**BEFORE THE IOWA CIVIL RIGHTS COMMISSION**

**BETH LARRAIN WHENNEN, Complainant**

**VS.**

**MEMORIAL LAWN CEMETERY, INC., PLANNING AND SERVICES CORP., and JAMES C. PETERSEN, Respondents.**

**CP# 03-85-12709**

THIS MATTER, a complaint filed by Beth Larrain Whennen (Complainant) with the Iowa Civil Rights Commission (Commission) charging Memorial Lawn Cemetery, Inc., Planning and Services Corp., and James C. Petersen (Respondents) with discrimination in employment on the basis of sex came on for hearing in Des Moines, Iowa on December 22, 1987 and continuing on January 19 and 20, 1988, before lone G. Shadduck serving as Hearing Officer. Complainant was represented by Teresa Baustian, Assistant Attorney General, and John C. Barrett, private attorney. Respondents Memorial Lawn Cemetery, Inc., and Planning and Services Corporation were represented by Russell H. Wilson, Esq. Respondent James C. Petersen was represented by James R. Cook, Esq.

**ISSUES TO BE CONSIDERED:**

I. Was there interference with Complainant's right to visit graves of her relatives?

II. Were health insurance benefits discriminatory on the basis of sex?

III. Was there a wage differential which was discriminatory on the basis of sex?

IV. Was Complainant placed on part-time, then laid off with no guarantee of returning to her job because she was pregnant?

V. Was Complainant constructively discharged?

After having reviewed the record and briefs of counsel, the Hearing Officer makes the following findings of fact, conclusions of law, rulings, recommended decision and order.

**FINDINGS OF FACT**

1. The Complainant, Beth Whennen, timely filed verified complaint CP# 03-85-12709 with the Iowa Civil Rights Commission on March 4, 1985, alleging a violation of Iowa Code section 601A.6, discrimination in employment on the basis of sex, by Memorial Lawn Cemetery, Inc., Planning and Services Corp., and James C. Petersen, Respondents.

2. The complaint was investigated, probable cause found, conciliation attempted but failed. Notice of Hearing was issued on July 28, 1987.

ISSUE I - WAS THERE INTERFERENCE WITH COMPLAINANT'S RIGHT TO VISIT GRAVES OF HER RELATIVES?

1. Whennen had several graves of relatives in the Memorial Cemetery. She did not visit those graves between the time she quit her job and the time her child was born on May 25, 1985. After the birth of her child, she felt uncomfortable visiting those graves. She felt that Dottie Martin (Respondents' sales manager) who was hired in September 1984, would watch her when she visited. (Transcript 192) Whennen's mother also testified that they were questioned as to what they were doing at the cemetery. (Transcript 270)

2. The office where Martin worked was inside the mausoleum. There were no windows in her office and the mausoleum had only the window in the entrance door. There were no restrictions on entering and leaving the cemetery.

**CONCLUSION OF LAW:**

Whennen claims that after the birth of her child and when visiting the graves of her relatives, she was uncomfortable because she felt that Martin was watching her. The baby was born on May 25, 1985. This complaint was filed on March 4, 1985, therefore, the claim of interference with visits to the graves was not part of the complaint. Whennen was no longer an employee of Respondents. No claim, of retaliation has been filed. The Commission has no jurisdiction over discrimination on this issue. [Iowa Code section 601A. 15(12)]

ISSUE II - WERE HEALTH BENEFITS DISCRIMINATORY ON THE BASIS OF SEX?

1. Whennen was not offered any medical benefits with her job. Art Woods, another member of the grounds crew who had been an employee since 1950 was provided with medical benefits and had received them for years before Whennen was lured. (Transcript 341)

2. Dennis Parrish, who was grounds supervisor under Charles Doggett at Memorial Lawn Cemetery for nine years (1966- 1975) was provided with health insurance. (joint Exhibit 1).

3. Barbara Petersen, wife of Respondent James Petersen and bookkeeper, secretary/treasurer at the 4400 Merle Hay Road business office of Memorial Lawn Cemetery, testified that the policy was that any new employees would not receive medical benefits, but Art Woods would continue to receive them. (Trans. 498) In fact, during the time Whennen worked for Respondents, no other employees, male or female, except for Woods were provided medical benefits.

CONCLUSIONS OF LAW

1. The complaint was timely filed, proceeded and the issues in the complaint are properly before the Hearing Officer and ultimately before the Commission.

2. Memorial Lawn Cemetery, Inc., Planning and Services Corp., and James C. Petersen are "employers" and *persons" as defined in Iowa Code section 601A.2(2) and 601A.2(5), and are

therefore subject, to Iowa Code section 601A.6 and do not fall under any of the exceptions of section 601A.6(5).

3. The applicable statutory provision is as follows:

> 1. It shall be an unfair or discriminatory practice for any:
> a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee or to otherwise discriminate in employment against any applicant for employment or employee because of the . . . sex ... of such applicant. . . unless based upon the nature of the occupation...
> * * *

4. The United States Supreme Court set out the basic allocation of burden and order of presentation of proof in a case alleging discriminatory treatment in McDonnell Douglas Cori). v. Green, 411 U.S. 792 (1973). In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1093, 67 L.Ed. 2d 207, 215 (1981), the Court summarized that burden and order from McDonnell as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. at 802, 5 FEP Cases, at 969. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination. -Id. at 804, 5 FEP Cases at 907.

This basic allocation of burdens and order of presentation of proof was adopted by the Iowa Supreme Court in Linn Cooperative Oil Co. vs. Quigley, 305 N.W.2d 729, 733 (Iowa 1981).

5. The complainant carries the initial burden of offering evidence adequate to create an inference that actions by a respondent were based on a discriminatory criterion which is illegal under the law, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843 (1977). In evaluating the evidence to determine whether the complainant has succeeded in establishing that inference, which is referred to as a . prima facie" case, the Commission and the Iowa Court have relied on McDonnell Douglas. The criteria established in McDonnell Douglas, however, were specific to a qualified applicant of a protected class who applied for a job and was rejected despite the qualification. Since then the Supreme Court has made it clear that the McDonnell Douglas criteria were to be neither "rigid, mechanized, or ritualistic." Furnco Const. Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978). Courts have been flexible in adopting the criteria to other types of cases.

6. The issue presented by Complainant relating to health benefits was based on different treatment.

The criteria for a prima facie case of different treatment in the case has been established: a) complainant was a female and, therefore, a member of a protected class. b) she was an employee of Respondent and performed the duties of a supervisor, c) she was not provided with health benefits although two male employees did receive health benefits.

Respondent stated that Art Woods, employee of former owners who started work in 1950 and continued through the time at issue, did have health benefits coverage by former owners and such coverage had been continued. The other male employee who received health benefits was Dennis Parrish, the grounds supervisor for the 9 years (1966-1975), eight years prior to the time of Complainant's employment. Parrish worked for Charles Doggett during that period of time. No other male employees were provided with health benefits. Neither were other female employees provided such benefits. Respondent Petersen had a policy of not providing such benefits during the time at issue, 1983 and 1984. Woods, an employee with functionally deficient mental capacity and seniority of over 30 years is, not considered a similarly situated male. Complainant has failed to carry her burden of proving by a preponderance of the evidence that she was discriminated against in health benefits.

ISSUE III - WAS THERE A WAGE DIFFERENTIAL WHICH WAS DISCRIMINATORY ON THE BASIS OF SEX?

1. Whennen started to work at Memorial Lawn Cemetery in Ottumwa on June 8, 1983. She filed her application on May 31, 1983 for position of "mowing, trimming, cleaning." Her starting wage was $3.35 per hour and the job was full time. Her immediate supervisor was Bob Stansberry. Stansberry's last day of work was November 18, 1983. He received weekly salary of $200.00 during 1983. He had been an employee since October 1981. The record indicates that Stansberry was rehired on August 27, 1985 for the ground crew at $5.00 per hour plus overtime. (See Complainant's Exhibit 12)

2. After Stansberry left in November 1983, a replacement supervisor was not hired. Whennen testified that she asked James Petersen, contract purchaser of Memorial Lawn Cemetery and Whennen's boss, if she could try out for the position of grounds supervisor and that he told her he would put her on a 30- day probationary period. After the 30-day period she asked if she was doing okay and he responded: "I haven't hired anybody.' She, therefore, assumed she was the supervisor. Whennen took over the supervisory responsibilities. She was never actually told that she was supervisor, but was requested to do the supervisory tasks. (Transcript 145)

3. On January 13, 1984, approximately 30 days after her probationary period started, Whennen was given a raise to $3.75 an hour plus overtime.

4. Floyd Vanderhoof was hired for the grounds crew on 4-24-84 at $3.50 an hour.

5. Robert Stansberry worked for Memorial Lawn in 1983-84 and again in 1985. After about a year, J. Petersen asked him to be grounds supervisor. He was then paid $200.00 weekly as salary. He was supervisor of Whennen. He did testify that the hardest job was shoveling dirt, that the heavy lifting was done by hoists. He also testified that Whennen didn't do her work. Whennen

had complained to Petersen about Stansberry, and the complaints resulted in his termination. (Transcripts 345-350)

Stansberry also believed that Whennen became supervisor after he was terminated.

When Stansberry returned to work in August 1985, he was paid $5.00 an hour plus overtime. He stated he came back as supervisor, lured by Martin. He chose hourly pay over salary because of the overtime. (Transcript 362)

6. It is Petersen's testimony that Stansberry returned and, was paid hourly instead of on salary at his request to be paid for overtime. Stansberry was paid $200.00 salary as a supervisor 1982-1983. The records indicate that he was rehired on August 27, 1985, at $5.00 an hour plus overtime. They do not indicate that he was supervisor (management). (Complainant's Exhibit 12) Floyd Vanderhoof was supervisor from March 1985 until July 1985 according to Petersen and Whennen was in training from November 1983 until November 1984. (Tran. 528) Vanderhoof's payroll record indicates that he started work on 4-24-84 at $3.50 an hour plus overtime and worked through 1-18-85 when he was given the management position at a weekly salary of $225. 00. The payroll record (Complainant's Exhibit 14) is confusing. It appears he continued as management until August 1985. That is apparently the time Stansberry was rehired as management. (See also R's Exhibit 6 and 7)

7. It is noted that it was customary to have a grounds supervisor at Memorial Lawn. Prior to the termination of supervisor Stansberry in November 1983 and subsequent to the hiring of Vanderhoof as supervisor in January of 1985, there were grounds supervisors. The only time there was no supervision was between those two periods, primarily 1984, when Whennen was doing the supervisory work without the title of supervisor. (Tr. 532)

8. James Petersen testified that in June 1984, Whennen was in training for supervisor. He denied giving her a 30 day trial. He stated that Whennen was never given the tide of supervisor. He stated also that she did perform some of the duties of supervisor. (Tr. 559)

9. Mabel Sammons lived across the street from Memorial Lawn and also worked for the Petersens from February of 1983 through April of 1984. She was also a current employee as of 1986. In the 83- 84 period she was secretary-receptionist full time and hired by Martin. She testified that she witnessed Whennen complain about Woods and Stansberry. She also testified that the grounds were not as well manicured during the time Whennen worked there.

10. Donald Sammons, husband of Mabel, a farmer, testified that Whennen wasn't qualified to maintain equipment and that the grounds were not in very good shape during the time Whennen worked there.

11. Dennis Parrish, who was grounds supervisor at Memorial Lawn for nine years (1966-1975), was requested by J. Petersen in Spring of 1984 to help get ready for Memorial Day. He testified that the two working there were Art Woods and Beth (Whennen) acting as "foreman.' He also testified that the cemetery was in, a "sad state of repairs."

12. In January or February 1984, Whennen stated that she talked with Charles Doggett, contract seller of Memorial Lawn, about the condition of the machinery and Doggett directed her to get it repaired and also hired Fred Steinway to help out. (Transcript 158) Steinway substantiated his hiring by Doggett. (Transcript 196). Doggett agreed except he testified that he obtained Petersen's permission first. (Transcripts 436-37).

13. B. Petersen stated that Whennen was in training for supervision, but never became supervisor. She testified that when an employee was a supervisor, it was noted on their payroll record that they were put on salary.

Petersen testified that Whennen was given a raise to $3.75 an hour when she started training. Art Woods, *who* had worked at Memorial Lawn for many years also received a raise to $3.75 on January 13, 1984, the same date. The additional payroll records: Van Velsor, Thudium, Canny, Nupp, Vanderhoof, Stevens and Ritter, 1984 employers, all received less than Whennen. (R. 6) On January 18, 1965, Vanderhoof, hired as supervisor, was put on salary at $225.00 weekly. (R. 7).

It is noted that Petersen, authorized Whennen to hire Nupp. (Tr. 504) It is also noted that Petersen stated Nupp was terminated a couple of weeks prior to Whennen quitting because the crew was cut down. (Tr. 505) her payroll record indicates that she worked 40 hours the 11/16 week. (R. 6)

14. Whennen testified that in summer of 1984, she accepted applications, interviewed applicants and made the decision to hire Raymond Wiseman, Jerry Ritter and Eugene Cuddyman. This is denied by James Petersen. (Tr. 615-16).

15. James testified that he liked Whennen, was encouraged by her enthusiasm and didn't regret giving her the opportunity. 571) The reason James gave for not making Whennen supervisor was that she needed more improvement.

16. At the time of hearing, Whennen was employed at an AMOCO station and had been so employed since October 1987. She worked 36 hours per week at $3.35 an hour in 1987, she earned $1,160.00; 1985, $1,287.00, and 1986, $1,400.00. (Complainant's Exhibit 19)

**CONCLUSIONS OF LAW:**

1. The issue of wage differential is also an issue based on different treatment. The criteria for a prima facie case of different treatment in the case has been established: a) complainant is a female and, therefore, a member of a protected class, b) she was an employee of Respondent and performed the duties of a supervisor, and c) she was paid less than male supervisors.

On the issue of pay, Respondent paid Stansberry, the prior grounds supervisor, $200.00 a week with no overtime. He was in his second year of employment. He was rehired on 8-27-85 at $5.00 an hour plus overtime as management. Vanderhoof was hired as grounds crew on 4-24-84 at $3.50 an hour. On 1-18-85, he was given the grounds supervisor position for a weekly Wary of $225.00. All other males (and females) received minimum wage of $3.35 an hour except Woods

*who* received a raise from $3.50 to $3.75 on the same day as Whennen received her raise from $3.50 to $3.75 and Woods had over 30 years of experience.

The evidence supports the conclusion that Whennen was serving as grounds supervisor in 1984. Respondents' reasons that she continued on probationary status for a year and hadn't unproved enough are not credible. Based on the belief that Whennen was put on a 30-day probationary period as grounds supervisor and then allowed to continue in that supervisory role until she quit although not given the tide, it is concluded that she should have been paid wages on the same basis as her predecessor supervisor, Stansberry as follows:

First Quarter, 1994, difference between $2,600.00

($200.00 per week, 13 weeks) less $2,423.79 (actual earning) = + $176.21;

Second Quarter, 1984, difference between $2,600.00 and $2,952.15 = - $352.15;

Third Quarter, 1984, difference between $2,600.00 and $2,228.69 = + $371.31;

Fourth Quarter through termination, 1984, difference between $1,600.00 ($200.00 per week, 8 weeks) less $1,229.18 = + $370.82

Total Amount Due for Differential Wages = $566.19

ISSUE IV - WAS COMPLAINANT PLACED ON PART-TIME, THEN LAID OFF WITH NO GUARANTEE OF RETURNING TO HER JOB BECAUSE SHE WAS PREGNANT?.

1. On October 30, 1984, Whennen suspected she was pregnant and went in for tests. The tests were positive. She informed Barbara Petersen, secretary, co-contract purchaser of Memorial Gardens, and wife of Respondent James Petersen, on the same day. Barbara requested information as to delivery date and release to work. Whennen went back to the doctor on November 5th for further check and delivery date was projected to be June 24, 1985. She then called Barbara and informed her of the delivery, date and that she had given the doctor's release to the secretary, Michelle Naomi, in Ottumwa. Michelle was to forward it to Barbara who worked in the Des Moines office. The baby was actually born on May 25, 1985. Barbara told Whennen she didn't know of any pregnancy policies. Whennen continued with her regular duties.

2. Whennen testified that Martin informed her that James Petersen decided Whennen could work through November, be cut to 20 hours per week in December, and be laid off as of January 1 because of her pregnancy.

3. Whennen then called J. Petersen on or about November 12, 1984, to ask if he would reconsider his decision. He told her he would think about it. The next day, Martin called her into the office and told her J. Petersen would not reconsider his decision. Whennen got very upset, went back to the shop, asked one of the crew members to do a task and was told by him that he was no longer taking orders from her and that it was Martin that informed him that she was no longer the supervisor. Whennen called her husband and talked with him about it. She then called

J. Petersen and was told by B. Petersen that he was not in the office. She then asked to talk with Paul Sellers, supervisor of all the cemetery supervisors, and told him that she was quitting. At that point J. Petersen came on the line and brought up an incident which had occurred earlier with Art Woods.

Whennen quit her job on November 13, 1984.

4. Barbara Petersen, also bookkeeper and secretary/treasurer at the 4400 Merle Hay Road business office, was employed by P & S (Planning and Services) from October 1977 until June 1986, now employed by Leopard Enterprises 1, Inc., prior to that change, employed by Hawkeye, Inc. (Tr. 530-531) She testified that Whennen had contacted her about pregnancy in July 1984 and that she did request a medical release at that time. Petersen denies being told that Whennen was not pregnant in July or discussing pregnancy with her in late October or early November and denies requesting or receiving a doctor's release. (Trans. 494-95, 51-7)

5. In June or July 1984, James said he talked with Whennen about pregnancy. He stated that it was his policy to have the pregnant employee work out a leave situation, submit it to him and if it was reasonable, he would approve it. (Tr. 557).

6. On November 12,1984, James said he got on the phone (Paul Sellers had placed the call) and admonished Whennen for the crypt incident which had happened 10 days or two weeks prior to that date. He said his conversation with Whennen regarding pregnancy took place between July and October. James sad he wanted a doctor's release and one was never produced. He asked for a reasonable plan for maternity leave and Whennen kept insisting she could work. He said he wanted her to work however she was comfortable during December at full time pay and January she would work part time light duties and about three weeks after the baby was born she could return to work. (Tr. 571).

7. James Petersen said the last time he talked with Whennen was a week or two before she left and that he did not have a conversation with Martin concerning maternity leave on or about November 12. He admitted that Martin conveyed to Whennen his terms for leave. He also testified that he was continually asked by Whennen to reconsider the leave plan. (Tr. 595)
8. The plan proposed by Petersen was said to have been based on a January birth date, however, the plan would have remained the same except for the starting date if he had known when the baby was due. He also testified that if he had received a doctor's release allowing Whennen to work, she could have done so. (Tr. 606-609).

9. Carl Whennen, husband of Complainant, worked as a sales person for Memorial Lawn for 2-3 months in May-June of 1984. He witnessed Complainant serving in a supervisory capacity. He was also present during Complainant's phone conversation with Paul Sellers. Carl testified as to the reaction of Complainant - angry, upset, crying - when she talked with Sellers. He also testified as to Whennen's change of behavior for the couple months following the time she quit her job. (Transcript 229).

10. Pilcher, Whennen's mother, witnessed Whennen's reaction to her work situation after her pregnancy was reported her depression, crying, worry and lack of responsiveness.

Pilcher also testified that she did see and read the doctor's note allowing Whennen to continue work although pregnant.

11. Art Woods, member of the grounds crew, had a traumatic childhood in institutions and had mental problems. He started working at Memorial Lawn in 1950. Sometime prior to the date Whennen quit her job, Woods was asked to clean a crypt. According to Woods, when he was in the crypt, Whennen and another crew member held his feet. He hollered and Martin told them to quit teasing him. He was scared. Martin reported the incident to J. Petersen. (Transcript p. 330, 338) Whennen denies that she was one of the persons who was teasing Art. (Transcript 293).

12. Barbara Petersen testified that the crypt incident involving Woods occurred a couple of weeks prior to Whennen's leaving and that on November 12, 1984, James Petersen did talk with Whennen about it. James said there was no conversation during that call regarding pregnancy. (Tr. 511-13)

13. Martin testified that Woods, who had suffered sun stroke, was allowed to do whatever he wanted and that they watched over him carefully. He was not required to work only part-time. (Complainant's Exhibit 15A).

**CONCLUSIONS OF LAW:**

1. The relevant law on ISSUE 3, was Complainant placed on part time, then on lay-off, with no guarantee of returning to her job because she was pregnant, is as follows:

> 161 Iowa Admin. Code 58.55 1-2 provides:
>
> (1) A written or unwritten employment policy or practice winch excludes from employment applicants or employees because of pregnancy is in prima facie violation of Chapter 601A, and may be justified only upon showing a business necessity.
>
> (2) Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Whennen thought she was pregnant in July and checked with the Petersens as to their policy on pregnancy leave. The Petersens agreed to this discussion and state that there was no policy but she would need a medical release to continue working. James Petersen testified that it was his

policy to have the pregnant employee work out a leave situation, submit it to him and, if it was reasonable, he would approve it. Both Petersens deny that Whennen informed them when she found out that she wasn't pregnant in July. They deny that she informed them when she was confirmed pregnant on October 10, 1984. They also deny that Whennen ever gave them a medical release. James Petersen denies discussing pregnancy leave with Whennen during the phone conversation November 12, 1984. He stated that he had asked Martin to convey his terms of pregnancy to Whennen. He also admitted that he continually was asked by Whennen to reconsider those plans and that Whennen kept insisting that she could work. Petersen said his terms were to allow Whennen to work however was comfortable at full pay during December and part time light duties in January. Then about three weeks after the baby was born she could return to work.

Whennen testified that Martin had notified her on November 12, 1984, that she would be cut to 20 hours per week in December 1985. She called James Petersen to request that he reconsider. She told him that she had obtained a doctor's release and he said he'd think about it and let her know. The next morning (11-13-84), Martin informed her that Petersen would not reconsider and that there was no guarantee she could return after the baby was born. Whennen also testified that she did get a doctor's release either October 30 or at the follow-up visit with the doctor and gave it to the office personnel to forward to Barbara Petersen.

Martin testified that she told Whennen that the 20 hours part time would begin on January 1, 1985 because of the difficulty of the work for anyone pregnant. This would continue until delivery time approached, then afterwards for an indefinite time. She could then be rehired. Martin also testified that during December Whennen could perform as she felt able to do.

Regardless of which version is believed, the admitted facts support a violation of the Rule cited above. Whennen was required to take a part time position as opposed to continuing full time based on the fact that she was pregnant. Exclusion from employment because of pregnancy is in prima facie violation of Chapter 601A. Such exclusion can be justified only upon a showing of business necessity according to Commission rule. Under federal law, where a case of discrimination is proved by direct evidence, it is incorrect to rely on differential treatment method of proof as set forth in McDonnell Douglas v. Green; Lee v. Russell County Board of Education, [30 EPD §33,022] 684 F.2d 769, 774 (11th Cir. 1982).

The legal standard changes:

> Once an (illegal) motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached absent the presence of that factor.

Id. (citing Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471) (emphasis added); Bell v. Birmingham Linen Service, 32 EPD §33, 831 (11th Cir. 1983). The court in Bibbs v. Block, 749 F.2d 508 (8th Cir. 1984), also held that after a finding of unlawful discrimination is made, the defendant is allowed a further defense in order to limit

relief if it can prove by a preponderance of evidence that the plaintiff would not have been hired even in the absence of the proven discrimination.

Although an attempt was made by Respondents to bring in the seriousness of the incident involving Woods in the crypt, that incident had nothing to do with the requirements of the pregnancy leave nor did the testimony about the condition of the equipment or the cemetery. The evidence does not support liability as a business necessity. The major reason for the requirements of the leave seemed to be a concern for the safety, of the fetus and the mother and yet Respondents did not pursue medical support for their reasoning. Even if Whennen had been pregnant in July, she would have been only about in her 4th month of pregnancy in November. Actually, she was not confirmed as pregnant until early November. Respondents' policy and practice is discriminatory on the basis of sex.

2. 161 Iowa Admin. Code §8.55(2) provides for consistent policy and practice regarding disabilities caused or contributed to by pregnancy and other temporary disabilities. In the case at issue Woods, a male employee, was not treated the same as Whennen. He was allowed to work within his limitations without mandatory part-time work or mandatory leave.

The precedent in the law, as reflected in the most recent statutory change to Chapter 601A (House File 580), puts the responsibility on the pregnant person to give timely notice of leave requested. The employer may require the pregnant employee to provide verification by medical certification stating the employee is not able to perform the work prior to granting a requested leave. But, the employee is not required to provide medical certification that she is able to continue to work. Whennen gave timely notice. She did not request leave. She made it clear she wanted to continue to work. Respondents mandated she take leave. Such action is discriminatory on the basis of sex.

ISSUE V - WAS COMPLAINANT CONSTRUCTIVELY DISCHARGED?

1. Whennen quit her job on November 13, 1984. She said she quit because James Petersen refused to reconsider the pregnancy leave terms conveyed to her by Martin.

2. The Petersens did not terminate Whennen. Bo believed she was doing a good job. (Transcript 543).

3. On or about November 12 or 13th, James Petersen admonished Whennen for the crypt incident. He denies discussing pregnancy leave with her at this time. When Whennen quit, Petersen felt she overreacted, that Whennen felt threatened. He did ask Sellers, the supervisor, to ask Whennen to come back on the job. Sellers did so. The conditions evidently remained the same and Whennen refused to return.

4. When Whennen first started her employment for Respondents, Stansberry was her supervisor. When he was terminated, Whennen took over his duties for approximately a year. After her 30 days probationary period, she was given a raise to $3.75 an hour and allowed to continue doing the supervision, but was never officially given the title by the Petersens. They allege she was still on probation a year later when she quit. At the time that she quit, she felt that management had

already relieved her of her supervisory duties, that Floyd Vanderhoof was making the decisions and overriding her orders. She had hired Vanderhoof several months prior to that time. Shortly after Whennen quit, Vanderhoof was made supervisor.

CONCLUSIONS OF LAW:

1. In its Decision No. 84-1, November 28, 1983, the EEOC decided that the following elements must be present to establish a constructive discharge: (a) a reasonable person in the charging party's position would have found the working conditions intolerable; (b) conduct that constituted a Title VII violation against the charging party created the intolerable working conditions, and (c) the charging party's involuntary resignation resulted from the intolerable working conditions. (EEOC Decisions Para 6939). The EEOC decided that it would not require a showing that the intolerable working conditions were imposed deliberately by the employer, nor that the employer imposed them with the actual intention of having the employee resign. In the case at issue, conduct that constituted a Title VII violation against Whennen created the intolerable working conditions and the resignation did result from the Title VII violation. The question remains whether or not a reasonable person in Whennen's position would have found the working conditions intolerable. It is not enough to establish constructive discharge if the Complainant simply establishes that continued employment would have been under discriminatory conditions. B. Schlei & P. Grossman, Employment Discrimination Law 611-612 (2d ed. 1983). In Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61, 22 FEP 1191 (5th CIR. 1980), the Court stated that Title VII itself accords legal protection to employees who oppose unlawful discrimination, 42 U.S.C. §2000e -3(a). The Court stated it believed that society and the policies underlying Title VII would best be served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships. In the case at issue, management was located in another city. The information on the pregnancy leave was conveyed through a new employee who was not only confused about her responsibilities, but clearly biased against pregnant women working. The lack of guidance by management in conjunction with Complainant's unconfirmed assumptions about her supervisory status resulted in unnecessary confusion. Although the circumstances of the issue of pregnancy leave alone in this case are not sufficient to cause a constructive discharge, the added facts that management allowed Complainant to perform supervisory work for a year without the title or pay and the apparent change in that supervisory status at the same time as mandated pregnancy leave requirements are sufficient to result in constructive discharge. It is concluded that Whennen was constructively discharged on November 13, 1984.

**RULING ON MOTIONS**

MOTION 1 Attorney James R. Cook moved to dismiss; James C. Petersen as a Respondent on the basis that he was not an employer of Complainant, but was an employee of Planning and Service Corporation and Memorial Lawn Cemetery. (Tr. 5)

MOTION 2 Attorney Russell H. Wilson moved for dismissal of the complaint against the Respondent, Planning and Service Corporation, on the basis that Whennen was an employee of Memorial Lawn Cemetery, Inc. and not employed by PIanning and Service Corporation. (Tr. 618)

1. Charles Doggett purchased, from Ethyl Kuhn, Memorial Lawn Cemeteries, Inc. in 1966. In 1975, Doggett formed the Shrine of Memories Funeral Home and Mausoleum, Inc. Both corporations were located in Ottumwa, Iowa. It is noted that Art Woods was an employee when the Kuhns owned Memorial Lawn. The business records for both corporations were located at 4400 Merle Hay Road, the site of the Merle Hay Funeral Home Mausoleum and Chapel Hill Cemetery in Des Moines, Iowa.

On February 2, 1981, Doggett sold both corporations to James Petersen, Barbara Petersen and William V. Allen for $300,000.00. (Complainant's Exhibit 4) Doggett retained possession of the stock as security for payment of the contract. Doggett was listed as the officer and 100 % owner of the stock on both 1983 and 1984 tax returns for Ottumwa Memorial Lawn Cemetery, Inc. (Complainant's Exhibits 10B and 10A) The March 1, 1980 Minutes of Memorial Lawn's stockholder's meeting indicates that James Petersen was elected president. Doggett was not shown to be a member of the Board of Directors. (Respondent's Exhibit 5) Doggett denies being an officer from date of 1981 contract until 1986. (Transcript 450) The tax return for fiscal year June 1980 to May 1981 listed the Petersens as the officers. (Respondent's Exhibit 4) Effective March 1, 1986, by mutual agreement of the parties (signed only by Doggett and James Petersen), the contract purchaser was declared in default and this contract was terminated. (Complainant's Exhibit 6). Under the evidence provided, it is believed that the contract for the sale of Memorial Lawn and Shrine of Memories (Complainant's Exhibit 4) was a paper only contract and not a legitimate transaction.

2. Between February and May of 1972, public stock was issued in Planning and Service Corporation after an organizational meeting on November 11, 1971. There were some 1900 stockholders in about 30 states. The business address for the corporation was 4400 Merle Hay Road, Des Moines, Iowa. Doggett was President and Board member of the corporation. (Complainant's Exhibit 2 and 3)

The contract for sale of Memorial Lawn and Shrine of Memories included a guarantee by Doggett for the debts and liabilities of Planning and Service [P & S1. It is noted in that contract that the purchasers were employed by P & S.

In August 1986, Doggett's real estate holding company, Hawkeye, Inc., bought out all other shareholders for $1.00. Hawkeye, Inc. had 200 shares of stock issued. Doggett was owner of all shares.

Doggett testified that as of the date of Hearing, P & S no longer existed. (Transcript 467). A couple of weeks prior to the January 20 Hearing, the assets and liabilities of what was P & S under Hawkeye, Inc. were transferred to Leopard Enterprises I, Inc. (Trans. p. 473).

3. On the 31st day of March 1980, Hawkeye Machinery Company by C.F. Doggett sold its fiberglass manufacturing operation to a new Iowa corporation, Hawkeye Fiberglass
Limited, by James C. Petersen, Barbara Petersen, and G. R. Johannessen at $12,000.00. Initial stock was 200 shares: 36 shares each to the Petersens, 48 to Johannessen, and 80 to Doggett. The agreement includes the provision that Doggett had agreed to sell to the Petersens and

Johannessen his stock in Memorial Lawn and Shrine of Memories. That sale did not occur until February 1981, almost a year later.

4. In 1986, according to testimony of Doggett, Shrine of Memories took over ownership of Memorial Lawn.

5. A couple of weeks before the Hearing on January 20, 1988, Leopard Enterprises I, Inc. and II. 111, IV were incorporated. Memorial Lawn and Shrine of Memories were sold to III for $10,000.00 and $40,000.00, respectively.

6. Petersen testified that she and her husband, James, received no compensation for work done for Memorial Lawn and Shrine of Memories. They did receive compensation from P & S.

7. James Petersen, Respondent, started working for P & S in July 1977. In 1981, he purchased Memorial Lawn and Shrine of Memories from Doggett. The default of that contract purchase occurred in 1986. Only James signed the termination paper. The other two contract purchasers did not sign the termination agreement.

8. James Petersen testified that over a period of close to two years, they made regular payments of approximately $40,000.00 to Doggett on the sale contract. No documentation of any payments were submitted into evidence. During the time the Petersens were buying Memorial Lawn, James Petersen was president of P & S. (Tr. 585)

9. Doggett served as president of P & S from its inception until 1980 when James Petersen became president. Petersen served until April 14, 1986. The business address of P & S was also 4400 Merle Hay Road. After resigning as president Doggett continued to serve on the board of directors. It is believed that Charles Doggett never relinquished his ownership in Memorial Lawn, Inc.

10. The record was held open for the contract of sale of Memorial Lawn and Shrine of Memories to Leopard Ill. That document was received on February 8, 1988, marked as Respondent's Exhibit 8, and admitted into evidence.

IT IS RULED that James C. Petersen was manager of Memorial Lawn Cemetery during the time at issue and as such is respondent. The motion for dismissal of James C. Petersen is denied.

IT IS FURTHER RULED that Planning and Services Corporation was not directly involved in the action against Complainant and charges against Planning and Services Corporation should be dismissed.

The Hearing Officer reserved ruling on Complainant's Exhibit 18, a release for Whennen to continue work dated May 2, 1985. IT IS RULED that Complainant's Exhibit 18 is admitted subject to the objections since it is relevant to the issue of a back pay award.

It is noted that the record was held open for the transcribed testimony from the tape of telephone conversation with a Dr. Wetrich. The transcription has not been received and IT IS RULED that such transcript with any attached documents shall not be considered as evidence in this case.

The Hearing Officer specifically reserves the right to rule on any award for attorney fees after affidavit is submitted.

**REMEDIES**

1. Section 601A. 15(8), The Code (1985), provides as follows:

> 8. If upon taking into consideration all of the evidence at a hearing, the Commission determines that the Respondent has engaged in a discriminatory or unfair practice, the Commission shall . . . 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 ...

Complainant requests back pay, lost value of insurance benefits, lost value of FICA benefits, front pay, moving expenses and damages for emotional distress.

2. The hearing officer has already concluded there was no discrimination in medical benefits, therefore, the request for lost value of insurance benefits is denied.

3. It has also been concluded that the Commission has no jurisdiction over Whennen's allegations of interference with visitation to her relatives' graves.

4. It was concluded under ISSUE III that Complainant should be awarded the differential in pay in the amount of $566.19.

5. The next issue is the award of constructive discharge pay. Whennen quit her job on November 13, 1984. Her doctor released her to continue work on May 2, 1985. (Complainant's Exhibit 18). She delivered her baby on May 25, 1985. She had two children prior to this birth. In July of 1985, Whennen and her family moved to Houston. Her husband quit his job in Ottumwa because he had a guaranteed job in Houston. She alleges they moved because she could not find a job in Ottumwa. She also admits that even if she had been working, she would have gone to Houston with her husband. Other than Whennen's testimony, there was no evidence submitted as to the extent she tried to get another job. It is noted that the burden of proof on mitigation of damages is on Respondents. She did receive unemployment benefits. (Tr. 183). In Houston, both Whennen and her husband found jobs, but they decided the cost of living was too high so they quit and returned to Ottumwa in October. No evidence was submitted to support the statements on cost of living.

During 1985, Whennen earned $1,287.01. The record does not indicate whether that sum was earned prior to leaving for Houston, while in Houston, after the return from Houston or if it was the unemployment compensation.

Termination of back pay varies. In general, courts have terminated back pay when a Complainant moves away and is no longer available for employment, but may continue if Complainant actively seeks employment after leaving area. Easter v. Jeep Corp., 534 F. Supp. 515 (N.D. Ohio 1982). In this case Whennen did seek employment after the move and did find work. Termination of back pay also occurs when there is termination or voluntary quit from a subsequent employer unless the reasons are reasonable. EEOC v. Riss Int'l. Corp., 35 FEP 423 (W.D. Mo. 1982). In the case at issue, the Whennens said they quit their jobs in Houston because the cost of living was too high when they balanced expenses, including child care, with their income. The Hearing Officer is convinced that there were additional reasons for the move to Houston that were unrelated to the constructive discharge. The Whennens had relatives in Houston. Beth admitted she would quit her job to follow her husband. She would have done so when he earlier found a job in North Carolina and in fact did give notice, but that job fell through so she stayed with Memorial Lawn. She followed him again to Fort Dodge subsequent to the return from Houston. It is concluded that back pay should cease as of July 1985. All earnings between November 14, 1984 and July 1, 1985 should be deducted including unemployment compensation. A reasonable number (2-4) weeks should be deducted for maternity leave. No moving expense should be allowed. "Would have" earnings should be based on a salary of $225.00 a week. Counsel for the parties shall submit a stipulated back pay award based on these conclusions within 15 days of the issuance of this proposed decision.

Prejudgment interest at 10 % per annum. should be awarded on the amount of both back pay awards.

6. Complainant also requests an award of front pay. Front pay has been deemed appropriate in civil rights actions. The Iowa Civil Rights Commission has considered front pay awards in those cases in which it would be a hardship to find employment, i.e., age discrimination and discrimination against highly trained individuals, or where seniority rights are lost. The job under consideration is none of those. Neither did Whennen seek reinstatement. Qualifications for grounds crew were minimal and pay was at minimum wage. The supervisor position was unskilled and required little more than knowledge of how to run lawn mowers and back hoes. There is no evidence that Whennen applied for and was denied similar supervisor employment. The request for front pay is denied.

7. Complainant also requests damages for emotional distress. The Iowa Supreme Court in Chauffeurs, Teamsters and Helpers Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W. 2d 375 (Iowa 1996), upheld the Commission's authority to award emotional distress damages. A requirement for such an award is substantial evidence to show that the discriminatory sets were the basis for and connected with the emotional distress suffered by a complainant.

In Dacy v. Burlington Northern Railroad, Iowa Civil Rights Commission Case Reports (1984-86), 24-25, the Commission set forth guidelines to assist the trier of fact in weighing the evidence presented. Neither the categories nor the numerical scores are determinative. Any award must be based on the evidence presented in each case. The categories are not exclusive

and can be used as guidelines with flexibility in considering pertinent facts. These guidelines are as follows:

CATEGORY I - EMPLOYER MOTIVATION

5- malicious acts, reckless disregard for results;

3 - deliberate acts to harass and exclude based solely on membership in protected class;

1 - Intentional acts of hostility, mixed with insensitivity, and incompetence.

CATEGORY II - SEVERITY OF DISTRESS

5 - Severe emotional distress, traumatic (e.g., inability to work, relate to family, friends);

3 - Serious emotional distress (e.g., hurt, anger, difficulty in relating to others);

1 - Some emotional distress (e.g., anger, frustration, hurt pride).

CATEGORY Ill - LENGTH OF EFFECTS

5 - Long term, therapy required;

3 - Recovery in process, therapy would help, but not required;

1 - Temporary, no therapy necessary.

CATEGORY IV - COMPLAINANT STATUS

5 - Innocent in acts, vulnerable because of prior related stress;

3 - Innocent in acts, no prior related stress;

1 - Early participant in acts, then rejection made known.

Based on the above guidelines and the facts of this case, Whennen would be rated a The acts of Respondents were intentional acts of insensitivity to the treatment of Whennen in regard to her supervisory role and incompetence in understanding and implementing the law relating to pregnancy. Whennen felt that it was unfair that she wasn't allowed supervisory status and pay because she is female, nor was it fair for them to take her job away just because she was going to have a baby. She was angry, upset and frustrated. She was concerned about the economic problems not working full time would cause.

Whennen did not seek medical or psychological help for her emotional distress.

The added factor of the reprimand over the Woods incident clutters the participatory status of Complainant in the acts. The Hearing Officer believes that Whennen was a participant in that incident. There is no evidence that she attempted to resolve the supervisory status, but was willing to continue doing the work without the official title and weekly pay. To say that the management style of the Petersens was loose is an understatement. The fact that Whennen walked off the job in the middle of a funeral service because of her anger causes this Hearing Officer some concern. It is admitted that the situation of Whennen's employment had deteriorated and some emotional distress was suffered. Even with the above guidelines, any award is more subjective than objective. Based on the evidence and demeanor of the witnesses, it is concluded that Whennen should be awarded $1,000.00 as damages from each Respondent for emotional distress.

**RECOMMENDED DECISION AND ORDER**

1. The charges against Planning and Services Corporation are dismissed.

2. Memorial Lawn Cemetery, Inc. and James C. Petersen violated lowa, Code section 601A.6, in differential pay, mandatory pregnancy leave, and constructive discharge of Beth Whennen.

3. IT IS ORDERED that Memorial Lawn Cemetery, Inc. cease and desist from unfair and discriminatory practices.

4. IT IS FURTHER ORDERED that Memorial Lawn Cemetery, Inc. submit to the Iowa Civil Rights Commission a leave policy which conforms with Iowa Code section 601A.6, as amended, within 60 days of issuance of the final order in this case.

5. IT IS FURTHER ORDERED that Memorial Lawn Cemetery, Inc. and James C. Petersen pay Beth Whennen $566.19 as pay differential plus 10 % interest per annum from date of filing the complaint (3-4-85) until paid in full.

6. IT IS FURTHER ORDERED that Memorial Lawn Cemetery, Inc. and James C. Petersen pay Beth Whennen back pay at $225.00 per week beginning on November 14, 1984 through June 30, 1985, less interim earnings to include unemployment compensation and as stipulated by counsel for the parties. In the event, counsel fail to stipulate as ordered, payment shall be as recommended by the Hearing Officer or Commission. The back pay award shall be plus 10% interest per annum from November 14, 1984, until paid in full.

7. IT IS FURTHER ORDERED that Memorial Lawn Cemetery, Inc. and James C. Petersen each pay Beth Whennen $1,000.00 for emotional distress damages, plus 10% interest per annum from November 14, 1984 until paid in full.

Signed this 4th day of May 1988.

IONE G. SHADDUCK
Hearing Officer

**PROPOSED DECISION ON ATTORNEY FEES**

ON July 15, 1988, at its regular meeting, the Iowa Civil Rights Commission remanded the issue of attorney fees in the above- captioned case to the Hearing Officer. After reviewing the Motion For Award of Attorney's Fees filed on June 15, 1988, and the Final Order of the Commission, the following recommendation is submitted to the Commissioners.

In Ayala v. Center Line, Inc., 415 N.W. 2d 603, 605 (Iowa 1987), the Iowa Supreme Court stated that attorney fees are separate and distinct from the underlying civil rights violation and are incurred only to remedy the harm already done. Therefore, an award of attorney fees is more in the nature of an equitable remedy than an award of actual damages. The assessment of attorney fees, like court costs, cannot be done until liability has been established. In the case at issue, liability has been established in 3 of the 5 issues presented at the Hearing.

Attorney Barrett claims he rendered Complainant Whennen 67.30 hours of professional services and that his legal assistant rendered 18.70 hours in preparation of this case. He requests a rate of $120.00 per hour for his services and $40.00 for the services of his legal assistant.

It is recommended that no award be made for time spent by the legal assistant since most of the services can be categorized as secretarial and pay for such work is generally part of the overhead of a law firm.

The number of hours requested for Attorney Barrett (87.30) should be, reduced as follows: 1.80 hours for reply brief untimely filed; 6.50 hours for post hearing brief untimely filed; 12 hours for excessive time to produce brief-, and 2 hours approximate duplicate trial time with Assistant Attorney General. Of the remaining hours, 65, 2.40 hours occurred prior to filing the complaint and 11.5 hours occurred prior to issuance of the Notice of Hearing. In Dacy v. Burlington Northern Railroad, IOWA CIVIL RIGHTS CASE REPORTS, 1984-86, page 25, this Commission ruled that only services rendered after the Notice of Hearing has been issued would be considered. Therefore, only 51. 10 hours will be considered for this award of attorney fees.

To determine whether or not a party prevailed for purposes of establishing entitlement to attorney's fee, consideration is given to the success on the claims made. In this case, there were five issues. Complainant was successful on three of those five. Therefore, she should be awarded fees for 3/5 or the time spent, a total of 30.66 hours. UVIEDO v. STEVES SASH and DOOR CO., 753 F. 2d 369, 35 EMPL. PRAC. DEC. (CCH) 135, 024 (5th CIR. 1985); HENSLEY v. ECKERHARD, 461 U.S. 424,32 EMPL. PRAC. DEC. (CCH) 233, 618 (1983).

An hourly rate of $120.00 has been requested. A lesser hourly figure is recommended specifically based on the numerous times the Hearing Officer was required to caution and reprimand Attorneys Barrett and Cook for nonprofessional behavior before the Hearing Officer. [See Transcript pages 150-152, I54-155, 186- 187, 190, 206, 223, 228-229, 263-264, 313-316, 337, 353-354 etc.) It is recommended that $60.00 an hour be used under these circumstances.

A total of 30.66 hours at $60.00 an hour results in award of attorney's fee of $1,839.60.

A hearing before the Commissioners may be requested on this proposed decision. This proposed decision will be considered at 9:00 A.M., August 26, 1988, at the Iowa Civil Rights Commission, 211 East Maple Street, Des Moines, Iowa.

IT IS ORDERED that Memorial Lawn Cemetery, Inc. and James C. Petersen pay Beth Whennen $1,839.60, for attorney's fee.

Signed this 22nd day of July 1988.

IONE G. SHADDUCK,
Administrative Law Judge

**FINAL ORDER**

ON July 15, 1988, at its regular meeting, the Iowa Civil Rights Commission reviewed the Proposed Decision of the Hearing Officer which was issued on May 4, 1988, and adopted that Proposed Decision as modified below:

Item 7 under Remedies is modified by changing the last sentence to read:

> "Based on the evidence of the witnesses, it is concluded that Whennen should not be awarded damages for emotional distress."

**DECISION AND ORDER**

1. The charges against Planning and Services Corporation are dismissed.

2. Memorial Lawn Cemetery, Inc. and James C. Petersen violated Iowa Code section 601A.6, in differential pay, mandatory pregnancy leave, and constructive discharge of Beth Whennen.

3. IT IS ORDERED that Memorial Lawn Cemetery, Inc. cease and desist from unfair and discriminatory practices.

4. IT IS FURTHER ORDERED that Memorial I-awn Cemetery, Inc. submit to the Iowa Civil Rights Commission a leave policy which conforms with Iowa Code section 601A.6, as amended, within 60 days of issuance of the final order in this case.

5. IT IS FURTHER ORDERED that Memorial Lawn Cemetery, Inc. and James C. Petersen pay Beth Whennen $566.19 as pay differential plus 10% interest per annum. from date of filing the complaint (3-4-85) until paid in full.

6. IT IS FURTHER ORDERED that Memorial Lawn Cemetery, Inc. and James C. Petersen pay Beth Whennen back pay at $225.00 per week beginning on November 14, 1984 through June 30, 1985, (32 weeks at $225.00 = $7,200.00), less interim earnings (NONE), less unemployment compensation ($2,216.73), less pregnancy leave of 4 weeks (4 weeks at $225.00 = $900.00) for a total back pay award of $4,083.27, plus 10% per annum interest from November 14, 1984, until

paid in full. [NOTE: Stipulation ordered in proposed decision was not received, therefore, this order conforms with proposed order]

7. IT IS FURTHER ORDERED that the issue of award of attorney fees is remanded to the Hearing Officer for recommendation as a separate order.

Signed this 28th day of July 1988.

RUBY ABEBE, Chair
IOWA CIVIL RIGHTS COMMISSION