary. Peyton is only required to show that she suffered emotional distress by the greater weight of the evidence. See Conclusion of Law No. 83. Reasonable minds confronted with this evidence, however, could only reach the conclusion that emotional distress had been sustained by Complainant Peyton.

125. Complainant Peyton credibly testified as to her reaction upon finding out her male successor was to be paid at an annual salary of $20,790 or 82.5% of the sheriff's salary:

> I was very angry. I felt I'd been slapped in the face by the supervisors, had been made a laughingstock. They paid my--the administrator prior to me being a male, had paid him a considerable amount more than what I was getting in wages. And when I asked them, you know, why I couldn't be paid that much, they said they were paying him too much. They couldn't see it, through all the years I worked for them, to give me a raise, my qualifications and the expertise job I was doing in the jail, and they bring someone in who is another male and pay him twice what I was making, I was just devastated by it.

(Tr. at 59).

126. Ms. Peyton also described how she felt when she was filing the complaint:

> I was very upset. I was mad. I felt that the board had made a laughingstock out of me. That they had gotten away with it because they paid me what they wanted to pay me. I did an excellent job in the jail. I gave it 100 percent every time, and I just felt that they were laughing at me.

(Tr. at 65).

127. Complainant Peyton's tone of voice and demeanor at the time of testifying about her feelings also demonstrated that she had been angered and upset by the discrimination inflicted upon her. This supported the credibility of her testimony. Her testimony on this issue was credible, plausible, and internally consistent.

128. It should be noted that, earlier in her employment, Peyton had become convinced that it was futile to ask that her salary be made a percentage of the sheriff's, as Kuhn's was, because the Respondent Board of Supervisors had told her that she would not be paid as much as Kuhn because he had been paid too much. (Tr. at 25). The Board had laughed at her when she gave them the jail administrator salary survey which they had requested. See Finding of Fact No. 17.

129. It is within the specialized knowledge of this Commission that, while it is not presumed to occur, emotional distress resulting from discrimination is often suffered by the victims of discrimination. It is hardly surprising that persons who discover they have been denied equal pay or other employment benefits due to discrimination suffer upset or anger or other forms of emotional distress as a consequence. Official notice is taken of these facts. Fairness to the parties does not require that they be given the opportunity to contest these facts.

130. The economic loss suffered by Peyton due to sex discrimination has already been noted. See Finding of Fact No. 122. Such loss is often seen as circumstantial evidence of emotional distress. See Conclusion of Law No. 86.

131. The Complainant here suffered emotional distress. Although her testimony was in the past tense, her demeanor made it clear that some of the upset and anger resulting from the discrimination were still present at the time of hearing, two and one half years after she realized that she had been denied equal pay due to her sex. Given the duration and intensity of the distress, an award in the sum of two thousand dollars ($2000.00) is full, reasonable, and adequate compensation for the distress sustained by Complainant Peyton.

X. Credibility:

132. On the whole, Complainant Peyton's testimony was credible, plausible, internally consistent and consistent with the greater weight of the evidence with respect to material issues in the case. Her demeanor was appropriate throughout the hearing. Her recollection on certain issues, such as who she recommended to replace her to Sheriff Davis, seemed to be clearer than that of other witnesses.

133. John McSweeney was an employee of the Iowa Department of Corrections with approximately 21 years of experience. He had inspected jails for the eight year period of 1984 through most of 1991 inclusive. (Tr. at 117-18). From 1986 to 1991, he inspected the Buchanan County jail. (Tr. at 118, 119). He came to know Complainant Peyton in her capacity as jail administrator. (Tr. at 119). His experience, knowledge, and expertise concerning jail administration and his inspections of the Buchanan County jail established that his testimony was credible.

134. Paul Pint, Brian Jackson, Jack Straw, and Sheriff Davis were credible witnesses. Complainant Peyton's clearer recollection with respect to her recommendations as to her replacement has already been noted.

135. Former sheriff Joel Dryer was a credible witness with respect to events that occurred while he was sheriff. The controversy in his testimony with respect to Kuhn's authority under Sheriff Herrick has already been noted in the record. See Findings of Fact No. 44-47. It appears that the discrepancy between Dryer's testimony that physical renovation of the jail ended under Kuhn and Peyton's supervision of further renovation simply reflects his lack of knowledge of the further renovations. See Finding of Fact No. 58.

136. The testimony in some respects of supervisors Ralph Kremer, Leo Donnelly and Gary Schweitzer is questionable due to their poor memories of various events, particularly the failure to recall Peyton's inquiry as to why she was not paid in the same amount or manner as Kuhn. (Tr. at 199-200, 213, 219-20). Their testimony that sex played no role in their determination of Peyton's salary is contrary to the greater weight of the evidence. See Finding of Fact No. 100.

CONCLUSIONS OF LAW:

I. Jurisdiction and Procedure:

A. Subject Matter Jurisdiction:

1. Subject matter jurisdiction ordinarily means the authority of a tribunal to hear and determine cases of the general class to which the proceedings in question belong. Tombergs v. City of Eldridge, 433 N.W.2d 731, 733 (Iowa 1988). Alice Peyton's complaint is within the subject matter jurisdiction of the Commission as the allegation that the Respondent failed to provide her with equal pay due to her sex falls within the statutory prohibition against unfair employment practices which the Commission has the power to hear and determine. Iowa Code *SS* 601A.6, .15 (now *SS* 216.6, .15),

B. Timeliness:

1. *Continuing Violations:*

2.

Iowa Code section 601A.15(12) provides that:

> [a] claim under [chapter 601A] shall not be maintained unless a complaint is filed with the Commission within one hundred eighty days after the alleged discriminatory or unfair practice occurred.

In connection with this statutory limitation a commission rule provides that:

> [i]f the alleged unlawful discriminatory practice or act is of a continuing nature, the date of the occurrence of the alleged unlawful practice shall be deemed to be any date subsequent to the commencement of the alleged unlawful practice up to and including the date upon which the unlawful practice has ceased.
>
> 161 Iowa Admin. Code 3.3 (2). . . . The commission rule codifies what is known in the federal job discrimination cases as the "continuing violation" doctrine. So under the rule, if the alleged discriminatory act is of a "continuing nature," then the act is considered to have occurred as of the last date of the act.
>
> . . .
>
> [I]f a violation is continuing, the time does not begin to run when the discrimination first happens. Instead the [filing is] in time if there are discriminatory acts within the limitations period.

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 527 (Iowa 1990).

2. Based on Legal Authority Specifically Addressing Equal Pay Discrimination, the Filing of the Complaint Was Timely:

3. The overwhelming weight of legal authority holds that equal pay violations are continuing violations. *E.g.* Miller v. Beneficial Management Corp., 977 F.2d 834, 60 Empl. Prac. Dec. _ 41841 at 72932 (3rd Cir. 1992); Bartlet v. Berlitz School of Language, 698 F.2d 1003, 30 Fair Empl. Prac. Cas. 1706, 1708 (9th Cir. 1983); Hall v. Ledex, Inc., 669 F.2d 397, 30 Fair Empl. Prac. Cas. 82 (6th Cir. 1982); Jenkins v. Home Insurance Co., 635 F.2d 310, 24 Fair Empl. Prac. Cas. 990, 992 (4th Cir. 1980); Satz v. I.T.T. Financial Corp., 619 F.2d 738, 22 Fair Empl. Prac. Cas. 929, 933 (8th Cir. 1980); Clark v. Olinkraft, Inc., 556 F.2d 1219, 14 Empl. Prac. Dec. _ 7779 at 5854-55, 5856 & n. 9 (5th Cir. 1977); Hodgson v. Behrens, 475 F.2d 1041, 1049, 9 Fair Empl. Prac. Cas. 816, 823 (5th Cir. 1973); 5 Employment Discrimination Coordinator _ 54045 (WGL)(1994). "To hold otherwise would permit perpetual wage discrimination by an employer whose violations . . . had already lasted without attack [for a time equal to the period of the statute of limitations]." Hodgson v. Behrens, 475 F.2d 1041, 1049, 9 Fair Empl. Prac. Cas. 816, 823 (5th Cir. 1973).

4. **"The discrimination is continuing in nature. [The plaintiff] suffered a denial of equal pay with each check she received."** Hall v. Ledex, Inc., 669 F.2d 397, 30 Fair Empl. Prac. Cas. 82, 83 (6th Cir. 1982)(emphasis added). *See also* Nealon v. Stone, ___ F.2d ___, 59 Fair Empl. Prac. Cas. 1118, 1123 (4th Cir. 1992); Bartlet v. Berlitz School of Language, 698 F.2d 1003, 30 Fair Empl. Prac. Cas. 1706, 1708 (9th Cir. 1983); Jenkins v. Home Insurance Co., 635 F.2d 310, 24 Fair Empl. Prac. Cas. 990, 992 (4th Cir. 1980). In Nealon, the Fourth Circuit noted that **the United States Supreme Court had found this principle "too obvious to warrant extended discussion."** Nealon, 59 Fair Empl. Cas. at 1123 (*quoting* Bazemore v. Friday, 478 U.S. 385, 395-96 (1986)(per curiam)(emphasis added).

5. **These violations do not terminate until such time as the practice ends or the affected employee leaves employment with the employer.** *E.g.* Jenkins v. Home Insurance Co., 635 F.2d 310, 24 Fair Empl. Prac. Cas. 990, 992 (4th Cir. 1980)(emphasis added). **"The practice of paying discriminatory unequal pay occurs not only when an employer sets pay levels, but as longas the differential continues."** Satz v. I.T.T. Financial Corp., 619 F.2d 738, 22 Fair Empl. Prac. Cas. 929, 933 (8th Cir. 1980)(emphasis added).

6. When the conclusions of law above are considered in light of the pertinent findings of fact, it is clear that the equal pay violation here alleged continued at least to the end of complainant's employment. See Findings of Facts Nos. 2, 3, 10. Since that date was well within one hundred eighty days of the date of filing, the complaint was timely filed. Iowa Code *S* 601A.15(12) (now *S*216.15(12)).

3. This Complaint Is Also Timely Filed Under The Continuing Violation Analysis Set Forth By the Iowa Supreme Court in the Hy-Vee Decision:

7. Because the Respondent addresses the Iowa Supreme Court's continuing violation analysis on brief, a **ruling** is made **in the alternative** with respect to it. (Respondent's Brief at 12-15). The Court has recognized that one type of continuing violation "consists of 'a series of acts with one independent discriminatory act occurring within the charge filing period.'" Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 528 (Iowa 1990)(quoting Schlei & Grossman, Employment Discrimination Law 1047 (1983)).

8.

> Four elements make up the "series of acts" type of continuing violation. . . . (1) the alleged discrimination pervades the series of events, (2) there is a present violation of the statute, (3) the present acts of alleged discrimination are related to the time-barred events, and (4) the charge covering the present violation is filed within the limitations period. . . . [T]he first and third elements refer to the same thing: the acts must be shown to be related and not isolated.

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 528 (Iowa 1990). In this case, the second element was met by showing that Complainant Peyton received the allegedly discriminatory pay differential throughout her employment. See Finding of Fact No. 3. The fourth element was met by showing that the charge was filed within one hundred eighty days of the end of her employment. See Findings of Fact Nos. 2, 3. 10. "A severing of the employment relationship ordinarily concludes a discrimination against the severed employee and activates the time period for filing charges with the commission." Annear v. State, 419 N.W.2d 377, 379 (Iowa 1988).

9. Elements one and three can be satisfied by showing that the "alleged discriminatory acts are related closely enough to constitute a continuing violation." Hy-Vee at 528. This showing may be established by examining the evidence concerning three factors: subject matter, frequency, and permanence. Id.

10.

> As to subject matter, the relevant question is whether "the alleged acts involve the same type of discrimination tending to connect them in a continuing violation." Id. Frequency deals with the question whether the alleged acts are of a recurring nature or more in the nature of an isolated employment decision. Id.

Hy-Vee at 528.

11. The past and present wage payments and salary determinations in this case were determined to be related to each other with respect to all three factors, including subject matter and frequency. See Findings of Fact Nos. 5- 9.

12.

> The last factor--permanence--deals with the question whether an employee should or should not realize the employer is discriminating. Id. For example, the discriminatory acts may be so persistent and longstanding that the employee should realize the employer is discriminating. Id. At that point, the statute of limitations is triggered. The limitations period, however, is not triggered when the consequences of the discriminatory acts is something the employee might reasonably expect without suspecting discrimination. Id. For example, an employee would probably not suspect an employer is discriminating when the employer's reasons for the acts are pretextual and seemingly legitimate.

Hy-Vee at 528.

13. In this case, Complainant Peyton was given a legitimate reason for not being paid as much as her predecessor, David Kuhn, i.e. that Kuhn was paid too much. See Finding of Fact No. 6. It was not until Fettkether was given the jail administrator position at a salary even higher than Kuhn's that Complainant realized that the reason given her was bogus. See Finding of Fact No. 9. Also, like the complainant in Hy-Vee, Peyton had entered into a settlement of a prior discrimination complaint with her employer. Hy- Vee at 523. See Finding of Fact No. 8. Such a settlement "could reasonably lead [a complainant] to believe that [her employer] would not continue to discriminate against her in the future." Hy-Vee at 528. See Finding of Fact No. 8. The discriminatory wage payments and hourly rate determinations are, therefore, also shown be related with respect to the factor of "permanence."

14. All four elements of the "series of related acts" form of continuing violation have been established. Therefore, a continuing violation to a time within the statute of limitations period is also shown under the Hy-Vee analysis.

C. The Buchanan County Board of Supervisors Is a "Person" Covered by the Act and is Properly Named as an "Employer" of Complainant Peyton:

15. On brief, Respondent argues that this case should have been brought against the Buchanan County Sheriff's Department and not the Buchanan County Board of Supervisors because the Board is not the "employer" of the complainant. (R. Brief at 9-10).

16. The statute at issue states "It shall be a . . . discriminatory practice for any **person** . . . to otherwise discriminate in employment against any . . . employee." Iowa Code *S* 601A.6(1)(a) (now *S*216.6(1)(a) (emphasis added).

17. Respondent relies on the Iowa Supreme Court decision in Kingsley v. Woodbury County Civil Service Commission to support its argument. It is true that a county sheriff's department "is a 'person' to whom the Civil Rights Act applies. Kingsley, 459 N.W.2d 265, 266 (Iowa 1990). However, the reason why Kingsley held a sheriff's department is a "person" is because Iowa Code *S*601A.2(2) (now 216.2(2)) defines "'person' to include all **political subdivisions** of [the] state." Id. (emphasis added).

18. A "political subdivision" is:

A division of the state made by proper authorities thereof, acting within their constitutional powers, for purpose of carrying out a portion of those functions of the state which by long usage and inherent necessities of government have always been regarded as public.

BLACK'S LAW DICTIONARY 1043 (5th ed. 1979).

19. The sheriff's department is a "person" covered by the act not because it is a "political subdivision of [the] state." Rather, the department is a "person" because it is, as the name suggests, a "department" of a political subdivision of the state, i.e. "Buchanan County." *See* IOWA CONST. art. III, *S* 39A; art. XI, *S* 2; Iowa Code *S* 331.301(8). The sheriff is an officer of the county. Iowa Code *S* 331.651.

20. Similarly, the Board is appropriately considered to be a "person" under the Iowa Civil Rights Act because "[a] power of a county is vested in the board, and a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law." Iowa Code *S* 331.301(2). Under similar reasoning, the Board is an "employer." An "employer" is "the state of Iowa or any political subdivision, board . . . thereof, and every person employing employees within the state." Iowa Code *S* 601A.2(7) (now 216.2(7))(emphasis added).

21. The powers of a county are broad and are not limited to those granted in express words. IOWA CONST. art. III, *S* 39A; Iowa Code *S* 331.301(1), (3). Nonetheless, the Board's statutorily mandated functions make it clear is an "employer." The sheriff's authority to appoint "one or more deputies, assistants, or clerks" is wholly dependent upon the "approval of the board [of supervisors]." Iowa Code *S* 331.903(1) (1989). There is no legal authority to suggest that the Board is not an "employer" because the Board's role with respect to hirings and promotions is to make the final decision as opposed to making the initial recommendation for hire or promotion. *See* Iowa Code *S* 331.903(1) (1989).

22. Finally, the Board is expressly granted the power to determine the compensation, not only of deputy sheriffs, but of "extra help and clerks" appointed by the sheriff. Iowa Code *S* 331.904 (2), (4).

23. Under the authorities set forth above, the Board of Supervisors is not only a "person" covered by the Act, but is the "employer" of Complainant Peyton.

II. Official Notice:

24. Official notice was taken of several facts. See Findings of Fact Nos. 2, 4, 13, 19, 129.

> 10. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Iowa Code § 17A.14(4). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980).

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 160 (1992).

III. The Applicability of Federal Court Decisions and Regulations:

A. Persuasive Authority of Federal Court Decisions:

25. In this case, extensive reliance is placed on federal equal pay cases and regulations:

> 19. Federal court decisions . . . applying Federal anti-discrimination laws . . . are not controlling or governing authority in cases arising under the Iowa Civil Rights Act. *E.g.* Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978). Nonetheless, they are often relied on as persuasive authority in these cases. *E.g.* Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Although opinions of the United States Supreme Court are often entitled to great deference, Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866 (Iowa 1978), its decisions have been rejected as persuasive authority when their reasoning is inconsistent with the broad remedial purposes of the Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d at 831; or of local civil rights ordinances. Quaker Oats Company v. Cedar Rapids Human Rights Commission at 866-67.

Maxine Boomgarden, CP # 07-86-14926, slip. op. at 65 (Iowa Civil Rights Comm'n October 12, 1993).

B. Persuasive Authority of Equal Pay Act Regulations and Decisions:

26.

> 10. In determining whether the Iowa Civil Rights Act's prohibition against discrimination on the basis of sex in employment has been violated through pay differentials based on sex, regulations promulgated and cases decided under the Equal Pay Act of 1963 may be cited as persuasive, but not controlling, authorities. Reference to such authorities has been made in at least one past Commission decision. Kathy Quakenbush, 2 Iowa Civil Rights Commission Case Reports 19, 22 (1978).

Ann Redies, 10 Iowa Civil Rights Commission Case Reports at 17, 26 (1989).

IV. Disparate Treatment Theory:

27. The disparate treatment theory of discrimination was relied on in this case:

> "Disparate treatment" is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their . . . sex . . . . Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 516 (Iowa 1990)(quoting Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)).

V. Order and Allocation of Proof Where Complainant Relies on Circumstantial Evidence to Prove Discrimination Under the Disparate Treatment Theory:

A. Distinction Between "Burden of Persuasion and Burden of Production":

28.

> 23. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding was on the Complainant [and the Commission] to persuade the finder of fact that the elements of each allegation of discrimination [have been proven]. [Iowa Code *S* 216.5(7);] Linn Co- operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981). Of course, in discrimination cases as in all civil cases, the burden of persuasion is "measured by the test of preponderance of the evidence." Iowa R. App. Pro. 14(f)(6).
>
> 24. The burden of persuasion must be distinguished from what is known as "the burden of production" or the "burden of going forward." The burden of production refers to the obligation of a party to introduce evidence sufficient to avoid a ruling against him or her on an issue. BLACK'S LAW DICTIONARY 178 (5th ed. 1979).

> 25. In the typical discrimination case, in which the Complainant uses circumstantial evidence to prove disparate treatment on a prohibited basis, the burden of production, but not of persuasion, shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 448 (Iowa Ct. App. 1981). These shifting burdens of production "are designed to assure that the [Complainant has] his day in court despite the unavailability of direct evidence." Trans World Airlines v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed. 2d 523, 533 (1985).

Dorene Polton, at 162.

B. Summary of the Order and Allocation of Proof in Circumstantial Evidence Disparate Treatment Cases:

29. The following order and allocation of proof was utilized in this case:

> 26. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). This showing is not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).
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> 27. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, non- discriminatory reason for its action. Id.; Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). If the Respondent does nothing in the face of the presumption of discrimination which arises from the establishment of a prima facie case, judgment must be entered for Complainant as no issue of fact remains. Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). If Respondent does produce evidence of a legitimate non-discriminatory reason for its actions, the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).
>
> 28. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981)).

> 29. This burden of production may be met through the introduction of evidence or by cross- examination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981). The Complainant's initial evidence and inferences drawn therefrom may be considered on the issue of pretext. Id. at n.10. This burden of production merges with the Complainant's ultimate burden of persuasion, i.e. the burden of persuading the finder of fact that intentional discrimination occurred. Id. 450 U.S. at 256, 101 S. Ct. at , 67 L. Ed. 2d at 217.

Dorene Polton, at 162.

VI. The Prima Facie Case in Pay Discrimination Cases:

A. The Prima Facie Case In General:

30.

> 21. The burden of establishing a prima facie case of discrimination is not onerous. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The complainant is merely required to produce enough evidence to permit the trier of fact to infer that the employer's action was taken for a discriminatory reason. Id. at 254 n.7. A prima facie case may be shown in a variety of ways as there will be different factual circumstances present in each case. Teamsters v. United States, 431 U.S. 324, 358 (1977)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).
>
> 22. While a prima facie case of discrimination may be established though evidence of "differences in treatment," Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W. 2d 512, 516 (Iowa 1990)(quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)), it may also be established through a "showing of treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation." City of Minneapolis v. Richardson, 239 N.W.2d 197, 202 (Minn. 1976).

Maxine Boomgarden, slip. op. at 66.

B. The Prima Facie Case In Pay Discrimination Cases:

1. *The Elements of the Equal Pay Prima Facie Case:*

31. The prima facie standard used in this case is the one typically used in "equal pay" cases:

> 10. . . . One way for a Complainant to establish a prima facie case of sex discrimination in pay is to show "that **an employer pays different wages to**

> **employees of opposite sexesfor equal work on jobs requiring equal skill, effort, and responsibility and are performed under similar working conditions.**" 29 C.F.R. Section 1620.27(c).

Ann Redies, at 26 (emphasis added). Evidence meeting this standard will also establish a prima facie case of sex discrimination in pay under both the Equal Pay Act and Title VII of the Civil Rights Act of 1964. *E.g.* Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S. Ct. 2223, 2228 (1974)(Equal Pay Act); Miller v. Beneficial Management Corp., 977 F.2d 834, 60 Empl. Prac. Dec. _ 41841 at 72934 (3rd Cir. 1992)(Title VII and EPA); Strecker v. Grand Forks County Social Services Board, 640 F.2d 96, 24 Fair Empl. Prac. Cas. 1019, 1020 (8th Cir. 1981)(Title VII and EPA); McKee v. Bi-State Development Agency, 801 F.2d 1014, 42 Fair Empl. Prac. 431, 434-35 (8th Cir. 1986)(Title VII and EPA); Parker v. Burnley, 693 F. Supp. 1138, 47 Fair Empl. Prac. 587, 596 (N.D. Ga. 1988)(Title VII and EPA). *See* 29 C.F.R. *S* 1620.27(a). One of the elements of the prima facie case, that Complainant was paid less than her male predecessor and successor, is well-established in the record and admitted by Respondent on brief. (Respondent's Brief at 6). See Findings of Fact Nos. 30-35.

2. In Establishing a Prima facie Case, Jobs are Being Compared, Not the Employees In Them:

32. In equal pay cases, such as this one:

> *Jobs are being compared, not the employees in them.*
>
> . . .
>
> The district court in Wirtz v. Basic, Inc. summed up the concept when it wrote:
>
> > Fundamental in the application of the law is the premise that it establishes an objective standard requiring that a judgment with respect to alleged discrimination between sexes is based upon the requirements of the particular jobs being compared, rather than a comparison of the skill of individual employees, the effort of individual employees or their previous training and experience.

Omilian, Sex-Based Employment Discrimination *S* 7.03 at 17-18 (1993)(quoting Wirtz v. Basic, Inc., 256 F. Supp. 786, 790, 9 Fair Empl. Prac. Cases 472 (D. Nev 1966)(italics in original).

3. The Jobs Being Compared Need Not Have Been Held Simultaneously by the Complainant and by Male Comparators:

33. Complainant Peyton relied on comparison with the job requirements and salaries of the jail administrator position as held by both her predecessor and successor. There is ample legal authority allowing the comparison of a job and salary held by a more highly paid male with that held by a lower paid female who either preceded or succeeded him. The male "comparator" and the female complainant need not have been performing the jobs being compared either simultaneously, *e.g.* Strecker v. Grand Forks County Social Services Board, 640 F.2d 96, 24 Fair Empl. Prac. Cas. 1019, 1020 (8th Cir. 1981); Pearce v. Witchita County, 590 F.2d 128, 19 Fair

Empl. Prac. Cas. 339, 342 (5th Cir. 1979); 29 C.F.R. *S* 1620.13(b)(2),(4), or in immediate succession. Clymore v. Far-Mar Co., 709 F.2d 499, 42 Fair Empl. Prac. 439, 441 (8th Cir. 1983); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 165-66 (1989). **Itis sufficient that the complainant establish a violation with respect to one comparator.** Ellison v. United States, 25 Cl. Ct. 481, 58 Fair Empl. Prac. Cases 955, 959-60 (1992); Schlei and Grossman. Employment Discrimination Law: Five Year Cumulative Supplement at 166. *See* Omilian, Sex- Based Employment Discrimination *S* 7.03 at 118-19 (1993).

4. In Determining Whether a Prima Facie Case Has Been Proven, the Focus is on Job Duties Actually Performed and Not Job Titles:

34. While the Respondent suggested, on brief, that Complainant Peyton had established a prima facie case of sex discrimination in pay merely by showing that she was paid less than her male predecessor and successor, (Respondent's Brief at 6), a prima facie case is not established merely by showing that a higher paid male predecessor and a lower paid female had the same job title:

> *The focus is on the duties actually performed by employees in the jobs. Job titles, job classifications or job descriptions are relevant but not controlling.* Application of the equal pay standard depends on actual job requirements and performance. . . . Job titles are frequently too general; they provide very little guidance as to job content or else the title describes what seem to be, but is in fact not, equal work. For example . . . [i]n Wheeler v. ARMCO Steel Corp., the court found that even though plaintiff's job title was identical to the man she replaced, she performed fewer duties and her lower pay was not discriminatory.

Omilian, Sex-Based Employment Discrimination *S* 7.03 at 17 (1993)(italics in original).

5. In Order to Establish a Prima Facie Case, the Jobs Compared Need Only Be "Substantially Equal," Not "Identical".

35.

> [A] majority of courts have agreed that the jobs being compared need not be identical to be equal, only that they be "substantially equal." "Any other interpretation would destroy the remedial purposes of the Act", the Fifth Circuit Court of Appeals said in Shultz v. Wheaton Glass Co.

Omilian, Sex-Based Employment Discrimination *S* 7.03 at 16 (1993)(quoting Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (5th Cir. 1970)). "'[E]qual' does not mean 'identical,'' rather the jobs must require similar skills, effort and responsibility under similar working conditions." Ellison v. United States, 25 Cl. Ct. 481, 58 Fair Empl. Prac. Cases 955, 959 (1992).

VII. What is Meant By "Equal Skill", "Equal Effort", "Equal Responsibility" and "Similar Working Conditions":

A. Equal Skill, Effort, and Responsibility:

36.

> What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. [T]he broad remedial purpose of the law must be taken into consideration. The terms constitute separate tests, each of which must be met in order for the equal pay standard to apply. It should be kept in mind that "equal" does not mean "identical." Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality as between the jobs justifying differences in pay.

29 C.F.R. Section 1620.14.Ann Redies, at 26 (quoting 29 C.F.R. *S* 1620.14).

37. Although no precise definition of these terms are available, the courts have relied on EEOC regulations on "skill," "effort," and "responsibility":

> "Skill" includes consideration of such factors as experience, training, education, and ability [required for the job]. 29 C.F.R. *S* 1620.15(a). "Effort" is concerned with the measurement of the physical or mental exertion needed for the performance of the job. 29 C.F.R. *S* 1620.16(a). "Responsibility" is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of job obligation. 29 C.F.R. *S* 1620.17(a).

Ellison, 25 Cl. Ct. 481, 58 Fair Empl. Prac. Cases at 961. When considering these three criteria, "courts frequently do not break their analyses down into separate comparisons by individual criterion." Schlei & Grossman, Employment Discrimination Law 449-450 (1983).

B. Similar Working Conditions:

38.

> The term "similar working conditions" encompasses two subfactors: "surroundings" and "hazards." "Surroundings" measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity and frequency. "Hazards" take into account the physical hazards regularly encountered, their frequency and the severity of injury they can cause.

29 C.F.R. *S* 1620.18.

VIII. Application of the Substantially Equal Work Standards to This Case:

39. In determining whether the job of Complainant Peyton was substantially equal with that of David Kuhn and Mark Fettkether, it was necessary to focus on "overall job content." Schlei and Grossman, Employment Discrimination Law: Five Year Cumulative Supplement at 166. The first step in this analysis was to determine whether there was a common core of duties or tasks such that a significant proportion of the jobs are identical. Schlei and Grossman, Employment Discrimination Law: 1987-89 Supplement 58-59 (1991). Such a common core of tasks was found when the jobs of Peyton, Kuhn, and Fettkether were compared. See Findings of Fact Nos. 37- 38, 82-83.

40. **The courts have recognized that, over time, positions can become substantially equal in terms of skill, effort, and responsibility and be performed under similar workingconditions.** Morgado v. Birmingham-Jefferson County Civil Defense Corps., 706 F.2d 1184, 1188 (11th Cir. 1983), *cert. denied,* 464 U.S. 1045 (1984)(cited in Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement at 166). Although Peyton's job was not substantially equal in terms of skill, effort, and responsibility to David Kuhn's or Mark Fettkether's jobs at the outset of her time as jail administrator, it was substantially equal to both of their positions by mid-1985. See Findings of Fact Nos. 37-38, 82-83. 57, 64, 68, 70-71, 79-80, 97. All of these positions were performed under similar working conditions. See Finding of Fact No. 56A, 78, 80-81, 90, 92, 96-97.

41. The growth in skill, effort, and responsibility required by the job corresponded to the increase in the average daily number of inmates and the number of jailers which Complainant Peyton was required to supervise. See Findings of Fact Nos. 65-67. A larger number of employees to supervise represents a significant increase in the responsibility and mental effort required by the job. *See* Howard v. Ward County, 418 F. Supp. 494, 504 (D. N.D.1976); Omilian, Sex-Based Employment Discrimination *S* 7.04 at 29-31 (1993 & Supp. 1993)((citing *e.g.* Orahood v. Board of Trustees, 645 F.2d 651 (8th Cir. 1981)). Similarly, it is recognized in a jail setting that having a substantially greater number of inmates to supervise may represent a job requirement of significantly greater responsibility. *See* Gunther v. County of Washington, 602 F.2d 882, 20 Fair Empl. Prac. Cas. 792, 796 (9th Cir. 1979), *a'ffd on other grounds,* 452 U.S. 161 (1981).

42. Fundamental to the determination that the skill, effort and responsibility requirements of the jail administrator position filled by Peyton and that filled by Fettkether are substantially equal are the principles that:

> (a) Insubstantial differences in skill, effort or responsibility required do not prevent a job from being found substantially equal to another. See Conclusion of Law No. 36. See Findings of Fact Nos. 88-97.
>
> (b) Possession of a skill by an employee which is not necessary, not utilized, or infrequently utilized does not render the jobs unequal. *See* Ellison v. United States, 25 Cl. Ct. 481, 58 Fair Empl. Prac. Cases 955, 963 (1992); Peltier v. City of Fargo, 533 F.2d 374, 11 Empl. Prac. Dec. _ 10,800 at 7354 (8th Cir. 1976); AFSCME v. County of Nassau, 799 F. Supp. 1370, 1409 (E.D. N.Y. 1992); United States v. City of Milwaukee, 441 F. Supp. 1371, 1374-75 (E.D. Wis. 1977); 29 C.F.R. *S* 1620.15(a). See Conclusion of Law No. 32. See Findings of Fact No. 84-87.

(c) "Extra duties that are done infrequently or sporadically do not create job inequality. These extra duties must also consume a significant portion of the work day." Omilian, Sex-Based Employment Discrimination *S* 7.03 at 23 (1993). See Findings of Fact Nos. 84-87, 95-97.

(d) Performance of a duty by a comparator which the complainant was not given the opportunity to perform, and which she is capable of doing, would not render the jobs unequal. *See* United States v. City of Milwaukee, 441 F. Supp. 1371, 1374-75 (E.D. Wis. 1977); Omilian, Sex-Based Employment Discrimination *S* 7.03 at 21; *S* 7.04 at 28-29 (1993). See Findings of Fact Nos. 88-94.

(e) A new duty taken on by a higher paid successor male comparator, either after being hired at higher pay for the same duties as the female predecessor, *see* Ellison v. United States, 25 Cl. Ct. 481, 58 Fair Empl. Prac. Cases 955, 965- 66 (1992), or after being paid at a higher rate for a substantial length of time, does not render the jobs unequal. *See* Strecker v. Grand Forks County Social Services Board, 640 F.2d 96, 24 Fair Empl. Prac. Cas. 1019, 1020 (8th Cir. 1981). See Findings of Fact Nos. 88-90, 93-94.

44. These concepts have been applied in law enforcement or jail settings. *See* AFSCME v. County of Nassau, 799 F. Supp. 1370, 1408-09 (E.D. N.Y. 1992)(female "police detention aide" found to be substantially equal to male police officer "turnkeys," although turnkeys carried guns when not in detention area); Peltier v. City of Fargo, 533 F.2d 374, 11 Empl. Prac. Dec. _ 10,800 at 7354 (8th Cir. 1976)(female "car markers" performed substantially equal work as male patrol officers who had additional training, but were rarely assigned duties other than car marking); Ellison v. United States, 25 Cl. Ct. 481, 58 Fair Empl. Prac. Cases 955, 963 (1992)(higher paid male U.S. Marshalls Service branch manager's law enforcement background not "skill" permitting higher pay over female predecessor when such background not necessary to the position).

45. In United States v. City of Milwaukee, for example, the jobs of matrons, all female, and jailers, all of whom were male police officers, were found to be substantially equal. Id., 441 F. Supp. 1371, 1374 (E.D. Wis. 1977). The jailers, unlike the matrons, received patrol officer training, carried guns at all times when not in the jail, were expected to make arrests if a law violation occurred in their presence, and were on active duty status for 24 hours a day. Id. at 1373-74.

46. The training, however, was not utilized in the jail. Id. at 1375. The gun, active duty, and arrest requirements applied to all police officers and were "not related to the duties of the jailers as jailers." Id. at 1374. Nor were the jailers assigned with any frequency to non-jail duties. Id. at 1375. The assignment to the jail was in effect a permanent assignment. Id. Only the jailers served as "head jailer," a clerical, non-supervisory position where a different jailer on each shift would make record entries of the comings and goings of prisoners. Id. at 1374-75. This was an insubstantial duty which the matrons had not been permitted to undertake. Id. at 1374-75. Although the jailers occasionally helped the matrons subdue unruly female inmates, this did not

warrant a finding of unequal effort. Id. at 1376. Under these facts, the Court found the positions were substantially equal. Id. at 1374.

47. When the above concepts were applied to the facts in this case, the Commission and Complainant Peyton established prima facie cases with respect to the jail administrator job held by Peyton and those held by Kuhn and Fettkether. All reasons asserted by Respondent which dealt with the skill, effort or responsibility elements of the prima facie case were also considered and rejected in light of these principles. See Findings of Facts Nos. 80, 97, 99, 110.

IX. Significance of Respondent's Brief in Determining What Reasons Were Asserted by Respondent and Whether These Reasons Were Legitimate and Nondiscriminatory:

48. As noted in the findings of fact, several purportedly legitimate, nondiscriminatory reasons were asserted on brief for the differences in pay between Complainant Peyton and, respectively, David Kuhn and Mark Fettkether.

49.

> 7. . . . [T]he Respondents' legitimate non- discriminatory reasons are limited to those set forth on brief, because by identifying only certain reasons on brief, the Respondents have admitted that those are the only reasons they **may** have articulated. The Respondents are bound by that admission. *See* Larson at 572. This admission is binding on the Commission in its adjudicative capacity and it may, therefore, consider only those reasons so identified on brief. *See* Id.; Grantham, 257 Iowa at 230-31.

Maxine Boomgarden, slip. op. at 59-60 (emphasis added).

50.

> 6. When an allegation, which militates against the party making it, is made on pleadings or in a brief, and such allegation has not been withdrawn or superseded, it binds the party making it and must be taken as true by a court, administrative agency, or other finder of fact. *See* Grantham v. Potthoff-Rosene Company, 257 Iowa 224, 230-31, 131 N.W.2d 256 (1965)(cited in Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)). *See also* Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991).

Id. at 59.

51. Under the above principles, the Commission must take as true (1) that only the reasons set forth on brief are being offered by Respondent as legitimate, nondiscriminatory reasons for the unequal pay; (2) that the pay of the complainant was less than that paid to her male predecessor and successor; and (3) that, assuming there was evidence that Respondent relied on differences in Peyton's and Kuhn's training and experience in making its pay decision, the comparison made was between Kuhn's experience and training at the time he started the jail administrator position

and Peyton's training and experience as it existed a year and a half prior to her entering the position. See Findings of Facts Nos. 30, 98-99, 101-02, 109-110.

X. Respondent Failed to Meet the Legal Requirements for Production of Evidence Sufficient to Articulate Three of Its Averred Legitimate Non-Discriminatory Reasons:

A. Denials of Discrimination by Respondent Decisionmakers or Arguments by Counsel on Brief Do Not Rebut a Prima Facie Case:

52. On brief, Respondent noted the supervisors' denials in the record of sex discrimination. (Respondent's Brief at 8). Such denials or averments of good faith are not sufficient to rebut a prima facie case. *See* Loeb v. Textron, 600 F.2d 1003, 1011-12, 20 Fair Empl. Prac. Cases 29, 35 n.5 (1st Cir. 1979). Pleadings or arguments of counsel also do not rebut a prima facie case. *See* Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed.2d 207, 216 n.9 (1981).

B. Respondent Failed to Meet the Standards for Production of Evidence With Regard to Three Reasons for the Disparity in Pay Between Peyton, Kuhn, and Fettkether Which Are Set Forth on Brief:

53. Rebuttal of the prima facie case must be done through the production of evidence which, assuming it were believed, sets forth a lawful, non-discriminatory reason for the action alleged to be due to discrimination. Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 517 (Iowa 1990).

54.

> 21. The evidence produced must be sufficient to raise "a genuine issue of material fact as to whether Respondent discriminated against the Complainant." Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989)(citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1094, 67 L.Ed. 2d. 207, 215-16 (1981)). The nondiscriminatory reason proffered "must be specific and clear enough for the [Complainant] to address and legally sufficient to justify judgment for the [Respondent]." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988).

John Mack Burton, 11 Iowa Civil Rights Commission Case Reports 1, 8 (1990).

55. It has been found that Respondent failed to meet these standards with respect to three reasons for the pay differential between Peyton, Kuhn, and Fettkether which were argued on brief: (1) that "Kuhn had lengthy experience and considerable training in that area at the start of his employment, where Peyton had not at all", (2) that the Board approved the higher pay for Fettkether due to his prior salary history, and (3) that the Board relied on Peyton's recommendation of Fettkether in approving his higher salary. The Respondent Board failed to meet these standards either by (a) completely failing to offer any evidence which stated these

were the Board's reasons for the unequal pay of Complainant or (b) failing to provide evidence which was sufficiently clear and specific with respect to the Board's reasons for its actions as to permit Complainant Peyton to address them. See Findings of Fact Nos. 101, 111-112, 114.

XI. Three Reasons Suggested by Respondent on Brief Do Not Meet the Legal Standard Requiring that Reasons be Legitimate and Non-Discriminatory:

56. Three reasons suggested by Respondent are either discriminatory or unlawful. See Conclusion of Law No. 53. First, assuming that sufficient evidence was introduced to articulate that Kuhn's and Peyton's differing pay was based on differences in training and experience, the comparison set forth on brief was discriminatory as applied. See Findings of Fact Nos. 102-04.

57. Second, "prior salary alone cannot justify pay disparity." Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988)(rejecting Covington v. Southern Illinois University, 816 F.2d 317 (7th Cir.), *cert. denied*, 108 S.Ct. 146, 98 L.Ed. 2d 101 (1987)). Such considerations constitute acceptance of the long rejected "market force theory" which postulates that it would be permissible for an employer to pay less to females for equal work because females are worth less on the market. Id. at 1570 (citing *e.g.* Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974)).

58. Finally, Respondent argues that an otherwise sex discriminatory pay rate would be justified because an hourly rate of pay, at time of placement in the position, was part of the settlement agreement which resolved Peyton's failure to hire complaint. This proposition must be rejected for two reasons. First, to the extent any provision of an employment contract is contrary to the Iowa Civil Rights Act, such provision is of no force or effect. Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 498 (Iowa 1975). The contract could not lawfully effect sex discrimination. Id. Second, there can be no prospective waiver of an employee's rights under anti-discrimination laws. *See* Schwartz v. Florida Board of Regents, 807 F.2d 901, 43 Fair Empl. Prac. Cases 1856, 1859 (11th Cir. 1987); *Cf.* Parr at 498 (rights assured by Iowa Civil Rights Act cannot be bargained away).

XII. Respondent's Reasons Were Shown to Be Pretexts for Discrimination:

59. There are a variety of ways in which it may be shown that Respondent's articulated reasons are pretexts for discrimination. *See* La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Cas. 913, 922 n.6 (7th Cir. 1984).

60.

> 30. [Pretext may be proven] by evidence showing:
>
> > (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the [challenged employment action], or (3) that the proffered reasons were insufficient to motivate the [challenged employment action].

> Bechold v. IGW Systems, Inc., 817 F.2d 1282, 43 Fair Empl. Prac. Cas. 1512, 1515 (7th Cir. 1987).

Ruth Miller, 11 Iowa Civil Rights Commission Case Reports 26, 48 (1990). See Findings of Fact Nos. 106-08, 120

61.

> The third method of showing pretext may be accomplished . . . through:
>
> > evidence that the proffered reason for the [challenged employment action] was something so far removed in time from the [action] itself that it is unlikely to have been the whole cause, even if a part of it, [for the challenged employment action].
>
> La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Cas. 913, 922 (7th Cir. 1984).
>
> 31. In addition, "[t]he reasonableness of the employer's reasons may . . . be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext." Loeb v. Textron, Inc., 600 F.2d 1003, 1012, 20 Fair Empl. Prac. Cas. 29, 35 n.6 (1st Cir. 1979). The focus, however, is on the employer's motivation and not its business judgment. Id.

Id. at 48-49. See Findings of Fact Nos. 118-19.

62.

> 32. Pretext may be shown by the employer providing inconsistent reasons, for the same adverse employment action, to the Complainant and other sources. *See* Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 266 & n.35 (2nd ed. 1989).

Id. at 49. See Findings of Fact Nos. 105, 118, 120.

63. An ultimate finding of discrimination, as made in this case, may be supported by:

> the combination of (1) the *inference* (not the presumption) of discrimination established by the evidence which demonstrated a prima facie case and (2) a determination that the employer's articulated reasons are false or "unworthy of credence". . ..

Maxine Boomgarden, slip. op. at 64 (citing St. Mary's Honor Center v. Hicks, ____ U.S. ____, 113 S.Ct. 2447, slip. op. at 8 (1993)). See Findings of Facts Nos. 117, 118, 120, 120A. The

Complainant has met her burden of persuasion with regard to establishing sex discrimination in pay in violation of Iowa Code section 601A.6 (now *S* 216.6).

XIII. Remedies:

A. Remedial Action:

64.

> Violation of Iowa Code section 216.6 having been established the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code § 216.15(8) (1993). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "**An appropriate remedial order should close off 'untraveled roads' to the illicit end andnot 'only the worn one.**'" Id. at 771.

Maxine Boomgarden, slip. op. at 88.

B. Compensatory Damages: Back Pay:

1. *Purposes of Back Pay:*

65.

> 77. The award of back pay . . . in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a back pay award . . . provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate [employment discrimination]." Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975). Second, back pay serves to "make persons whole for injuries suffered on account of unlawful employment discrimination." Id. 422 U.S. at 419, 95 S.Ct. at 2372. Both of these purposes would be served by an award of back pay in the present case.

Maxine Boomgarden, slip. op. at 91.

2. Principles to Be Followed In Computing Back Pay:

66.

> 78. . . . [T]wo basic principles [are] to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Hy-Vee Food Stores,

> Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 530-531 (Iowa 1990). "It suffices for the [agency] to determine the amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. at 531.

Maxine Boomgarden, slip. op. at 91-92.

3. Back Pay Should Be Based on the Highest Paid Comparator:

67.

> The Commission may "calculate awards [based] on the experience of comparable employees outside of the claimant's protected class." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d at 531. In selecting between the two comparable employees in this case, the Commission has elected to use the one with the greatest gross wages as opposed to using the lowest paid employee or an average of their wages. . . . This was done based on the previously stated principle that uncertainties about what the Complainant earned should be resolved against the employer. . . . Use of the highest paid comparable employee is appropriate to resolve any doubts under the principles set forth in the Hy-Vee decision [which cited with approval two cases Stallworth and Robinson where the highest paid comparable was selected].

Michael Biggles, 10 Iowa Civil Rights Commission Case Reports 50, 59 (1990).

4. In the Absence of a Constructive Discharge, Complainant Peyton's Back Pay Ends as of the Effective Date of Her Voluntary Resignation:

68. On brief, Respondent argues that Complainant Peyton is entitled to no back pay for any sex discriminatory unequal pay she sustained during her employment because she eventually left that employment voluntarily. Respondent's Brief at 16-18. That is not the rule. In this case, constructive discharge is not an issue. See Finding of Fact No. 123.

69. As this Commission has previously held:

> Unless the Complainant is constructively discharged, **the back pay period terminates when the complainant leaves her employment and is no longer eligible for promotion.**Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975)(reproduced at B. Schlei & P. Grossman, Employment Discrimination Law 613 (2nd ed. 1983). *See* [id. at] 1432-33.

Ann Redies, 10 Iowa Civil Rights Commission Case Reports at 28 (1989)(emphasis added).

70. Although Redies dealt with failure to promote, the same principles would govern in equal pay cases. The only authority cited by Respondent is a legal encyclopedia. 14A C.J.S. Civil Rights Section 417 at 500. This contains the poorly worded statement "An employee who resigns

is entitled to back pay only if he was constructively discharged." Id. A review of the cases cited reveals that a more accurate statement would indicate that "An employee who resigns is entitled to back pay **for the resignation** only if he was constructively discharged."

71. The 10th Circuit in one of the cases cited, Derr v. Gulf Oil Corp., accurately stated the rule by quoting its earlier decision in Muller:

> Unless [the employee] was constructively discharged, he would not be entitled to back pay, interest, and retirement from the date of [his resignation]. **His damage would bemeasured by the difference between actual pay and the amount he would have made [had he not been discriminated against] until he quit.**

Derr v. Gulf Oil Corp., 796 F.2d 340, 342 (10th Cir. 1986)(quoting Muller at 930)(emphasis added). This is no legal authority for the absurd proposition that a complainant who is the victim of years of pay discrimination loses all right to a back pay remedy for that discrimination merely because she voluntarily resigned her employment.

5. Iowa Code Section 614.1 Does Not Limit the Back Pay Remedy:

72. On brief, Respondent argues that back pay should not be awarded for any time prior to January 10, 1988, which is two years prior to Complainant's filing of her complaint, because of the statute of limitation for actions for claims for wages set forth at Iowa Code Section 614.1 (8):

> Limitations of **Actions:**
>
> . . .
>
> **Actions** may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> . . .
>
> (8) Those founded on **claims for wages** or for a liability or penalty for failure to pay wages, within two years.

Iowa Code *S* 614.1 (8)(emphasis added). (Respondent's Brief at 15-16).

73. This argument should be rejected for four reasons.First, Respondent admits "there is no authority in Iowa for application of this statute to civil rights claims." (Respondent's Brief at 16).

74. Second, by its own terms, section 614.1 is only a limitation of actions. The legislature gave no special definition of the term "action" in Chapter 614. The word "action" is a word which has "acquired a peculiar and appropriate meaning in law [and] shall be construed according to such meaning." Iowa Code *S* 4.1(38). An "action" refers only to a proceeding in court. See Iowa Code *SS* 611.1, 611.2; BLACK'S LAW DICTIONARY 26 (5th ed. 1979). "**Under** Iowa Code chapter 601A **[the Iowa Civil Rights Act], an action is not commenced until it is filed in**

districtcourt." Landalls v. George A. Rolfes Co., 454 N.W.2d 891, 896 (Iowa 1990)(emphasis added). **The filing of a civil rights complaint is not the commencement of an action.** Id. If there is no petition in district court, there is no action. Wederath v. Brant, 287 N.W.2d 591, 594-95 (Iowa 1980).

75. Iowa Code section 614.1(8) does not apply to this proceeding because this proceeding is not an "action". This is a "contested case," i.e. "a proceeding . . . in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code *S* 17A.2(5).

76. Third, this proceeding is not "founded" on a claim for wages or failure to pay wages. Iowa Code *S* 614.1 (8). The essence of this proceeding is a claim of sex discrimination in pay under the Iowa Civil Rights Act. This is not a claim that the employer failed to pay wages due, (regardless of the reason for failure to pay) under a theory of *quantum meruit* or a violation of Iowa Code Chapter 91A, the wage payment collection law. Back pay in a civil rights proceeding is a remedy, and not the essence of the claim. *See* Iowa Code *S* 601A.15(8)(a)(1) (now 216A.15(8)(a)(1) (defining "remedial action").

77. Fourth, the legislature has provided a specific statute of limitations for the Iowa Civil Rights Act. Iowa Code *S* 601A.15(12)(now *S* 216.15(12). *See* Iowa Civil Rights Commission v. Massey Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973). Such a particular enactment must prevail over the more general limitation set forth at Iowa Code 614.1(8). Iowa Code *S* 4.7. This statute sets no limitation on the amount of time for which back pay may be awarded. There is no reason why it should.

C. Compensatory Damages: Emotional Distress:

1. *Legal Authority For and Purpose of Power to Award Damages for Emotional Distress:*

78. In considering the question of emotional distress damages, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures for more than a century," Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971). The Iowa Civil Rights Act was enacted, in part, for the purpose of preventing and remedying employment-related sex discrimination. Iowa Code *SS* 216.6, 216.15(8)(a)(8); Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 498 (Iowa 1975).

79. **It is beyond question that the Commission has the power to award "actual damages," which are synonymous with "compensatory damages". The purpose of such authority is not to remedy only part of the victim's damages or to award back pay only while disregarding proven emotional distress damages, but to "make whole" the victims of discrimination forall losses suffered as a result of discrimination**. *See* Iowa Code *S* 216.15(8)(a)(8)(1993); Chauffers, Teamsters, and Helpers v. Iowa Civil Rights Commission, 394 N.W.2d 375, 382 (Iowa 1986). A victim of discrimination is to receive "a remedy for his or her complete injury," including damages for emotional distress. Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990).

80. The Iowa Supreme Court's observations on the emotional distress damages resulting from wrongful discharge are equally applicable to the distress resulting from pay discrimination:

> **[Such illegal employment action] offends standards of fair conduct and normally will cause the employee damages in lost income. In addition to h[er] monetary loss of wages, the employee may suffer mentally. "Humiliation, wounded pride and the like may cause very acute mental anguish." [citations omitted]. We know of no logical reason why a . . .employee's damages should be limited to out-of-pocket loss of income, when the employee also suffers causally connected emotional harm. . . . We believe that fairness alone justifies the allowance of a full recovery in this type of tort.**

Niblo v. Parr Mfg. Co., 445 N.W.2d 351, 355 (Iowa 1989).

81.

> Emotions are intangible but are no the less perceptible. The hurt done to feelings and to reputation by an invasion of [civil] rights is no less real and no less compensable than the cost of repairing a broken window pane or a damaged lock. Wounded psyche and soul are to be salved by damages as much as the property that can be replaced at the local hardware store.

Belton, Remedies in Employment Discrimination Law 408 (1992)(quoting Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985)(quoting Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979)).

2. "Wounded Pride," "Anger", "Hurt" and "Upset" Are All Forms of Compensable Emotional Distress:

82. **Among the many forms of emotional distress which may be compensated are "anger," "upset," "hurt,"** Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24- 29 (1982)(citing Fraser and 121-129 Broadway Realty v. New York Division of Human Rights, 49 A.D.2d 422, 376 N.Y.S.2d 17 (1975)), **"wounded pride, and the like."** Niblo v. Parr Mfg. Co., 445 N.W.2d at 355. It is uncontradicted in the record that Complainant Peyton suffered such distress due to pay discrimination. See Findings of Fact Nos. 124-131.

3. Lenient Proof Requirements for Emotional Distress Are Consistent With the Requirement That The Statute Is To Be Liberally Construed to Effectuate Its Purpose:

83. Emotional distress damages must be proven. Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980). These damages must be proven here, as in any civil proceeding, by a preponderance or "greater weight" of the evidence. Iowa R. App. Pro. 14(f)(6). Sex discrimination in employment violates:

> not only a statute but a strong public policy underlying that statute. . . . [O]ur civil rights statute is to be liberally construed to eliminate unfair and discriminatory acts and practices. [Citation omitted]. **We therefore hold a civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severedistress, or outrageous conduct.**

Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990)(emphasis added).

4. Even Mild Emotional Distress Should Be Compensated:

84. **Even mild emotional distress resulting from discrimination is to be compensated.** Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 73 (1990); Robert E. Swanson, 10 Iowa Civil Rights Commission Case Reports 36, 45 (1989); Ann Redies, 10 Iowa Civil Rights Commission Case Reports 17, 28 (1989). *See* Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525-26 (Iowa 1990)(citing Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 355 (Iowa 1989)(adopting reasoning that because public policy requires that employee who is victim of discrimination is to be given a remedy for his complete injury, employee need not show distress is severe in order to be compensated for it)).

5. Emotional Distress May Be Proven By Testimony of the Complainant Alone:

85. **"The [complainant's] own testimony may be solely sufficient to establish humiliation or mental distress."** Williams v. TransWorld Airlines, Inc., 660 F.2d 1267, 1273, 27 Fair Empl. Prac. Cases 487, 491 (8th Cir. 1981). *See also* Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977); Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. Ill. 1981); Belton, Remedies in Employment Discrimination Law 415 (1992).

6. Emotional Distress Damages Can Be Awarded In the Absence of Evidence of Economic Loss or Physical or Mental Impairment:

86. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). Nonetheless, the evidence of lost income in this case, may be considered when assessing the existence or extent of emotional distress. *See* Niblo v. Parr Mfg. Co., 445 N.W.2d 351, 355 (Iowa 1989); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988). See Finding of Fact No. 130.

7. Determining the Amount of Damages for Emotional Distress:

87.

> [D]etermining the amount to be awarded for [emotional distress] is a difficult task. As one court has suggested, "compensation for damages on account of injuries of this nature is, of course, incapable of yardstick measurement. It is impossible to lay down any definite rule for measuring such damages."

2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-29 (1982)(quoting Randall v. Cowlitz Amusements, 76 P.2d 1017 (Wash. 1938)).

88. Although awards in other cases have little value in determining the amount an award should be in another specific case, Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990), there are many examples of such awards, ranging from $500 to $150,000, for emotional distress in discrimination cases. *See e.g.* Belton, Remedies in Employment Discrimination Law 416 n.78 (1992)(listing awards in 19 cases; 17 of which were for $10,000 or over). The Iowa District Court for Polk County recently awarded eighty thousand dollars ($80,000) to a sex discrimination plaintiff for emotional distress. Pamela Farren v. Super Valu Stores, Inc., Law No. Cl100-57791, slip op. at 22 (Polk Co. Dist. Ct. March 4, 1994). While any award should be tailored to the particular case, one commentator has noted that "a $750 award for mental distress is 'chump change.' Awards must be made which are large enough to compensate the victim of discrimination adequately for the injury suffered." 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 60-61 (1982).

89. Like back pay, the reasonably certain prospect of an emotional distress damages award, when such damages are proven, serves to encourage employers to evaluate their own employment processes to ensure they are nondiscriminatory. The consistent failure to award such proven damages will remove this incentive and may encourage discriminatory practices. *See* id. at 61. *Cf.*Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975)(back pay).

90.

> 45. The two primary determinants of the amount awarded for damages for emotional distress are the severity of the distress and the duration of the distress. Bean v. Best, 93 N.W.2d 403, 408 (S.D. 1958)(citing Restatement of Torts § 905). "'In determining this, all relevant circumstances are considered, including sex, age, condition of life, and any other fact indicating the susceptibility of the injured person to this type of harm.' And continuing 'The extent and duration of emotional distress produced by the tortious conduct depend upon the sensitiveness of the injured person.'" Id. (quoting Restatement of Torts *S* 905). *[See also* Restatement (Second) of Torts *S* 905 (comment i).]

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 166 (1992).

91. Based on these principles, an award of $2000.00 constitutes reasonable compensation for the distress suffered by Complainant Peyton. See Finding of Fact No. 131.

XIV. Credibility and Testimony:

92.

27. In addition to the factors in the findings on credibility . . . , the Administrative Law Judge has been guided by the following principles: First, . . . "[I]n the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." NLRB. v. Pittsburgh Steamship Company, 337 U.S. 656, 659 (1949) (rejecting proposition that consistently crediting witnesses of one party and discrediting those of the other indicates bias). Second, "[t]he trier of facts may not totally disregard evidence but it has the duty to weigh the evidence and determine the credibility of witnesses. Stated otherwise, the trier of facts . . . is not bound to accept testimony as true because it is not contradicted. In Re Boyd, 200 N.W.2d 845, 851-52 (Iowa 1972).

28. Furthermore, the ultimate determination of the finder of fact "is not dependent on the number of witnesses. The weight of the testimony is the important factor." Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957). In determining the credibility of a witness and what weight is to be given to testimony, the factfinder may consider the witness' "conduct and demeanor. . . [including] the frankness, or lack thereof, and the general demeanor of witnesses," In Re Moffatt, 279 N.W.2d 15, 17-18 (Iowa 1979); Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957), as well as "the plausibility of the evidence. The [factfinder] may use its good judgment as to the details of the occurrence . . . and all proper and reasonable deductions to be drawn from the evidence." Wiese v. Hoffman, 249 Iowa 416, 424-25, 86 N.W.2d 861 (1957).

29.

> Evidence on an issue of fact is not necessarily in equilibrium because the witnesses who testify to the existence of the fact are directly contradicted by the same number of witnesses, even though there is but a single witness on each side and their testimony is in direct conflict.
>
> . . .
>
> Numerical preponderance of the witnesses does not necessarily constitute a preponderance of the evidence so as to require a contested question of fact to be decided in accordance therewith. . . . [T]he intelligence, fairness, and means of observation of the witnesses, and various other recognized factors in determining the weight of the evidence . . . should be taken into consideration. . . . It is, of course, well recognized that the preponderance of the evidence does not depend upon the number of witnesses.

Id., 249 Iowa at 425, 86 N.W.2d 861.

Darrell Harvey, CP # 04-90-19797, slip. op. at 44-45 (January 28, 1994).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant Alice Peyton and the Iowa Civil Rights Commission, are entitled to judgment because they have established that Respondent Board of Supervisors of Buchanan County failed to provide her with pay equal to either that of her male predecessor or male successor because of her sex. Failure to provide equal pay with respect to either her male predecessor or male successor because of her sex is a violation of Iowa Code Section 601A.6 (now 216.6).

B. Complainant Peyton is entitled to a judgment of twenty-three thousand one hundred thirty four dollars and thirty-seven cents ($23134.37) in back pay for the loss resulting from sex discrimination with respect to her pay.

C. Complainant Peyton is entitled to a judgment of two thousand dollars ($2000.00) in compensatory damages for emotional distress.

D. Interest at the rate of ten percent per annum shall be paid by the Respondent to Complainant Peyton on her award of back pay commencing on the date payment would have been made if she had been provided equal pay and continuing until date of payment.

E. Interest at the rate of ten percent per annum shall be paid by the Respondent to Complainant Peyton on the above award of emotional distress damages commencing on the date this decision becomes final, either by Commission decision or by operation of law, and continuing until date of payment.

F. Respondent Board of Supervisors of Buchanan County is hereby ordered to cease and desist from any further practices of sex discrimination in employment.

G. Respondent Board of Supervisors of Buchanan County shall post, within 60 days of the date of this order, in conspicuous places at its location at Buchanan County, Iowa, in offices and other areas readily accessible to and frequented by employees, including but not limited to employees of the Sheriff's Department, at least five copies of the poster, entitled "Equal Employment Opportunity is the Law" which is available from the Commission.

H. Respondent Board of Supervisors shall develop and post, in the same locations and manner as required in paragraph G of this order, a written policy stating that it is the policy of Buchanan County, Iowa to provide equal pay to its employees, regardless of their sex, for jobs requiring equal skill, equal effort, equal responsibility, and performed under similar working conditions. This policy shall set forth an internal procedure whereby complaints of unequal pay on the basis

of sex may be brought to the Board's attention, considered, and acted upon. This policy shall also inform employees that this internal mechanism neither limits an employee's right to file a sex discrimination complaint with the Iowa Civil Rights Commission or the Equal Employment Opportunity Commission nor tolls any time limitations for the filing of complaints with those agencies. This policy shall be subject to the review and approval of the Commission's representative. It shall be implemented and posted within 180 days of this order unless an extension is granted by the Commission's representative.

I. Respondent shall file a report with the Commission within 210 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs B through E and G through H inclusive of this order.

Signed this the 9th day of February 1994.

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319
515-281-4480

FINAL DECISION AND ORDER

1. On May 20, 1994, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order in this case which is hereby incorporated in its entirety as if fully set forth herein.

IT IS SO ORDERED.

Signed this the 26th day of May, 1994.

Sally O'Donnell
Chairperson
Iowa Civil Rights Commission
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