BEFORE THE IOWA CIVIL RIGHTS COMMISSION

DIANE HUMBURD, Complainant,

VS.

MARY A. HARLAN and VIRGIL G. HARLAN, Respondents.

CP# 03-85-12695

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Diane Humburd against the Respondents Virgil G. Harlan and Mary A. Harlan alleging discrimination on the basis of race in public accommodations. Specifically, Ms. Humburd alleges that the Respondents denied her child care services on the basis of her race.

A public hearing on this complaint was held on February 16, 1989 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Commission's office in Des Moines, Iowa. The case in support of the complaint was presented by Rick Autry, Assistant Attorney General. The Complainant, Diane Humburd, was represented by Herbert Rogers, Sr., Attorney at Law. The Respondent, Mary A. Harlan, was represented by Michael Jankins, Attorney at Law. The Respondent Virgil S. Harlan did not appear.

During the course of the hearing, a motion for default judgment against Respondent Virgil Harlan was made on behalf of the Commission. A motion to dismiss was also made on behalf of Respondent Mary Harlan. Rulings on these motions will be incorporated in this decision.
The findings of fact and conclusions of law are incorporated in this contested case decision in accordance with Iowa Code § 17A.16(l) (1989). The findings of fact are required to be based solely on evidence in the record and on matters officially noticed in the record. Id. at 17A.12(8). Each conclusion of law must be supported by legal authority or reasoned opinion. Id. at 1 7A. 16(1).
The Iowa Civil Rights Act requires that the existence of racial discrimination be determined in light of the record as a whole. *See* Iowa Code § 601A.15(8) (1989). Therefore, all evidence in the record and matters officially noticed have been carefully reviewed. The use of supporting transcript and exhibit references should not be interpreted to mean that contrary evidence has been overlooked or ignored.

In considering witness credibility, the Administrative Law Judge has carefully scrutinized all testimony, the circumstances under which it was given, and the evidence bolstering or detracting from the believability of each witness. Due consideration has been given to the state of mind and demeanor of each witness while testifying, his or her opportunity to observe and accurately relate the matters discussed, the basis for any opinions given by the witness, whether the testimony has in any meaningful or significant way been supported or contradicted by other testimony or documentary evidence, any bias or prejudice of each witness toward the case, and the manner in which each witness will be affected by a particular decision in the case.

FINDINGS OF FACT

1. The complainant, Diane Humburd, filed a verified complaint CP # 03-85- 12695 with the Iowa Civil Rights Commission, on February 26, 1985, alleging a violation of Iowa Code section 601A.7 (1983) which prohibits discrimination in public accommodations on the basis of race. The date of incident stated in the complaint is September 16, 1984. (C. Ex. 1).

2. The complaint was investigated. After probable cause was found, conciliation was attempted and failed. (C. Ex. 2 & 3). Notice of Hearing was issued on May 17, 1988. (C. Ex. 3).

3. Official notice is taken of a document indicating that the Notice of Hearing was sent to Virgil G. Harlan by certified mail letter number 510249. Official notice is also taken of certified mail return receipt 510249 addressed to Virgil G. Harlan at 1907 - 62nd Street, Des Moines, Iowa 50311 and signed by one Cindy Harlan on May 18,1988.

4. An Order granting a continuance pending assignment of a new Administrative Law Judge to hear the case was issued on October 5, 1988. The final hearing date was set by Order dated January 23, 1989 which was sent to Virgil G. Harlan and to the respective counsel for Ms. Harlan and Ms. Humburd by certified mail. Official notice is taken of a document, dated January 24, 1989, attached to the Order, which serves to indicate that the Order was sent to Virgil G. Harlan by certified mail letter number 510024. Official notice is also taken of certified mail return receipt 510024 addressed to Virgil G. Harlan at 1907 - 62nd Street, Des Moines, Iowa 50311 and signed by Cindy Harlan on January 30, 1987. Fairness to the parties does not require that they be given an opportunity to contest the facts officially noticed in this and the preceding paragraph.

5. Virgil G. Harlan was neither present nor represented at the hearing. He has not responded to either the Notice of Hearing or the Order of January 23, 1989 setting the final date for the hearing.

6. As of September 16, 1984, Mary A. Harlan managed her own child care business. (Tr. at 129, 135). The house in which Ms. Harlan offered these services was her home and the title to the house was in her name . . . . (Tr. at 135). At that time, Ms. Harlan usually charged $50.00 per week for day care services in her home. (Tr. at 123). She did not require that her customers, the parents of the children she cared for, be from a particular geographic area or make a certain income or have any other similar defined criteria limiting the members of the public she offered her services to. (Tr. at 130-31).

7. Ms. Harlan offered her child care services to the general public through advertisements in the Des Moines Register in 1984. (Tr. at 130, 136, C. Ex. 4). She was also registered and licensed by the Iowa Department of Human Services to provide day care. (Tr. at 137). Ms. Harlan's understanding was that no license was required unless the child care provider cared for in excess of six children. (Tr.at 138). Despite her advertising and obtaining this license, the number of children under Ms. Harlan's care at any given time in 1984 did not exceed three. (Tr. at 130, 136, 138).

8. On Sunday, September 16, 1984, an advertisement, placed by Mary Harlan, appeared in the "Child Care" column of the classified section of that day's Des Moines Register. (Tr. at 130, 136, C. Ex. 4). The advertisement states:

> CHILD care. Infant to age 4. Reg. 62nd and Franklin. 279-2900.

(C. Ex. 4).

9. Official notice is taken that caring for an infant of one year of age for several hours a day requires far more than the mere provision of shelter for that child. It also requires that such tasks as observation of the child, feeding, diaper changing, and a certain amount of cleaning be performed by another person. Fairness to the parties does not require they be given an opportunity to contest this fact.

10. Diane Humburd is a black female. Ms. Humburd has a son who was one year old in September of 1984. (Tr. at 9-10, 177). Her son is also black. (Tr. at 19).

11 . Diane Humburd read Ms. Harlan's September 16th child care ad. (Tr. at 13, C. Ex. 1). Ms. Humburd called the listed number and spoke to Mary Harlan about obtaining child care for her son. (Tr. at 13, 121, C. Ex. 1). During their conversation, they discussed the dollar amount which Ms. Harlan charged for day care services. At this time, Ms. Humburd was informed by Ms. Harlan that, because Ms. Humburd was only working six hours a day and would not require the same number of hours of child care services as someone who worked longer hours, she would charge her only $1.00 per hour for child care services. (Tr at 13, C. Ex. 1). They made arrangements for Ms. Humburd to meet Ms. Harlan that evening. (Tr. at 13, C. Ex. 1).

12. Virgil Harlan is the husband of Mary Harlan. As of February 1989, Virgil Harlan and Mary Harlan had been married approximately 23 years. (Tr. at 114). Virgil and Mary Harlan lived at the same residence in 1984 and still do. (Tr. at 135).

13. Later that same day, September 16, 1984, Ms. Humburd and her son went to the Harlan residence at 62nd and Franklin to meet with Ms. Harlan. (Tr. at 13, 121). Ms. Humburd and her son were admitted into the Harlan Home by Ms. Harlan. (Tr. at 15,122). A discussion occurred between Ms. Humburd and Ms. Harlan in the living room. Mr. Harlan was not present in the living room during this discussion, nor had he been at any time since Ms. Humburd entered the house. (Tr. at 17, 125). Ms. Harlan then entered the kitchen. (Tr. at 18, 126). At this point, Ms. Humburd overheard Ms. Harlan inform someone in the kitchen that Ms. Humburd was black. (Tr. at 18, C. Ex. 1). Virgil Harlan was in the kitchen with Ms. Harlan. (Tr. at 18, 125). He told his wife to tell Ms. Humburd that they were not going to mix races. (Tr. at 126). Ms. Harlan refused to do this. (Tr. at 126). There is no evidence in the record to indicate whether or not Ms. Humburd heard these latter statements.

14. Virgil Harlan then entered the living room and announced, in the presence and hearing of Ms. Humburd, her son, and Ms. Harlan, either that "We are not going to mix races" or that "We are not going to mix nationalities." (Tr. at 18, 126, C. Ex. 1). Regardless of the exact statement, both Ms. Harlan and Ms. Humburd clearly understood that the statement was intended to inform

Ms. Humburd that child care was being denied by the Harlans to Ms. Humburd and her son because they were black. (Tr. at 19, 131). Mr. Harlan also stated that the Harlans' other child care customers might not be comfortable with Ms. Humburd's son being there. (Tr. at 69). Ms. Harlan made no response to these statements. Nor did she make any further statement of any kind. (Tr. at 19, 67-68, 131). Ms. Humburd stated "Okay. Thank you." and left with her son. (Tr. at 19).

15. Ms. Harlan would not care for any child to whom her husband strongly objected due to his or her race. (Tr. at 132). Ms. Humburd's child was within this category. (Tr. at 19, 69, 131, C. Ex. 1).

16. Virgil Harlan is a manic depressive and was one in September of 1984. (Tr. at 114-15). Due to this condition, Mr. Harlan tends to talk in a loud voice and in a very rapid manner, switching from one subject to another, when he becomes angry. (Tr. at 117-118). On the basis of medical advice, Ms. Harlan tries to avoid bringing up problems with her husband which would upset him. (Tr. at 118).

17. Ms. Harlan failed to respond to her husband's statements to Ms. Humburd because she did not wish to upset him. She also believed that the presence of Ms. Humburd's child in their home would have upset Mr. Harlan, i.e. "he wouldn't have let me take care of the child because he would have just drove me crazy with his hollering." (Tr. at 127).

18. It is clear from Ms. Harlan's testimony, cited above, that, despite her initial resistance, she had acquiesced, and would continue to acquiesce, to her husband's demand that Ms. Humburd's son be excluded from Ms. Harlan's child care business because of his race. The underlying reason for Ms. Harlan's tacit consent to and compliance with her husband's objection to the "mixing" of children of the black and white races at her child care business is her desire to not upset him because of his mental illness and the behavior which may result therefrom. (Tr. at 118, 127).

19. Ms. Humburd experienced several reactions to her rejection for child care at the Harlans' residence. She was angered by this rejection, although she did not express the anger to the Harlans. (Tr. at 29). She made several contacts which led to her retaining an attorney. (Tr. at 19). She discussed the situation with her parents immediately after she left the Harlans. She also discussed it with her siblings. (Tr. at 19-20). She became anxious about and developed an increased sensitivity, which was still present at the time of the hearing, to the possibility of racial discrimination against her personally and against her child. "[C]olor just seems to come into issue all the time now for some reason." (Tr. at 30). Ms. Humburd, age 38 at the time of the hearing, had never directly experienced race discrimination before September 16, 1984. (Tr. at 9, 28, 71). She had discussed this event on one occasion, shortly before the public hearing, with her doctor. (Tr. at 89).

20. From September 16,1984 to the time of the hearing, this incident has caused Ms. Humburd continuing distress, substantially beyond the usual concern of a parent, about the kind of care her child is receiving or would receive from child care providers. (Tr. at 29-31). "[E]ven when I work to this day, I think about if my child is getting taken care of, you know. I don't trust everybody and anybody." (Tr. at 29). During her subsequent search for child care, she repeatedly

asked child care providers, who she either knew were white or whose race she did not know, whether it would be a problem if her son was black. (Tr. at 30, 86-88). Once, for example, when she was assured by a child care provider that her son's race would be no problem, although the provider had no black children in its care, she decided to not follow up because of the combined concerns of potential race discrimination and cost. (Tr. at 30, 84).

21. Ms. Humburd sought child care services because she had learned the previous Friday that she had been accepted for employment by Merry Maids, a housecleaning service. (Tr. at 11, 20-21). This job was located near the Harlans. (Tr. at 10, 13-14, 114). She was to begin her employment on September 17, 1984, the day after she visited the Harlans. (Tr. at 11). She was to work six hours a day, a thirty hour week, at a pay rate somewhere between $5.00 and $6.00 per hour. (Tr. at 21). Prior to being informed she was accepted for employment, she was trained by Merry Maids for the position. (Tr. at 142).

22. At the time she was informed she would begin work on Monday, September 17th, she was also informed by Merry Maids that she must have made arrangements to take care of her child prior to beginning work. (Tr. at 20, 58).

23. After her rejection for child care by the Harlans, Ms. Humburd did not have sufficient time to find another child care provider before Monday morning. (Tr. at 20). On Monday morning she contacted Merry Maids to inform them she could not report to work because she had no child care arrangements. (Tr. at 20). At this point, Merry Maids informed her that they would not employ her if she did not have child care arrangements because they needed her that day. (Tr. at 59).

24. Ms. Humburd would have been employed by Merry Maids for a maximum of four months if she had not been rejected as a child care customer by the Harlans. This would be the period from September 17, 1984 to January 17, 1985. Although she estimated that she would have been employed a maximum of two years, (Tr. at 23), this estimate is rebutted by her testimony on cross-examination concerning her actual work history. As of the date of hearing, Ms. Humburd had never been employed at any job for more than four months because she has been "going to school most of my life." (Tr. at 60). She had never been employed in any position prior to September 16, 1984. (Tr. at 38). Ms. Humburd did not reapply to Merry Maids in part because of her rejection by them due to lack of child care, and in part because she "went to school." (Tr. at 56). The only reasonable inference which can be drawn from this testimony is that Ms. Humburd would have left her housecleaning employment with Merry Maids after a maximum of four months, just as she left similar employment with another company, Daisy Fresh, in order to pursue her education. (Tr. at 60, 72-73).

25. At various times in 1984, Ms. Humburd contacted and applied for work at temporary employment services listed in newspaper classified ads and the telephone book in her search for work. (Tr. at 26-27). The evidence in the record is not sufficient to show whether or not Ms. Humburd applied with such agencies during the specific period from September 17, 1984 to December 31, 1984. (Tr. at 80-81). She did, however, make efforts to obtain work through in-person contacts during that period. (Tr. at 46-47). The evidence in the record is not sufficient to

show whether or not Ms. Humburd obtained any employment during this specific period in 1984. (Tr. at 24,47.).

26. In 1985, Ms. Humburd made efforts to obtain work through employment agencies. (Tr. at 26, 53). There is not sufficient evidence in the record to establish whether or not Ms. Humburd obtained employment in the first half of 1985. During the latter part of 1985, Ms. Humburd obtained temporary work, but there is no evidence in the record to indicate who the employer was, how much Ms. Humburd was paid or what her hours were. (Tr. at 24, 48-49, 52). There is also not sufficient evidence in the record to provide a reasonable estimate of how much Ms. Humburd's earnings were for that year. (Tr. at 24, 50-51). The most that can be said is that her 1985 earnings were less than $4,000. (Tr. at 24, 51).

27. Evidence was introduced in support of the complaint to show earnings from Ms. Humburd's 1986 employment. (C. Ex. # 5, Tr. at 27-28, 47, 49, 51). Nonetheless, it is unnecessary to make findings concerning such earnings because they fall outside the time period for which Ms. Humburd is eligible for compensation. See Finding of Fact No. 24.

28. Although the record shows that Ms. Humburd has spent a very substantial amount of time engaged in post-secondary education, both by attending classes and by correspondence, from the time she obtained her G.E.D. in 1971 until approximately six and one-half months prior to the hearing, the evidence establishes no specific time periods during which it can definitely be said that Ms. Humburd attended school after 1978. (Tr. at 53, 56, 60, 73-76, 100). The last time she attended Area XI Community College was in 1978. (Tr. at 75). Ms. Humburd attended "AIB" in 1986 or 1987 for an unspecified period of time. (Tr. at 75). At some subsequent point, she attended the American School for Word Processing for an indefinite period ending at least six and one-half months prior to the public hearing. (Tr. at 59-60). Ms. Humburd has also received training at Des Moines Skills Center and through CETA for unknown periods of time. (Tr. at 76).

29. With the exception of a remark by Ms. Humburd deploring the paucity of jobs available from temporary services in 1985, (Tr. at 53), there is no evidence in the record on the job market and the availability of jobs for which Ms. Humburd was qualified for any time period since September 17, 1984.

30. At some time after September 17, 1984, Ms. Humburd was employed at Daisy Fresh, a house cleaning service. (Tr. at 71). There is no evidence in the record as to what year she was employed. (Tr. at 71). This employment ended sometime prior to a point six and one-half months before the hearing. (Tr. at 59- 60). The length of her employment did not exceed four months. (Tr. at 60). During that time she worked 30 hours a week at the pay rate of $4.00 per hour. (Tr. at 72).

31. Given the lack of time between her rejection at the Harlans and the beginning of her job at Merry Maids, and her desire to explore legal avenues to remedy her rejection by the Harlans, Ms. Humburd did not immediately seek other child care services on the night of September 16th. (Tr. at 20, 45). Ms. Humburd did, however, look for child care after September 16, 1984. (Tr. at 27). She would look for longer term child care arrangements only after she had obtained work in

order to be able to pay for them. (Tr. at 99-100). Ms. Humburd did not have the financial means to make longer term child care arrangements during periods when she did not have immediate prospects for a job. During the latter part of 1984, for example, Ms. Humburd received Aid to Dependent Children payments to the extent of $289.90 per month and no child support payments from the father of her child. She also received less than $100.00 per month in food stamps. (Tr. at 81-83). Child care payments of $50.00 per week, without the immediate prospect of work, were beyond her financial capability. (Tr. at 44). During her work search at that time, she often made arrangements to pay friends on a temporary basis to care for her son. (Tr. at 46-47).

32. Ms. Humburd's testimony, with the exceptions noted below, was credible. In particular, her account of her telephone conversations with Ms. Harlan and the events at the Harlans' residence is more credible than Ms. Harlan's account in regard to the few vital points where they vary. Ms. Humburd's testimony about these events is more believable because of the obvious emotional impact which this incident had upon her. Also, Ms. Humburd's testimony conforms to the story given in her complaint, (C. Ex. 1), an affidavit which was signed by Ms. Humburd approximately five months after the incident at the Harlans' residence. In particular, it is difficult to believe that a person in Ms. Humburd's financial condition in 1984 would not inquire about the costs of child care prior to visiting the child care provider. Her testimony that she did make such inquiry is, therefore, simply more believable than Ms. Harlan's testimony to the effect that Ms. Humburd never made such inquiry. (Tr. at 121, 123).

33. Although Ms. Humburd's testimony on damage issues was generally credible, her testimony, to the degree it might be said to indicate that she looked for and would have worked a forty hour per week job while attending school in person, and not by correspondence, is simply not credible. Her testimony on this issue is so equivocal that it is not worthy of credence. (Tr. at 76). Also her testimony that she had a paper indicating that she would have worked at Merry Maids for two years is not credible in light of the failure, without explanation, to introduce this paper into evidence or to provide a detailed explanation of its contents, and the obvious self-interest of Ms. Humburd in expanding the back-pay period. (Tr. at 23). For the reasons stated in Finding of Fact Number 24, Ms. Humburd's statement that she would have worked for Merry Maids for two years is also not credible. Finally, although there were numerous instances where Ms. Harlan did not remember specific information requested, her testimony that she did not recall the specific information seemed credible.

34. Ms. Harlan's testimony, with the exception noted above, was generally credible. See Finding of Fact No. 32.

CONCLUSIONS OF LAW

Jurisdiction

1. Diane Humburd's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code § 601A.15(11) (1983). See Finding of Fact No. 1. All the statutory prerequisites for hearing have been met, i.e. investigation, finding of probable cause,

attempted conciliation, and issuance of Notice of Hearing. Iowa Code § 601A.15 (1989). See Finding of Fact No. 2.

2. Shortly before the Harlans' refusal of service to Ms. Humburd, the statutory definition of the term "Public Accommodations" was changed by amendment. This revised definition of the term "Public Accommodation" with the deletions bracketed by the symbols "< >" and in bold print, and the additions underlined and *in italicized print*, states, in relevant part:

> 10. "Public accommodation" means each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee or charge *to nonmembers or any organization or association utilizing the place, establishment, or* facility .... Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the <general public> *nonmembers* for a fee or charge. . . it shall be deemed a public accommodation during such period.

1984 Iowa Acts 70 ch. 1096 (effective July 1, 1984).

3. Prior to this amendment, the definition of "public accommodation" made reference to "the general public" rather than to "nonmembers." Iowa Code § 601A.2 (1983). The former definition also did not include the phrase "nonmembers of any organization or association utilizing the place, establishment, or facility." Id. The Iowa Supreme Court has noted that the former definition mirrored a proposed statute designed to avoid a construction of the statute which would unduly restrict the Act's coverage of places open to the general public for a fee. United States Jaycees v. Iowa Civil Rights Commission, 427 N.W.2d 450, 454-55 (Iowa 1988). In other words, the former definition was written so as to include all places open to the general public for a fee within the Commission's jurisdiction unless they came within a specific exception to the statute. See id.

4. The issue of whether the Respondents' child care services constitute a "public accommodation" was raised by Respondent Mary Harlan's motion to dismiss. (Tr. at 104, 113). In order to make a reasoned determination of whether the evidence shows that the Respondents' child care services are within the current definition of "Public Accommodation" and, therefore, within the Commission's subject matter jurisdiction, it is necessary to ascertain what was the effect of the 1984 amendments. Were the changes incorporated in the language of the present statute intended to effect a drastic, restrictive change in the definition of public accommodation so that only places, establishments, and facilities which are utilized by organizations and associations, and which also offer their services, facilities, or goods to nonmembers for a fee, are now within the definition of public accommodation? Or does the present definition of public accommodation still reflect the broad coverage of places that are open to the public which was incorporated in the former definition?

5. The Iowa Supreme Court's treatment of this amendment Strongly suggests that it is viewed as an amendment to minor details of the statute. See United States Jaycees v. Iowa Civil Rights

Commission, 427 N.W.2d 450, 455 (Iowa 1988). In the Jaycees case, the Court applied, using this amendment, the principle that amendment to minor details of a statute casts light on the legislative intent in regard to the meaning of the statue as it existed before amendment. Id. The Court concluded that this amendment was intended to simply "clarif[y] the distinction *between the 'place, establishment, or facility' which qualifies as a 'public accommodation'* and the ,organization or association' which uses the accommodation." Id. (emphasis added).

6. The Court's treatment of the revised statute implies that no drastic changes in coverage were effected by the amendment. Id. Therefore, under the present statute, the emphasis in determining whether an entity is a public accommodation should continue to be places on ascertaining whether it is a "place, establishment or facility" and not on whether it is utilized by an "organization or association." *See* id. at 454-55. Given the absence of any extreme change in the coverage of the statute, it may reasonably be concluded that the reference to "nonmembers" in the present definition of "public accommodation", includes, at a minimum, those persons who constitute "the general public" as that term was used in the former statute. See Good v. Iowa Civil Rights Commission, 368 N.W.2d 151, 155-56 (Iowa 1985). Such a construction of the statute also conforms to the legislative mandate that the act be broadly construed to eliminated unfair and discriminatory practices in public accommodations. Iowa Code § 601A.18 (1989); Ladd v. Iowa West Racing Association, 438 N.W.2d 600, 602 (Iowa 1989).

7. In September of 1984, the child care business at the Harlans' residence occurred at a "place" or "establishment" within the meaning of the statute. United States Jaycees v. Iowa Civil Rights Commission, 427 N.W.2d 450, 454 (Iowa 1988). See Findings of Fact Nos. 6, 12, 13. This business "offer[ed] services" to the general public and therefore was a public accommodation as that term is defined in the Act. Id. See 1984 Iowa Acts 70 ch. 1096. See Findings of Fact Nos. 6-

Default Judgment

8. A motion that default judgment be entered against Respondent Virgil Harlan was made by the attorney for the Iowa Civil Rights Commission. (Tr. at 102). "A 'default' is a failure to take the step required in the progress of an action and a judgment by default is a judgment against the party who has failed to take such step." Kirby v. Holman, 238 Iowa 355, 374, 25 N.W.2d 664 (1947). The question of whether or not to enter a default judgment is largely within the discretion of the adjudicating body. *See* Johnson v. Gib's Western Kitchen, Inc., 338N.W.2d 872, 874 (Iowa 1983). In district court, for example, the court is not required to enter a default judgment even though the conditions set forth in the specific Rules of Civil Procedure governing the entry of default judgments have been met. Id. The policy of the law is to favor trial on the merits. Id.

9. In order to enter default judgment against a respondent, it must first be shown, where the respondent has not voluntarily appeared, that the adjudicating body acquired personal jurisdiction over the respondent. 49 C.J.S. *Judgments § 24* (1947); 47 AM. JUR. 2D *Judgments § 1174*(1969). Such acquisition of personal jurisdiction is shown by proof of service of process, i.e. service of the notice of hearing. 49 C.J.S.*Judgments* § 24; 47 AM. JUR. 2D *Judgments § 1174* (1969). This rule is consistent with those rules of civil procedure which operate together to require that a defendant in a civil action, who has neither appeared nor filed an answer or motion, has been served with process prior to the entry of default. *See* Iowa R. Civ. Pro. 53, 230.

10. This proceeding is a "contested case" under the Iowa Administrative Procedures Act because it is "a proceeding ... in which the legal rights, duties or privileges of a party are required by ... statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code §§ 17A.2 (2), 601A.15 (1989). As such, service of the notice of hearing may be made on a respondent by "personal service as in civil actions or by certified mail return receipt requested." Iowa Code § 17A.12(l) (1989).

11. Personal jurisdiction was acquired over Respondent Virgil Harlan by the Commission because evidence in the record and documents officially noticed in the record prove that the statutory requirements for service of the notice of hearing have been met. See Findings of Fact Nos. 2-4.

12. Official notice may be taken of all facts of which judicial notice may be taken. 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). Official notice of these documents is proper because judicial notice may be taken of "all the ... jurisdictional papers in a case on trial and the same need not be introduced in evidence." Searls v. Knapp, 5 S.D. 325, 327, 58 N.W. 807, 808 (1894) (taking judicial notice of summons and pleading), *quoted in* In Re Williams Estate, 90 S.D. 173, 240 N.W.2d 74, 76 (S.D. 1976); *see* Slater v. Roche, 148 Iowa 413,126 N.W. 121 (1910) (taking judicial notice of writ of attachment and return of service as papers properly filed or returned).

13. In light of the Commission's acquiring personal jurisdiction over Respondent Virgil Harlan, of his failure to respond to either the Notice of Hearing or the Order setting the final date for hearing, and his failure to be present or represented at the hearing, the motion for entry of default judgment should be granted. See Findings of Fact 2-5. Under these circumstances, denial of default judgment would not serve the policy of the law favoring hearing on the merits.

Order and Allocation of Proof

14. The burden of proof or "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 is on the complainant to persuade the finder of fact that prohibited discrimination on the basis of race in the area of public accommodations has occurred. *See* Iowa Code § 601A.15 (7) (1983) (this section refers to the burden of the "Commission"). Cf. *e.g.* King v. Iowa Civil Rights Commission, 334 N.W.2d 598, 602 (Iowa 1983) (complainant has burden of proof in religious discrimination in employment case); Linn Co-operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981) (complainant had burden of proof in sex discrimination in employment case).

15. Although Federal court decisions applying Federal anti-discrimination laws are not controlling in cases under the Iowa Civil Rights Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829,831 (Iowa 1978), they are often relied on as persuasive authority in cases under the Act. ' Iowa State Fairgrounds Security v. Iowa Civil Rights

Commission, 322 N.W.2d 293, 296 (Iowa 1982). Opinions of the Supreme Court of the United States are entitled to particular deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866 (Iowa 1978).

16. There is authority which indicates that the proper analytical approach in a case with direct evidence of discrimination is, first, to note the presence of such evidence; second, to make the finding, if the evidence is sufficiently probative, that the challenged practice is discriminatory on the prohibited basis; third, to consider any affirmative defenses of the respondent; and, fourth, to then conclude whether or not illegal discrimination has occurred. See Trans World Airlines v. Thurston, 469 U.S. 111, 121-22, 124-25 105 S. Ct. 613, 83 L.Ed. 2d 523, 533, 535 (1985) (Age Discrimination in Employment Act). With the presence of such direct evidence, the analytical framework, involving shifting burdens of production, which was originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), and subsequently adopted by the Iowa Supreme Court, e.g. Iowa State Fairgounds Security, 322 N.W.2d 293 (Iowa 1982), is inapplicable. Price Waterhouse v. Hopkins, U.S., 57 L.W. 4469, 4481 (1989) (0,Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985).

17. In this case, there is direct evidence in the record to the effect that Ms. Humburd was denied child care services by the Harlans because of her race. The same evidence demonstrates that the Harlans "directly or indirectly ... indicate[d] ... that the patronage of persons of [the black] race ... is unwelcome, objectionable, not acceptable, [and] not solicited." Iowa Code § 601A.7 (1983). See Findings of Fact Nos. 13-15, 17-18. The inquiry, however, does not end there, for the defenses of the respondent must be examined. Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25 105 S. Ct. 613, 83 L. Ed. 2d 523, 533 (1985).

Mr. Harlan's Metal Illness

18. Respondent Mary Harlan asserts that her acquiescence in the practice of racial discrimination advocated by her husband, Respondent Virgil Harlan, should be excused because was "doing nothing more than attempting to appease her husband . . . . [b]ecause of [his] mental illness and disease [and the advice of] doctors to try to keep him from becoming angry. Defendant's Brief at 9. This defense should be rejected for several reasons.

19. First, neither mental illness nor acting to appease one who is mentally ill are affirmative defenses specifically recognized by the statute.

20. Second, mentally disabled persons are usually held liable for their torts, i.e. civil wrongs or injuries, other than breach of contract, which may be remedied by damages. Keeton, Prosser and Keeton On Torts 1072 (5th ed. 1984); Wertz v. Wertz, 43 Iowa 534, 536-37 (1876) (dictum); Behrens v. McKenzie, 23 Iowa 333, 343 (1867) (dictum). Certainly, if this principle applies, as it does, to civil actions, which are mechanisms designed to remedy specific disputes, then it should apply to this administrative process which is designed to correct "a broader pattern of behavior," i.e. "the practice of discrimination." Ironworkers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971).

21. Third, the underlying rationale given for holding the mentally ill person liable for his torts applies equally well to violations of the statute and also serves, in part, to demonstrate why the "appeasement" defense should be rejected:

> [I]t is better that the estate of the [mentally disabled person] be taken to give compensation for the damage he has done than that it should remain to be administered by guardians for his own incompetent benefit. . . [A]Iso . . . if he is *held liable, his custodians and those interested in his estate will be stimulated to keep him in order,* and that since insanity is easily feigned, there would be too much temptation to pretend it.

Keeton, Prosser and Keeton on Torts 1073 (5th ed. 1984) (emphasis added).

22. Fourth, if a person chooses to operate a public accommodation out of his or her home, they have a legal duty to refrain from denying offered services to customers because of their race. Iowa Code § 601 A.7. If they cannot meet that duty because of opposition to the legal requirement of nondiscrimination by other members of their family, for whatever reason, they should choose to refrain from operating the accommodation. Catering to the racial prejudice of family members provides no more of a defense to the charge of race discrimination in public accommodations than complying with the racial preferences of customers. *Cf* Diaz v. Pan American World Airways, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants in sex discrimination in employment case).

Statutory Defense

23. The Respondent Mary Harlan asserts that her child care business falls within the following statutory exception to the prohibition against discrimination in public accommodations:

> 2. This section [601 A.7] shall not apply to: ...
>
> b. The rental or leasing to transient individuals of less than six rooms within a single housing accommodation by the occupant or owner or such housing accommodation if the occupant or owner or members of his family reside therein.

Iowa Code § 601 A.7(2) (b) (1983) (emphasis added).

24. Respondent Mary Harlan asserts that:

> [T]he discriminatory practices of Iowa Code Section 601A.7 should not apply to her. The primary purpose of the Defendant's babysitting service is to provide temporary housing accommodations for the children of working parents which would enable the parent to work *and the child to be properly cared* for. The aforementioned arrangement is transient in nature in that a child has the benefit of the living quarters of the home but it is not intended to be a permanent living arrangement. The Defendant, Mary Harlan, lives in the home with her son, daughter, and her husband. The circumstances of this case fall within the intent

> and spirit of the exception which is provided for in Iowa Code section 601A.7(2)(b).

Defendant's Brief at 7-8 (emphasis added). Respondent Mary Harlan cites other non- public accommodations exceptions to the Act where "the person's family dwelling is involved.' Defendant's Brief at 8 (citing Iowa Code §§ 601 A.6 (employment) and 601 A. 12 (housing)).

25. The interpretation of Iowa Code section 601A.7(2) (b) should be:

> guided by the following well-settled principles. The intent of the legislature is the polestar in construing the statute.... With respect to Chapter 601 A, the legislature has mandated that it be construed broadly to eliminate unfair and discriminatory practices in public accommodations. . . . However, where the language of the statute is clear and plain there is no room for construction, so the sole function of [the Commission] is to apply the statute according to its terms.

Ladd v. Iowa West Racing Association, 438 N.W.2d 600, 601- 02 (Iowa 1989) (citations omitted).

26. The language of Iowa Code § section 601A.7(2) (b) is clear and plain. It provides an exception, under certain specified circumstances, to the prohibition against discrimination in the *rental or leasing of rooms.* This exception has no application to the instant case which involves the denial of *child care* services which entail more than the rental or leasing of a room or the provision of temporary shelter. See Findings of Fact Nos. 8 & 9. The other exceptions cited, by their own terms, do not apply in public accommodations cases.

Remedies

27. Violation of Iowa Code § sections 601A.7(l) (a) (b) having been shown, and no legitimate defense having been established, the Commission has the duty to "issue an order requiring the respondent to cease and desist from the discriminatory or unfair practice and to take the necessary remedial action as in the judgment of the Commission will carry out the purposes of this chapter. A copy of the order shall be delivered to ... any other public officers and persons as the commission deems proper." Iowa Code § 601 A. 15(8) (11989).

28. Other appropriate remedies, in addition to a cease and desist order, include:

> (5) Extension to all individuals of the full and equal enjoyment of the . . . services of the respondent denied to the complainant because of the unfair or discriminatory practice.
>
> (6) Reporting as to the manner of compliance.
>
> (7) Posting notices in conspicuous places in the respondent's place of business in form prescribed by the commission and inclusion of notices in advertising material.

> (8) Payment to the complainant of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees.

Iowa Code § 601 A. 15 (1989).

Damages for Emotional Distress

29. In accordance with the authority granted by the statute to award actual or compensatory damages, the Iowa Civil Rights Commission has the power to award damages for emotional distress. Chauffeurs Local Union 238 v. Iowa Civil Rights, 394 N.W.2d 375,383 (Iowa 1986) (interpreting Iowa Code § 601A.15(8)). In this context, where emotional distress is "an item of damage," damages for emotional distress are treated as a component of actual damages. Dickerson v. Young, 332 N.W.2d 93, 98-99 (Iowa 1983); See Blessum v. Howard County Board,245 N.W.2d 836, 844-45 (Iowa 1980). Therefore, the requirements for proof of damages for emotional distress should not be confused with proof of the elements of the cause of action for intentional infliction of emotional distress, e.g. outrageous conduct. Dickerson v. Young, 332 N.W.2d 93, 98-99 (Iowa 1983).

30. Respondent Mary Harlan asserts on brief and in her motion to dismiss that Ms. Humburd, by relying on her testimony about the incident and the effects it had upon her, has either failed to introduce any evidence or to introduce sufficient evidence which would permit an award of damages for emotional distress. (Defendant's Brief at 14-15; Tr. at 112-13). The Commission adopts the response made to the same argument, in a housing discrimination case, by the United States Court of Appeals for the Seventh Circuit:

> It appears to be defendants' position that unless there is evidence of economic or financial loss, or medical evidence of mental or emotional impairment, there can be no award of compensatory damages. We conclude, to the contrary, that *an award of compensatory damages ... or "actual damages ". . . is appropriate for humiliation caused by the type of violations of rights established here. Humiliation can be inferred from the circumstances as well as established by the testimony.*

Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974) (italicized portion quoted with approval in Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980)). Even slight testimony of emotional distress, when combined with evidence of circumstances which would be expected to result in emotional distress, can be sufficient to show the existence of the distress. Dickerson v. Young, 332 N.W.2d 93, 98-99 (Iowa 1983). While these cases did not arise under the Iowa Civil Rights Act, it would be anomalous to mandate more stringent requirements for proof of emotional distress in cases under the Act than is required in the usual case where emotional distress is an item of damage. Also, such stringent requirements would violate the legislative command that the Act "be construed broadly to effectuate its purposes." Iowa Code § 601 A. 18 (1983).

31. When the evidence demonstrates that the complainant has suffered emotional distress proximately caused by discrimination, an award of damages to compensate for this distress is appropriate. Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984) (citing Nichols, Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview, 32 Drake L. Rev. 273, 301 (1982- 83)); *See* Gray v. Serruto Builders, Inc. 110 N.J. Super 297, 265 A.2d 404, 414 (1970); Williams v. Joyce, 4 Or. App. 482, 479 P.2d 513, 519 (1971). In this case, the testimony of the complainant and the evidence of the surrounding circumstances, demonstrating facts "which would inevitably have a strong impact on the emotions of an individual," are sufficient to show that the complainant sustained compensable emotional distress.Dickerson v. Young, 332 N.W.2d 93, 99 (Iowa 1983); *See* Gaudry v. Bureau of Labor and Industries, 48 Or. App. 589, 617 P.2d 668, 670-71 (1980) (testimony combined with "the nature of incident itself" supported award of emotional distress damages in public accommodation race discrimination case). See Findings of Fact Nos. 13-15, 19, 20.

32. The amount of damages for emotional distress will depend on the facts and circumstances of each individual case. Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984). Past Commission decisions have referred to the consideration of various factors in awarding damages for emotional distress. Cheri Dacy, 7 Iowa Civil Rights Commission Case Reports 17, 24-25 (1985) (nature of the respondent's acts, severity of distress, length of effects, vulnerability of complainant, if any, due to pre-existing condition); Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984) (extent of the harm, its duration, the wantonness of respondent's conduct, and the quality of the evidence establishing harm). Some state and federal court decisions have suggested other factors which may be considered. See generally 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-39 (1982).

33. It becomes clear, upon examination of the Commission's cases, and the authority cited therein, that 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. The greater the severity and the longer the duration of the emotional distress, the greater the compensation that is required to make the complainant whole.

34. The other factors are still relevant because they bear upon one or both of these determinants. For example, the wantonness of an act of discrimination is relevant because the inference may be drawn "that mental anguish could reasonably be expected from these actions." Joyce Wilder 4 Iowa Civil Rights Commission Case Reports 162, 168 (1979). The more extreme the act, the greater the severity of the emotional distress that could be inferred.

35. Given the severity and, especially, the duration of the distress sustained by Ms. Humburd, which are shown by the testimony and which may be reasonably inferred from the circumstances of the case, the Commission concludes that an award of four thousand four hundred dollars ($4400.00) in damages for emotional distress is full, reasonable, and appropriate compensation for her loss. See Findings of Fact Nos. 13-15, 19 & 20.

Consequential Damages:

Back Pay for Merry Maids Employment

36. The complainant seeks consequential or special damages in the form of back pay to compensate her for the employment opportunity with Merry Maids which she lost as the result of the denial of child care by the Harlans. (Tr. at 6, Post Hearing Brief of Commission at 6-7). The back pay damages requested here fall within the category of special damages because such damages do not ordinarily or generally result from the denial of child care services. *See* Kirchner v. Incorporated Town of Larchwood, 120 Iowa 578, 582, 95 N.W. 184,186 (1903). They are at issue here only because of unusual circumstances, i.e. the combination of the denial of child care services and the lack of time to obtain another child care provider prior to the beginning of the position with Merry Maids resulted in the loss to the Complainant of employment in that position. See Finding of Fact No. 23.

37. Respondent Mary Harlan asserts that Complainant Humburd did not meet her burden of proof in establishing back pay damages, and thatshe failed to mitigate these damages by exercising reasonable diligence in her search for work. (Defendant's Brief at 10-14, Tr. at 107-113). In order to evaluate these defenses to damages, it is necessary to determine (a) who bears the burden of proof in regard to establishing damage and the failure to mitigate damage, and (b) what are the bearers of those respective burdens of proof required to show in order to establish damages and failure to mitigate damage?

38. The complainant bears the burden of proof in establishing her damages. *See* Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981). While the complainant has the duty to mitigate damages, the respondent bears the burden of proof in establishing that the complainant failed to mitigate her damages. *See* Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); Iowa Power & Light Company v. Board of Waterworks Trustees, 281 N.W.2d 827, 833 (Iowa Ct. App. 1979). Standards for Establishing Back Pay Damages

39. The Iowa appellate courts have never considered the question of what the complainant is required to show in order to establish back pay damages resulting from a violation of the Iowa Civil Rights Act. there are two lines of authority setting forth different standards concerning what evidence a complainant must adduce in order to establish back pay damages under Federal anti- discrimination laws. In considering these cases, it should be noted that both the Iowa Civil Rights Act and Title VII of the Civil Rights Act of 1964 require that, in making back pay awards, interim earnings are to be deducted from gross back pay. Iowa Code § 601 A. 15(8) (a) (1) (1989); 42 U.S.C.A. § 2000e-5(g) (1981 & Supp. 1989).

40. The United States Court of Appeals for the Seventh Circuit has held, in Title VII cases, that the complainant is required to introduce both evidence of gross back pay and of interim earnings, i.e. earnings which were accrued during the period for which back is sought. Horn v. Duke Homes, 755 F.2d 599, 606-09 (7th Cir. 1985); Kamberos v. GTE Automatic Electric, Inc., 603 F. 2d 598, 602 (7th Cir. 1979); Taylor v. Phillips, Industries, Inc., 593 F. 2d 783, 786-87 & n.5 (1979) (per curiam). The complainant is also required to show what times, if any, during the back pay period, she was not working. Taylor v. Phillips, Industries, Inc., 593 F.2d at 787. This initial burden of proving economic loss will be met if the evidence is sufficient to allow a reasonable estimate of back pay damages by deducting interim earnings from the gross back pay

the complainant would have earned absent the discrimination. Horn v. Duke Homes, 755 F.2d at 60608; Kamberos v. GTE Automatic Electric, Inc., 603 F.2d at 2; Taylor v. Phillips, Industries, Inc., 593 F-2d at 786-87 & n.5. Once this has been done, the burden shifts to the respondent to rebut complainant's evidence on damages and to prove that the complainant failed to mitigate damages during the periods when she was not working. Horn v. Duke Homes, 755 F.2d at 608; Taylor v. Phillips, Industries, Inc., 593 F.2d at 787 & n.5 (citing Sprogis v. United Airlines, 517 F.2d 387, 392 (7th Cir. 1975)). Failure by the complainant to introduce evidence on her interim earnings or the periods of time when she was not working does not result in the draconian sanction of denying damages. Horn v. Duke Homes, 755 F.2d at 607 n.11. Rather, the record is reopened to take further evidence on these issues. Horn v. Duke Homes, 755 F.2d at 607 n.1 1; Taylor v. Phillips, Industries, Inc., 593 F.2d at 788.

41. Federal courts in other circuits have reached a different conclusion. In the Second Circuit, the complainant is only required to establish her gross back pay. EEOC v. Kallir, Phillis, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.Y. 1976), aff'd mem., 559 F. 2d 1203 (2d cir.), *cert. denied*, 434 U.S. 920 (1977). Once this is done, the burden shifts to the defendant to prove interim earnings and any failure of the complainant to mitigate damages. Id. A Federal district court is the First Circuit has also adopted this approach. Denton v. Boilermakers Local29, 673 F. Supp. 37, 39 (D. Mass. 1987). Given this treatment of interim earnings, it is doubtful that either of these courts would require complainants to establish the periods when they were not working. In the Eleventh Circuit proof of the time periods when the complainant was not working is viewed as part of the respondent's burden of proving complainant's failure to mitigate damages. See Nord v. United States Steel Corp., 758 F.2d 1462, 1471 (11th Cir. 1985).

42. The latter approach is preferable for several reasons. First, the courts which have adopted this view have relied on the resolution of the same question arising in cases under the National Labor Relations Act (NLRA). EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924. Because the remedial provisions of Title VII were expressly modeled after the remedial provisions of the NLRA, "principles developed under the NLRA generally guide, but do not bind courts in tailoring remedies under Title VII." Ford Motor Co. v. EEOC, 455 U.S. 219, 226, 102 S.Ct. 3057, 73 L. Ed. 2d 721, 729 & n.1 1 (1982). Although decisions under the NLRA provide that the General Counsel of the National Labor Relations Board is required to show only the gross amounts of back pay due while the respondent is required to show interim earnings or lack of reasonable diligence in searching for work, e.g. NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1318 (D.C. Cir. 1972); NLRB v. Brown & Root, Inc., 311 F. 2d 447, 454 (8th Cir. 1963), these decisions were not discussed in the Seventh Circuit cases.

43. Second, commentators and courts have noted the similarity between damage and mitigation rules in Title VII cases and cases involving breach of employment contracts. Schlei & Grossman, Employment Discrimination Law, 1442, 1447 (2nd ed. 1983). The majority rule in breach of employment contract cases is that it is the plaintiff's burden to prove breach and the contract price, i.e. gross back pay, and it is the employer's burden to prove the interim earnings of the plaintiff. Dobbs, Remedies 925 (1973). It would seem difficult to justify a requirement that evidence of interim earnings be introduced by complainants or "one of the Commission's attorneys or agents," Iowa Code § 601A.15(6), in discrimination cases when this burden is not

placed on plaintiffs in breach of employment contract cases or on the General Counsel in NLRA cases.

44. Third, the Commission is acutely aware of its responsibility to deduct interim earnings from a back pay award. Iowa Code § 601 A. 15(8) (a) (1) (1989). Nonetheless, despite the emphasis placed on this duty by the Seventh Circuit, e.g. Taylor v. Phillips, Industries, Inc., 593 F. 2d at 787, the existence of the duty does not provide any guidance as to whose burden it is to introduce evidence on interim earnings. Certainly, the duty is limited to the deduction of interim earnings which are reflected in the record. Since the full panoply of discovery methods available to parties in civil actions was available to the respondent here, Iowa Code § 17A.13 (1989), the placing of the burden with the respondent should not impede the introduction of evidence of interim earnings. The Commission also notes that the Commission's attorneys have, in this case and others, routinely introduced evidence of interim earnings which they are prepared to concede even though this is not part of the Complainant's burden. See Finding of Fact No. 27. Cf NLRB v. Brown & Rood, Inc., 311 F.2d 447, 454 (8th Cir. 1963) (General Counsel makes known to respondent the credits the Board is prepared to concede).

45. The complainant had shown that she has sustained damage through the loss of the Merry Maids position. See Findings of Fact Nos. 21-24. Given that the complainant's burden of proof on damages only requires her to show the gross back pay for the back pay period, she has met that burden. When, as here,:

> [the discriminator's] conduct has prevented a precise computation of damages, the injured party is not to be deprived of adequate damages. *The trier of the fact may draw reasonable inferences from the relevant facts, and all doubts are to be resolved in favor of the injured party;* the wrongdoer does not become the beneficiary of his own wrongful conduct.

EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 923 (emphasis added).

46. Although there is "uncertainty . . . in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated." Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 857 (Iowa 1973).

47. A precise computation of damages is not possible because, as a result of her loss of the Merry Maids position, it is impossible to know exactly how long the Complainant would have remained in the position. Nonetheless, a reasonable inference was drawn that the Complainant's length of employment with Merry Maids would have lasted as long as her longest employment since September of 1984, i.e. 4 months. See Finding of Fact No. 24. A further reasonable inference from the testimony may be drawn that she would have received approximately $5.50 per hour in wages at Merry Maids. See Finding of Fact No. 21. A finding has been made that she would have worked six hours a day, for a thirty hour week. See Finding of Fact No. 21. Although doubts have been raised about the possibility that the Complainant was attending school, or may have had interim earnings during the back pay period, none of these doubts has been proven and, therefore, must be resolved in favor of the Complainant. See Findings of Fact Nos. 25, 26, 28, 30.

48. In light of the above, the computation of gross back pay would be:

> 16 weeks X 30 hours per week X $5.50 per hour $2640.00.

Failure to Mitigate Damages

49. In order to meet her burden of proving that Complainant Humburd failed to mitigate her damages in her search for work, Respondent Mary Harlan must establish:

> (1) that the damages suffered by the [complainant] could have been avoided, i.e. that there were suitable positions available which plaintiff could have discovered and for which [s]he was qualified; and (2) that [complainant) failed to use reasonable care and diligence in seeking a position.

EEOC v. Sandia Corp., 639 F.2d 600,627 (1 Oth Cir. 1980).

50. Respondent Mary Harlan has failed to prove either of the two above propositions and, therefore, has not proven that Complainant Humburd has failed to mitigate damages in her search for employment. See Findings of Fact Nos. 25, 26, 28, 29. Given the facts of this case, the only meaningful mitigation that could have occurred in regard to Ms. Humburd obtaining child care services would have happened if she had been able to obtain child care prior to the morning following her rejection by the Harlans. See Finding of Fact No. 21-23. This was not possible. Finding of Fact No. 23. Nonetheless, Ms. Humburd has been found to have searched for child care services during the back pay period. Finding of Fact 31. Therefore Respondent Mary Harlan has also failed to carry its burden of showing that Ms. Humburd did not mitigate her damages in searching for an alternative child care provider.

Interest

51. Interest begins to run on an award of damages from the date of the commencement of the action at the rate of ten percent per annum. Iowa Code § 535.3 (1989). In this case, interest should be paid on damages from the time of the filing of the complaint on February 5, 1985.

Attorneys Fees

52. The complainant having prevailed, she is entitled to an award of reasonable attorney's fees. Iowa Code § 601 A. 15(8) (1989). If the parties cannot stipulate to the amount of these fees, they should be determined at a separate hearing. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987). The Commission must specifically retain jurisdiction of the case in order to determine the actual amount of attorney's fees to which Complainant Humburd is entitled to under this order and to enter a subsequent order awarding these fees. City of Des Moines v. Iowa Civil Rights Commission, 343 N.W.2d 836.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Diane Humburd, is entitled to judgment because she has established that the refusal by the Respondents Harlan to provide her child care services was based on her race and was in violation of Iowa Code § Section 601 A.7(1) (a), (b) (1983).

B. The Commission's Motion for Default Judgment against Respondent Virgil G. Harlan is granted.

C. Respondent Mary A. Harlan's Motion to Dismiss is denied.

D. Complainant Diane Humburd is entitled to a judgment of four thousand four hundred dollars ($4,400.00) in general compensatory damages against Respondents Virgil G. Harlan and Mary A. Harlan for the emotional distress she suffered as a result of the racial discrimination practiced against her by the Respondents.

E. Complainant Diane Humburd is entitled to a judgment of two thousand six hundred and forty dollars ($2,640.00) in special compensatory damages against Respondents Virgil G. Harlan and Mary A. Harlan for the back pay damages resulting from the loss of the Merry Maids position.

F. Interest shall be paid to Complainant Diane Humburd on the above awards of general and special damages at the rate of ten percent per annum commencing on February 6, 1985 and continuing until date of payment.

G. Within 20 calendar days of the date of this order, provided that agreement can be reached between the parties on this issue, the parties shall submit a written stipulation stating the amount of attorney's fees to be awarded Complainant Humburd's attorney. If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Commission and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of determining the proper amount of fees to be awarded. Once the full stipulation is submitted or the hearing is completed, the Administrative Law Judge shall submit for the Commission's consideration a Supplemental Proposed Decision and Order setting forth a determination of attorney's fees.

H. The Commission retains jurisdiction of the case in order to determine the actual amount of attorneys fees to which Complainant Humburd is entitled to under this order and to enter a subsequent order awarding these fees. <u>This order is final in all respects except for the determination of the amount of the attorney's fees.</u>

I. Respondents Mary A. Harlan and Virgil G. Harlan are hereby ordered to cease and desist from any further practices of racial discrimination in the provision of child care services to the public.

J. In all future print advertising for the provision of child care services for the next two years, Respondents Mary A. Harlan and Virgil G. Harlan shall include the statement, "An equal opportunity child care provider," in a type size not smaller than the largest type used in the

remainder of the advertisement. Respondents shall provide copies of all future child care advertisements for two years from the date of this order to the Iowa Civil Rights Commission.

K. A copy of this decision and order shall be provided to the Iowa Department of Human Services.

Signed this the 18th day of July, 1989.

DONALD W. BOHLKEN
Administrative Law Judge

ADOPTION OF PROPOSED DECISION AND ORDER AND REMAND FOR DETERMINATION OF ATTORNEYS FEES

1. On September 22, 1989, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order, which is incorporated in its entirety in this order as if fully set forth herein. At that time, the case was also remanded back to the Administrative Law Judge so the attorneys fees issue may be resolved.

2. In accordance with paragraph G on page 41 of the proposed decision and order, the parties are required to "submit a written stipulation stating the amount of the attorneys fees to be awarded Complainant Humburd's attorney" within 20 calendar days of the date of this order. "If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Commission and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of determining the proper amount of fees to be awarded."

IT IS SO ORDERED.

Signed this the _____ day of _____, 1989.

KEN ROBINSON
Chairperson
Iowa Civil Rights Commission

Copies to:
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SUPPLEMENTAL PROPOSED DECISION AND ORDER ON THE AWARD OF ATTORNEYS FEES

FINDINGS OF FACT

1. The proposed decision and order in this matter, which was adopted by the Commission's Order of September 28,1989, provided that the Complainant is to be awarded attorneys fees. This order left open the issue of what amount of fees were to be awarded. In accordance with paragraph G on page 41 of the decision, the parties were required to:

"submit a written stipulation stating the amount of the attorneys fees to be awarded Complainant Humburd's attorney" within 20 calendar days of the date of this order. "if any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Commission and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of determining the proper amount of fees to be awarded."

2. No such stipulation nor any such notification has been submitted to the Commission. Therefore, the parties were given notice of a telephone scheduling conference to be held in order to determine whether any of the parties were interested in participating in a hearing on the attorneys fees award or whether they wished to waive such a hearing and allow an award to be made on the record established so far. An order was issued informing the parties and their respective attorneys that, if they failed to inform the Administrative Law Judge in writing of the telephone number at which they could be reached for the conference, they were waiving their right to participate in the scheduling conference. The parties were also informed that, in the event neither of the Respondents contacted the Administrative Law Judge, a hearing would not be held and the award would be made based on the record established to date, unless either the Commission or the Complainant objected to such procedure.

3. Neither the Respondents nor the Complainant contacted the Administrative Law Judge by letter to inform him of the telephone number at which they could be reached. Consequently, the scheduling conference was not held. Neither the Commission, the Respondents, nor the Complainant objected to making the award of attorneys fees based on the record established so far. Therefore, the award of attorneys fees is being made based on the established record which

consists of an Affidavit of Time Expended In Support of Attorneys Fees filed by the Complainant's attorney *(hereinafter* "Affidavit").

4. The above procedure was followed because the Administrative Law Judge was aware that neither of the Respondents had filed an appeal or any exceptions to the proposed decision in this case. In the event neither of the Respondents were interested in challenging the attorneys fees award, it would be a futile additional expense to schedule and conduct an attorneys fees hearing at which neither of the Respondents appeared unless the Complainant wished to present additional evidence on this issue. By following this procedure, the Respondents and the Complainant were given an opportunity to express their interest, if any, in an attorney fees hearing and the Commission was able to avoid the additional expense and waste of time of opening an attorney fees hearing at which none of the parties appeared. As the Commission's decision and the notice of the telephone scheduling conference made clear, an attorneys fees hearing would have been scheduled if any interest in one had been shown by any of the parties.

5. The Affidavit presents a request for fees at the rate of seventy-five dollars ($75.00) per hour for a total of 27.30 hours. The Notice of Hearing in this case was issued on May 17, 1988. The Affidavit indicates that the Complainant's attorney seeks compensation for 5.0002 hours of services in regard to this matter for services rendered after May 17, 1988, and for 22.2998 hours for services rendered on or before May 17, 1988.

6. The Affidavit provided is reasonably detailed, giving the date of each service rendered, a summary of the service provided, and the time expended is given in ten minute increments expressed in fractions of the hour to within one ten thousandth of an hour. For example, ten minutes or one-sixth of an hour is expressed as .1667 hours.

7. The only hours which might be questioned as not being reasonably expended were the total of four hours requested for the public hearing. This was the total length of the hearing. If the Complainant's attorney had borne the burden of presenting the case, or shared that burden in approximately equal portions with the Assistant Attorney General, then compensation for all four hours might have been reasonably justified. In this case, however, the Administrative Law Judge was informed in advance by both the Complainant's attorney and the Assistant Attorney General, during conversations concerning scheduling, that the Assistant Attorney General would be presenting the case alone. This is essentially what happened during the case. (Tr. at 33-36). Nonetheless, the Complainant's attorney did confer with the Assistant Attorney General and undoubtedly had some input on questions asked by the Assistant Attorney General during the course of the hearing. Therefore the request for compensation for four hours for the hearing should not be totally denied, but should be reduced to one hour. To permit compensation for the full four hours would be to permit the billing of hours which are excessive, redundant, or otherwise unnecessary, All other hours requested in the Affidavit were hours reasonably expended.

8. The fee of $75.00 per hour is a reasonable hourly fee. This hourly fee, when multiplied times the number of hours reasonably expended, 24.30 hours, results in a total fee of $1822.50.

9. The results obtained through this litigation include an award of $4,400.00 in emotional distress damages and $2,640.00 in back pay. In addition, the Complainant obtained an order requiring the Respondents to cease and desist their discriminatory practices and to indicate that they were an equal opportunity child care provider in all future print advertising. These constitute excellent results in a public accommodations case.

CONCLUSIONS OF LAW

1. The Iowa Civil Rights Act allows the award of "reasonable attorneys fees" as part of the remedial action which the Commission may take in response to the Respondents' discriminatory practices. Iowa Code 601 A.1 5(8) (1989). Attorneys fees can only be awarded to complainants when discrimination has been proven. See Id.

2. An award of attorneys fees may be made in the absence of a separate evidentiary hearing where the opportunity for an attorneys fees hearing has been provided and all parties have elected to not take advantage of the opportunity. See Rouse v. Iowa Department of Transportation, 408 N.W.2d 767, 768 (Iowa 1987).

3. Although Federal court decisions applying Federal anti- discri m i nation laws are not controlling in cases under the Iowa Civil Rights Act,Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829,831 (Iowa 1978), they are often relied on as persuasive authority in these cases. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Opinions of the Supreme Court of the United States are entitled to particular deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866 (Iowa 1978).

4. Prior Commission decisions have held that attorneys fees shall be awarded only for services rendered after the date when the Notice of Hearing is issued. E.g. Cheri Dacy, 7 Iowa Civil Rights Commission Case Reports 17, 25 (1985). The only rationale stated to support this holding is that "the contested case commences when the Notice of Hearing is delivered." Id. While this is a correct statement of law, there is absolutely no authority, statutory or otherwise, other than these past Commission decisions, to support the proposition that attorneys fees awards should be limited to the period commencing with the issuance of the Notice of Hearing.

5. The reason for awarding attorneys fees to prevailing complainants in contested cases under the Iowa Civil Rights Act is the same as that for awarding attorneys fees to prevailing plaintiffs in civil actions brought under the Act, i.e. "to ensure that private citizens can afford to pursue legal actions necessary to advance the public interest vindicated by the policies of the civil rights acts." Ayala v. Center Line, Inc., 415 N.W.2d 603, 605 (Iowa 1987)(citing Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-02, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263, 1265-66 (1968)). Therefore, a prevailing complainant "should ordinarily recover an attorneys fee unless special circumstances would *render such* an award *unjust."* Newman v. Piggie Park Enterprises, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)(emphasis added). This "special circumstances" exception has been narrowly construed by the courts. Schlei & Grossman, Employment Discrimination Law 1468 (2d ed. 1983).

6. The practice of denying attorneys fees for services rendered by a private attorney for a complainant during the investigation and conciliation stages is in direct contradiction to the public policies identified in Ayala. Such practices will tend to discourage the private bar from assisting private citizens in civil rights cases at the investigation and conciliation stages. This practice effectively bars those victims of discrimination who cannot afford to pay attorneys fees from obtaining legal representation at these stages of the complaint process.

7. The timing of the provision of services by an attorney for a prevailing complainant, that is their being rendered at the investigation and conciliation stages, as opposed to any other stage of the complaint process, is not a special circumstance rendering the award of attorneys fees unjust. On the contrary, the value of the services of an attorney for the Complainant at the investigation and conciliation stages of state administrative civil rights processes has been recognized by the United States Supreme Court: "Representation by a private attorney thus assures development of a complete factual record at the investigative stage .... Retention of private counsel will help assure that . . . rights are not compromised in the conciliation process." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70, 100 S.Ct. 2024, 64 L.Ed.2d 723, 738 (1980). Indeed, a complainant seeking attorneys fees under Title VII of the Civil Rights Act of 1964 may recover attorneys fees in Federal district court not only for services rendered during the Federal judicial proceedings but also for services performed during state administrative civil rights proceedings, including services performed at the investigation and conciliation stages. Id. The practice of denying the award of reasonable attorneys fees to successful complainants for work performed during the complaint process prior to issuance of the notice of hearing is itself anomalous, unjust, and contrary to public policy.

8. For the reasons stated above, the *holding* set forth in the Commission's Decision in the Cheri Dacy case, *that attorneys fees shall be awarded to successful complainants only for services rendered after the date when the Notice of Hearing is issued, is hereby expressly overruled.* Commencing with this decision, it shall be the practice of the Commission to award reasonable attorneys fees to successful complainants for services performed at all stages of the administrative complaint process in accordance with the standards set forth by the applicable case law.

9. The amount of the attorneys fee to be awarded depends on the facts of each case. Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S. Ct. 1933, 76 L.Ed. 2d 40, 48 (1983). Where, as here, agreement on the attorneys fees issue has not been reached, the successful complainant bears the burden of establishing the amount of her attorneys fees by "documenting the appropriate hours expended and hourly rates." Id., 461 U.S. at 437, 76 L.Ed. 2d at 53. The complainant's attorney is not required to document each minute of his time in great detail, but should identify the general subject matter of his time expenditures. Id. & n.12. This burden has been met here. See Findings of Fact Nos. 5 & 6.

10. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Id., 461 U.S. at 433, 76 L.Ed. 2d at 50. Hours that were not "reasonably expended" should be excluded from this calculation. Id.

11.

> Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important factor in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary."*

Id., 461 U.S. at 434, 76 L.Ed. 2d at 50-51 (Quoting Copeland v. Marshall, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980)(en banc)(emphasis in original)).

12. This "lodestar" calculation of reasonable hours times a reasonable rate may be further adjusted either upward or downward based on other factors, including the results obtained. Id., 461 U.S. at 434, 76 L.Ed. 2d at 51; Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 554 (1989). Where, as here, the case presents only a single claim, the Commission "should focus on the overall relief obtained by the [complainant] in relation to the hours reasonably expended on the litigation." Hensley v. Eckerhart, 461 U.S. at 435, 76 L.Ed. 2d at 51-52. An award of a fully compensatory fee, including compensation for all hours reasonably expended during the litigation, should be made when the complainant has obtained excellent results. Id., 461 U.S. at 435, 76 L.Ed. 2d at 52. The complainant who has obtained substantial remedies should not have the fee reduced because the Commission did not adopt each contention asserted. Id., 461 U.S. at 440, 76 L. Ed. 2d at 55.

13. Under the legal standards set forth above, the Complainant should receive a fully compensatory attorney's fee award, based on the lodestar calculation of hours reasonably expended times the reasonable hourly rate, and considering the excellent results obtained in this case, of one thousand eight hundred twenty-two dollars and fifty cents ($1822.50). See Findings of Fact Nos. 5-9: Conclusions of Law 9-12.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Diane Humburd, is entitled to a judgment of one thousand eight hundred twenty-two dollars and fifty cents ($1822.50) against Respondents Virgil G. Harlan and Mary A. Harlan for the fees of her attorney Herbert Rogers, Sr.
Signed this the 21 st day of November, 1989.

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
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515-281-4480

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Rick Autry
Assistant Attorney General

ADOPTION OF SUPPLEMENTAL PROPOSED DECISION AND ORDER ON THE AWARD OF ATTORNEYS FEES

1. On January 26, 1990, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's supplemental proposed decision and order on the award of attorneys fees, which is incorporated in its entirety in this order as if fully set forth herein.

IT IS SO ORDERED.

Signed this the 30th day of January, 1990.

KEN ROBINSON
Chairperson
Iowa Civil Rights Commission

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