BEFORE THE IOWA CIVIL RIGHTS COMMISSION

HOA THI BLOOD, Complainant,

VS.

HY-VEE FOOD STORES, CEDAR RAPIDS, and

HY-VEE FOOD STORES, CHARITON, IOWA, Respondents.

CP # 02-84-11395

LOCAL # 1020-A212

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RULING ON REMAND CONCERNING THE STATUTE OF LIMITATIONS ISSUE.

COURSE OF PROCEEDINGS

This matter originally came before the Iowa Civil Rights Commission on the amended Complaint filed by Hoa Thi Blood against Hy-Vee Food Stores alleging retaliation, as well as sex and national origin discrimination in employment. After a hearing was held on November 6, 1985, the Commission adopted, with modifications, the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, Ruling, Recommended Decision and Order by its Order of July 8, 1986. The Commission found that Hy-Vee did discriminate on the basis of national origin, in regard to promotion and assignment of working hours, and on the basis of sex in regard to promotion, both in violation of Iowa Code section 601A.6 (1983). The Commission also found that Hy-Vee did not retaliate against the Complainant and, therefore, was not in violation of Iowa Code section 601A.11 (1983). The Commission's decision finding national origin and sex discrimination was appealed to the Iowa District Court for Lucas County by Hy-Vee by Petition for Judicial Review. The District Court issued a Ruling on the Petition on April 29, 1988. Hy-Vee appealed the District Court's Ruling to the Supreme Court of Iowa.

On October 12, 1989, the Iowa Supreme Court issued an Order for Limited Remand to the District Court. This order states, in part:

> One of the issues presented is whether the complainant filed her complaint within the time prescribed by Iowa Code section 601A ' 15(12). The appellant [Hy-Vee] raised this issue in its "Exceptions to Proposed Findings of Fact, Conclusions of Law, Ruling, Recommended Decision, and Order" filed with the appellee [the Commission] on June 12,1986. The appellee did not address this issue in its order of July 8, 1986.
>
> The issue involves a fact question and an interpretation of Iowa Code section 601A.15(12) as well as an interpretation of an administrative rule found in Iowa Administrative Code chapter 1613.3(2)(1988)(formerly Iowa Administrative

> Code Chapter 240-1.3(3)(6)). The district court made findings of fact and conclusions of law that should properly have been made by the appellee.

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, No. 88-934, Order for Limited Remand at 1-2 (Iowa October 12, 1989)(emphasis added). The Iowa Supreme Court thereupon remanded the case to the district court with instructions requiring the district court to immediately remand the case to the Iowa Civil Rights Commission, in order for the Commission to resolve the statute of limitations issue, and setting a deadline for Commission action *by November* 14, 1989. Id. at 2.

Pursuant to these instructions, the Iowa District Court for Lucas County issued an Order of Remand on October 12, 1989 which states. in part:

> 1. This case is hereby remanded to the Iowa Civil Rights Commission for findings of fact, conclusions of law and ruling on the issue of whether complainant Hoa Thi Blood filed her complaint within the time prescribed by Iowa Code Section 601A.15(l2). The Iowa Civil Rights Commission shall give *immediate priority attention to this matter and shall issue its findings, conclusions and ruling on an expedited basis.*
>
> 2. The Iowa Civil Rights Commission shall certify its decision to the district court. The Iowa Civil Rights Commission shall file its certification in the office of the clerk of the Lucas County Iowa District Court in Chariton, Iowa, on or before November 14,1989.On the same day, the Commission shall deliver a copy of its certification to the undersigned Judge in Room 313 of the Polk County Courthouse in Des Moines, Iowa.

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, Civil No. 21550, Order of Remand at 1-2 (Lucas County District Court October 12, 1989)(emphasis added).

On October 13,1989, Administrative Law Judge Donald Bohlken initiated a telephone conference call with Stephen Meyer, attorney for Hy-Vee, and Rick Autry, Assistant Attorney General, representing the Iowa Civil Rights Commission. Mr. Autry and Mr. Meyer agreed that, in lieu of submitting further briefs or making oral argument on the statute of limitations issue to the Administrative Law Judge, the Administrative Law Judge could rely on the briefs filed by the parties with the Iowa Supreme Court as well as the brief filed by Hy-Vee in support of its exceptions filed with the Commission.

FINDINGS OF FACT

The Findings of Fact given below have a combined numerical and alphabetical designation in order to distinguish them from the Findings of Fact adopted by the Commission's Order of July 8, 1986. These Findings of Fact are made in response to Respondent Hy-Vee's Exception No. 7 on timeliness, and to arguments made on brief in regard to that exception. They are intended to supplement, but not supplant, except to the degree required to make more specific findings on the issues raised by the Respondent, the Findings of Fact adopted by the Order of July 8, 1986.

National Origin Discrimination in the Assignment of Work Hours:

1A. As of 1979 or 1980, Laura Melich and Susan Zahari, both of whom are non-Vietnamese, asked for and received an additional six or seven hours per week of work. (Tr. at 97- 98, 310, 329-330). Before they received these additional hours, they, and Complainant Blood, were working thirty hours per week as regular-time checkers. (Tr. at 316, 329-330). At that time, Complainant Blood had longer continuous employment with Hy-Vee than either Ms. Melich or Ms. Zahari, but was not offered any additional hours. (Complainant's Ex. 31; Tr. at 96, 101-102). See Findings of Fact Nos. 3, 8, 13.

1B. In the summer of 1981, late 1981, and early 1982, Complainant requested additional hours from Mr. Sapp. (Tr. at 95-96). She received an additional two hours of work per week in February of 1982, raising her hours to 32 hours per week. (Tr. at 97). The Complainant made other, unsuccessful, requests for increased hours until at least sometime in December of 1983. (Tr. at 102, 124). Official notice is taken of the fact that the earliest date in December of 1983, December 1, 1983, is seventy days before the filing of Complainant Blood's complaint on February 9, 1984. Fairness to the parties does not require that they be given an opportunity to contest this fact. See Findings of Fact Nos. 1, 13, 15.

National Origin Discrimination in Promotion:

2A. Complainant Blood began to ask Mr. Sapp for a promotion commencing in 1980. Jr. at 193). She would make inquiry approximately every six months from that time on about the availability of promotions. (Tr. at 193). This included a request in June of 1981. (Tr. at 109, 192). Complainant Blood requested that she be recommended for promotion to a Hy-Vee deli manager position in November or December of 1982. (Tr. at 103). This request was denied. (Tr. at 104). See Findings of Fact Nos. 10, 14.

2B. In October of 1982, Laura Melich, non-Vietnamese, was promoted from checker and part-time (backup) bookkeeper to full-time bookkeeper. (Tr. at 141, 308-09). Kathy Wisehart, non-Vietnamese, who had no bookkeeping experience was promoted from checker to the parttime bookkeeper position in January 1983. (Tr. at 105, 141). The Complainant, who had bookkeeping experience and had been employed with Hy-Vee longer than Ms. Wisehart, had asked for the parttime bookkeeper position without success. (Complainant's Exhibit 31; Tr. at 105). See Findings of Fact Nos. 7, 14, 16.

2C. The promotion of Susan Zahari, non-Vietnamese, to the Health and Beauty position designated as "aisle coordinator," occurred on June 6, 1983. (Tr. 141, 331). Ms. Zahari was subsequently promoted to front end supervisor in December of 1983, a position where she had responsibility for supervising the front-end checkers. (Tr. at 123-24, 141- 42, 334). There can be no doubt that the move to front end supervisor was a promotion as it gave Ms. Zahari additional supervisory responsibilities and was considered by store manager Don Sapp to be a promotion. (Tr. at 121-22, 141-42, 334). The importance of these additional duties is underscored by the Respondents' purported practice of giving greater emphasis, when considering who to promote,

to work experience with the Respondent. (Tr. at 106). As previously noted, December 1, 1983 is seventy days prior to the filing of the complaint. See Findings of Fact Nos. 1 B, 14, 15, 16.

Sex Discriminatory Promotion System:

3A. The practice of promoting male courtesy clerks to stocker positions while female courtesy clerks were promoted to checker positions continued at the Cedar Rapids Store No. 5 from at least October of 1977 until January 29, 1984, the period during which Don Sapp was manager. (Tr. at 21, 41-42, 124). This practice was prevalent throughout the Hy-Vee stores in Cedar Rapids area from 1980 to 1985 inclusive. See Finding of Fact No. 10. The policy of having the line of progression from courtesy clerk to higher level positions which required stocking experience was in effect throughout the Hy-Vee system from at least July 31, 1974 to May 1, 1985. (Complainant's Ex. 30, 30A; Tr. at 25-28, 133-34). During Mr. Sapp's time as manager, this policy, when combined with the practice of reserving the stocker positions for males, disproportionately excluded the Complainant and the other checkers, all of whom were females, from the higher level positions requiring stocking experience at Cedar Rapids store No. 5. See Findings of Fact Nos. 4, 5, 10, 11. The effect, over time, that these continuing practices and policies had on the Complainant, in terms of income and promotion, is demonstrated by the comparison of the Complainant to Jim Wichman. See Finding of Fact No. 18. This combined practice and policy had a similar sex discriminatory effect in promotion at all Hy-Vee stores throughout the Cedar Rapids area from 1980 to 1985 inclusive. See Findings of Fact No. 11, 12.

3B. Official notice is taken that January 29, 1984 is eleven days prior to the filing of Complainant Blood's complaint on February 9, 1984. Fairness to the parties does not require that they be given an opportunity to contest this fact.

CONCLUSIONS OF LAW

1. Iowa Code section 601 A.1 5(12) states that "[a] claim 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." However:

> If 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) (1989)(formerly 240 Iowa Admin. Code 1.3(3) "b" (1 983)(emphasis added)).

2. This administrative rule is intended to recognize and incorporate the continuing violation theory, a court-created doctrine which was developed through the interpretation and application of the statute of limitations in employment discrimination cases arising under Title VII of the Civil Rights Act of 1964. Annear v. State, 419 N.W.2d 377, 379 (Iowa 1988)(citing e.g. Satz v. ITT Financial Corp., 619 F.2d 738, 744 (8th Cir. 1980)). In accordance with the rule that the procedural requirements of Iowa Code section 601A.15(12) are to be liberally construed "in view

of its beneficial purposes of exposing unlawful discrimination," the continuing violation theory applies to cases arising under the Iowa Civil Rights Act. Id. at 380.

3. Under the terms of the rule, if a discriminatory act or practice alleged in the complaint is of a "continuing nature," then such act or practice will be considered to have occurred as of the last date of the act or practice. 161 Iowa Admin. Code 3.3(2) (1989). The rule is designed to operate together with the statute of limitations so that, if the complaint is filed within 180 days of the last date of an act or practice which is of a continuing nature, then the complaint will be timely filed in regard to the entire period for which that act or practice was in effect, i.e. from the date of the commencement of the act or practice until the time of its termination. Id.; Iowa Code 601 A.1 5(12) (1989).

4. The key questions then, in determining whether a complaint is timely filed in regard to an act or practice asserted to be a continuing violation, are: (1) Is the allegedly discriminatory act or practice of a continuing nature?; and (2) Is the last date on which this act or practice occurs not more than one hundred eighty days before the filing of the complaint? See 161 Iowa Admin. Code 3.3(2); Iowa Code 601A.15(12) (1989). If the answers to both questions are in the affirmative, then the complaint is timely filed in regard to that act or practice. If the answer to either question is in the negative, the complaint is not timely filed in regard to any occurrence of the act or practice which takes place more than one hundred eighty days before the filing of the complaint.

5. Acts or practices are of a continuing nature if they constitute either (1) a series of related discriminatory acts; or (2) a system or policy of discrimination or act(s) taken pursuant to such system or policy. Schlei & Grossman, Employment Discrimination Law 1047, 1050 (2nd ed. 1983); 45A AM. JUR. 2D *Job Discrimination §§* 1233-34(1986).

6. In the instant case, Respondents assert that "there is no discriminatory activity within one hundred eighty days prior to the filing of the complaint." Brief in Support of Exceptions at 18-19. This fact issue has been resolved against Respondents in regard to national origin discrimination in working hours and in promotion, and in regard to sex discrimination in promotion. See Findings of Fact Nos. 1 B, 2C, 3A, 3B. In regard to the allegation of sex discrimination, Respondents assert that the statutory period should be measured from July 16, 1985, the date the complaint was amended to include sex discrimination. Appellant's Brief and Argument at 37. Because "[a] similar 180 day limitation is to be found in 42 U.S.C. section 2000e- 5(e).... [i]nterpretations of the federal act are instructive." Annear v. State, 419 N.W.2d 377, 379 (Iowa 1988). This amendment shall be treated in accordance with the well- established rule in the federal Title VII cases: "for time-limit purposes, an amendment is treated as if it were filed at the time the charge was filed." 45A AM. JUR. 2D *Job Discrimination* § 1273 (1986). The complaint is, therefore, timely filed with regard to at least one act or practice of national origin discrimination in working hours and in promotion, and in the maintenance of a practice of sex discrimination in promotion.

7. Respondents assert that the denial of hours and promotions to the Complainant do not constitute a continuing violation because they "are isolated instances and not a series or pattern of events resulting from some discriminatory practice of the Respondent." Brief in Support of

Exceptions at 20. The Commission, on the other hand, asserts that Respondent's practices are of a continuing nature because they constitute a series of related acts with respect to national origin discrimination and systemic discrimination with respect to sex discrimination. Appellee's Brief and Argument at 23-24.

National Origin Discrimination: Series of Related Acts:

8. Commentary in a legal encyclopedia states that:

> A charge alleging a series of discriminatory acts, some of which occurred beyond the charge filing period is timely if-
>
> -[1] the alleged discrimination pervades the series of acts.
>
> -[2] there is a present violation of the Act.
>
> -[3] the present acts of alleged discrimination are related to the time-barred events.
>
> -[4] the charge covering the present violation is filed within the limitations period.

45A AM. JUR. 2D *Job Discrimination § 1233* (1986).

9. The second and fourth elements stated above have already been shown to have been satisfied. See Conclusion of Law No. 6.

10. Upon examination of the cases, it is apparent that the first and third elements actually refer to the same concept, i.e. the requirement that the acts in the series of acts of discrimination be shown to be related, and not isolated, acts. In Milton v. Weinberger, for example, the court notes the two alternative methods, discussed above, for proving that violations are of a continuing nature, including showing "a series of related acts." Milton v. Weinberger, 645 F.2d 1070, 1075 (D.C. Cir. 1981)(cited as authority for first element in 45A AM. JUR.

2D *JobDiscrimination§* 1233 n.17 (1986)). The court then states:

> To be considered continuing in nature, however, the discrimination may not be "limited to isolated incidents but *[must] pervade" a series or pattern of events* which continue to within" the filing period. Id. In Laffey, the discharges were related to each other sincethey had resulted from the same employment policy of the defendant.

Id. at 1076 (discussing and quoting Laffey v. Northwest Airlines 567 F.2d 429, 473 (D.C. Cir. 1976)(emphasis added)). The distinction, if any, between showing that a series of discriminatory acts are pervaded by discrimination and showing that the acts are related is that a showing of the former may constitute evidence of the latter, i.e. a showing that the acts are all motivated by the same discriminatory animus or the result of the same discriminatory policy may tend to prove

that the acts are related. The listing of the two as separate elements may best be explained by the observation that "[c]ase law on the subject of continuing violations has been aptly described as inconsistent and confusing." E.g. Dumas v. Town of Mt. Vernon, 612 F.2d 974, 977 (5th Cir. 1980). 11. No clear standard-has been articulated for ascertaining when "alleged discriminatory acts are related closely enough to constitute a continuing violation and when they are merely discrete, isolated, and completed acts which must be regarded as individual violations." Berry v. Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983).

12.

> This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, which [are] . . . by no means . . . exhaustive. The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring ... or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Id.

13. As previously noted, there were two sets of allegations and violations found in regard to national origin discrimination: assignment of working hours and promotion. The acts concerning discriminatory assignment of working hours will be considered first. These acts were all alleged and found to involve the same type of recurring discrimination, i.e. a consistent, repetitive practice of denial of Complainant Blood's requests for more hours while increased hours were granted to similarly situated non- Vietnamese personnel. See Findings of Fact Nos. 1A, 1B, 13, 15; Complaint. Thus, the first two "relatedness" factors have been satisfied with regard to this allegation.

14. The degree of permanence evident in any single refusal to assign working hours or in the awarding of additional hours to non-Vietnamese personnel would not be sufficient to alert the Complainant that she could not expect to be awarded hours in the future. This is particularly true under the facts of this case where the Complainant was repeatedly informed by management that no additional hours were available. See Finding of Fact No. 13. She also had received a single two hour increase in working hours in February of 1982. See Findings of Fact Nos. 1 B, 13. Under these circumstances, the Complainant would not know, for some period of time, that the denials were either discriminatory or permanent. The third "relatedness" factor is, therefore, satisfied with regard to assignment of working hours.

15. The acts concerning discriminatory failure to promote the Complainant were all alleged and found to involve the same type of recurring discrimination, i.e. a consistent, repetitive practice of

denial of Complainant Blood's requests for promotions while similarly situated non-Vietnamese personnel were promoted. See Findings of Fact Nos. 2A, 2B, 2C, 14; Complaint.

16. The degree of permanance evident in any single refusal to promote the Complainant or in the promotion of non-Vietnamese personnel would not be sufficient to alert the Complainant that she could expect a continuous practice of non-promotion in the future. A failure to promote, unlike hiring or discharge or other events often found to not constitute continuing discrimination, Dumas v. Town of Mt. Vernon, 612 F.2d 974, 975 (5th Cir. 1980), does not "take place on a particular day ... it invariably arises during a lengthy period of time." Rich v. Martin Marietta Corp., 522 F.2d 333, 348 (1 Oth Cir. 1975). It is for this reason that courts often recognize "that discriminatory failure to promote represents an actionable, continuing violation." Trevino v. Celanese Corp., 701 F.2d 397, 402-03 (5th Cir. 1983). *See* Annear v. State, 419 N.W.2d 377,379 (Iowa 1988)("failure to promote is viewed as ongoing"- dictum).

17. Although Complainant Blood voiced suspicions that she was being discriminated against due to her national origin in regard to promotions in early 1983, an ambitious, capable employee, such as Ms. Blood, may not have sufficiently realized that there was a consistent practice of discriminatory non-promotion of her until the promotions of Susan Zahari, first to "aisle coordinator" in June of 1983, and, then, to front-end supervisor in December 1983. See Findings of Fact Nos. 1 B, 2A, 2C, 6, 16. She may well have voiced her suspicions to her manager in order to alert him to her concerns and "to give her employer the benefit of the doubt and, in so doing, strive to disconfirm her own suspicions." Glass v. Petro-Tex Chemical Corp., 757 F.2d 1554,1562 (5th Cir. 1985).

18. In addition, there are other facts in this case which serve to indicate the relatedness of the acts of discriminatory assignment of hours and of promotion. Neither the decision- maker nor the methods by which hour assignments and promotions were decided, methods which are noted by their absence of a posting and application process and the reliance on subjective decisions by one person, changed during the period of Don Sapp's employment as manager. See Finding of Fact Nos. 1A, 3A, 10, 13. Also, these acts all occurred after the Respondents had entered a conciliation agreement with the Complainant, in regard to a previous complaint, wherein the Complainant was promoted to a 30 hour week. See Finding of Fact No. 8. She could therefore reasonably expect that non-discrim i nation, and not continued or new discrimination, would be the subsequent treatment she would receive from her employer.

19. The national origin discrimination in the assignment of working hours and in promotion are both of a continuing nature, as each constitutes a series of related acts. The last date of each practice occurs within one hundred eighty days of the filing of the complaint. The complaint is therefore timely filed in regard to each of these allegations.

Sex Discrimination in Promotion: Systemic Discrimination:

20. The continued maintenance of a discriminatory policy or system into the limitations period will constitute a continuing violation. Schlei & Grossman, Employment Discrimination Law 1050 (2nd ed. 1983).

21. The findings of the Commission and the allegations of the complaint in regard to the issue of sex discrimination in promotion both set forth that it was the Respondent's continuing practice to set aside stocker positions for males while simultaneously enforcing a policy requiring stocking experience for higher level positions in the line of progression. See Findings of Fact 3A, 10, 11; Amended Complaint. These discriminatory practices and policies were found to have continued to at least eleven days prior to the filing of the complaint. See Findings of Fact No. 3A, 3B.

22. These findings are sufficient to show a continuing violation through maintenance of a discriminatory system or policy into the charge filing period. Taken together, they "challenge the entire promotion system maintaining that it continually operated so as to hold [the complainant] in lower echelons," Clark v. Olinkraft, Inc., 556 F.2d 1219, 1222 (5th Cir. 1977)(quoting Rich v. Martin Marietta Corp., 522 F.2d 333, 343 (1 Oth Cir. 1975)), and therefore "show that continuing discrimination is under attack." Id. at 1223.

23. In order to attack a continuing discriminatory promotion system or policy, it is not necessary to show that the Complainant was denied a particular promotion due to her sex within the limitations period for:

> [A] challenge to systematic discrimination is always timely if brought by a present employee, for the existence of the system deters the employee from seeking [her] full employment rights or threatens to adversely affect [her] in the future.

Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 761 (9th Cir. 1980)(quoting Elliott v. Sperry Rand Corp., 79 F.R.D. 580, 586 (D. Minn. 1978)).

24. The sex discriminatory promotion policies and practices are of a continuing nature, as they constitute a system or policy of discrimination. The last date on which this system or policy was in effect occurs within one hundred eighty days of the filing of the complaint. The complaint is therefore timely filed in regard to the allegation of sex discrimination in promotion.

RULING

1. The Complaint, as amended, is timely filed under Iowa Code section 601 A. 15(12).

2. Hy-Vee's Exception Number 7 to the Proposed Findings of Fact, Conclusions of Law, Ruling, Recommended Decision, and Order is overruled.

3. To the extent that any exception, appeal, or other objection to any part of this ruling, whether made before the Administrative Law Judge or before the Commission, has not been specifically adopted, rejected, or otherwise decided in this ruling, such exception, appeal or other objection has been considered and is hereby found to be without merit and is overruled.

Signed this the... day of October, 1989.

DONALD W. BOHLKEN

Administrative Law Judge
Iowa Civil Rights Commission
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515-281-4480

ADOPTION OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RULING ON REMAND CONCERNING THE STATUTE OF LIMITATIONS ISSUE.

1. On November 3, 1989, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed findings of fact, conclusions of law and ruling on remand concerning the statute of limitations issue, which are incorporated in their entirety in this order as if fully set forth herein.

2. The exceptions filed by the Respondents to the Administrative Law Judge's proposed findings of fact, conclusions of law and ruling on remand are hereby overruled.

IT IS SO ORDERED.

Signed this the 6th day of November, 1989.

KEN ROBINSON
Chairperson
Iowa Civil Rights Commission