BEFORE THE IOWA CIVIL RIGHTS COMMISSION

CP # 03-88-17384

SANDRA J. WHALEY, Complainant,

and

IOWA CIVIL RIGHTS COMMISSION,
v.

CITY OF DES MOINES, Respondent.

SUMMARY

This matter came before the Iowa Civil Rights Commission on the Complaint, alleging discrimination in employment on the basis of sex, filed by Sandra Whaley against the Respondent City of Des Moines.

Complainant Whaley alleges that the Respondent failed to hire her for the position of Recreation Supervisor because of her sex.

A public hearing on this complaint was held on January 11-12, 1994 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the offices of the Iowa Civil Rights Commission in Des Moines, Iowa. The Respondent was represented by Nelda Barrow Mickle, City Solicitor. The Iowa Civil Rights Commission was represented by Rick Autry, Assistant Attorney General. The Complainant, Sandra Whaley, was not represented by counsel.
The Respondent's Brief was received on April 21, 1994. The Commission's Brief was received on April 19, 1994.

Complainant Whaley and the Commission proved her allegations of discrimination in employment because of her sex through direct and circumstantial evidence of such discrimination. This evidence was considered and rulings made under three different orders and allocations of proof. Although discrimination need be established under only one of these methods of proof, discrimination was established by all three methods.

The first (direct evidence) was based on (a) the presence of sufficient credible direct evidence in the record to establish sex discrimination and (b) the failure of Respondent to actually plead any affirmative defense responsive to such direct evidence.

The second (mixed motive) was based on (a) the presence of sufficient credible direct evidence in the record to establish that sex discrimination was a factor in the hiring process and (b) the examination of evidence relating to Respondent's reasons to ascertain if Respondent had proven by a preponderance of the evidence that the Complainant would not have been hired even if the hiring process had been non-discriminatory.

The third (circumstantial evidence) was based on (a) the complainant's establishment of a prima facie case of sex discrimination, (b) Respondent's production of evidence setting forth legitimate nondiscriminatory reasons for its actions, and (c) proof that these reasons were pretexts for discrimination through (1) the combination of (i) the falsity of the articulated reasons and (ii) the inference of discrimination remaining from the prima facie case and (2) direct evidence that discrimination was the true motive for Respondent's actions.

Remedies awarded include $18,789.72 in back pay, $5522.75 in deferred compensation, $10,000 in emotional distress damages, front pay and front deferred compensation.

FINDINGS OF FACT:

I. JURISDICTIONAL AND PROCEDURAL FACTS:

A. Subject Matter Jurisdiction:

1. "The City is an Iowa Municipality which, as a public employer, is subject to the provisions of Chapter 216, Code of Iowa, prohibiting discrimination on the basis of sex in employment." (Stipulation of Facts, hereinafter "Stip.," No. 1).

2. Complainant Whaley alleges that Respondent failed to hire her for the position of Recreation Supervisor because of her sex. (Stip. No. 4; Notice of Hearing-Complaint). The particulars of Complainant's complaint were:

> I believe my sex was a factor in the following incident:
>
> 1) On January 11, 1988, I found out that a male was selected for the recreation supervisor position. I was told by Mr. Robert Eldredge, superintendent of recreation, that they needed a strong, male supervisor.

(Stip. No. 5). This is a sufficient allegation to bring the complaint within the subject matter jurisdiction of the Commission.

B. Timeliness:

3. The parties have stipulated that Complainant Whaley timely filed, on March 1, 1988, a civil rights complaint claiming she had been discriminated against on the basis of her sex in violation of Chapter 601A (now Chapter 216), Code of Iowa, in the City's selection of a male for the recreation supervisor position." (Stip. No. 4).

C. Amendment of Notice of Hearing:

4. At hearing, the parties stipulated to an amendment of the Notice of Hearing so that the Respondent would be properly named as the "City of Des Moines." (Tr. at 4).

D. Jurisdictional Prerequisites:

5. The Complaint was investigated. (Stip. Nos. 7-10; Notice of Hearing). After probable cause of sex discrimination in employment was found, conciliation was attempted and failed. (Stip. No. 11; Notice of Hearing). Notice of Hearing was issued on October 13, 1993. (Notice of Hearing).

II. BACKGROUND:

A. Background of Complainant:

6. Complainant Sandra Whaley is employed by the Park and Recreation Department of the City of Des Moines (hereinafter "Department"). (Stip. No. 2, 3, 59). The history of Whaley's career with the Department is summarized in the Stipulations of Fact:

> 47. Complainant commenced working for the . . . Department on a part-time basis as a Recreation Leader at Bates Park in 1968 and Stone Park in 1969. In 1970, Complainant commenced working for the City on a part-time basis as a Recreation Specialist.
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> 48. Complainant was hired by Mr. [Robert]Eldredge into a full-time permanent Recreation Supervisor position in October 1974.
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> 49. Some seventeen months later a reorganization of the . . . Department by the City Manager resulted in the elimination of Complainant's Recreation Supervisor position and Complainant had to vacate this position.
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> 50. Complainant was allowed to transfer to a Community Center Supervisor position in order to retain City employment; her transfer was effective mid-February 1976 with her pay frozen at the higher level she had been receiving as a Recreation Supervisor until the pay of the Community Supervisor position exceeded such salary amount.
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> . . .
>
> 57. On June 11, 1990, Complainant was selected to serve in a temporary upgrade as a Senior Administrative Aide in the Department.
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> 58. After being certified by the CSC [Civil Service Commission] for the Senior Administrative Aide position, Complainant was selected from the certified list and was appointed to the position on October 15, 1990.
>
> 59. Complainant remains presently employed in the Senior Administrative Aide position.

(Stip. Nos. 47-50, 57-59). For reasons stated in the Conclusions of Law, all stipulations of fact are binding on the Commission in its adjudicative capacity. See Conclusion of Law No. 4.

B. Complainant's Prior Applications for Recreation Supervisor Openings:

7. The parties stipulated to Complainant's attempts to be appointed to the Recreation Supervisor position before 1987:

> 51. In 1979 Complainant applied for and was included among the candidates certified by the CSC for the Recreation Supervisor position. CSC records show Complainant waived appointment to the position [on] March 13, 1979. [A]nother candidate, Jennifer Johnson (now Marcouiller) was appointed to the position [on] April 9, 1979. On October 1, 1979, another candidate from the list, Cheryl Fitzgerald, was appointed to the Recreation Supervisor position.
>
> 52. In 1980 Complainant applied for and was included among the candidates certified by the CSC for the Recreation Supervisor position. Another candidate from the certified list, William Beverly, was appointed June 1, 1980. Complainant raised no challenge to the appointment of a male to the position. On August 25, 1980, another candidate from the certified list, Connie Love, was appointed to the Recreation Supervisor position.

C. Background of Respondent:

8.

> 2. The . . . Department . . . is a department within the City of Des Moines whose work force is made up of several job classifications including those of Recreation Supervisor, Community Center Supervisor, and Senior Administrative Aide.

(Stip. No. 2).

9. "At the time of the challenged selection for the Recreation Supervisor position (late 1987 and early 1988), the Department had three such positions." (Stip. No. 61).

10. Although recreation supervisors all have the same job title, they have differing responsibilities. (Tr. at 10). One position was held by Mr. Bill Beverly. He was, and still is, in charge of adult athletics. His main duties are to be in charge of leagues for adults in the community, such as basketball, softball, flag football and volleyball. (Stip. No. 62; Tr. at 134).

11. The second position was held by Jennifer Marcouiller, who was "responsible for the Department's leisure arts programs, music, cultural programs and special events." The responsibilities of the vacant third position, formerly occupied by Christine Larsen who had been promoted, would include "direct responsibility for the operation of all City community centers, the City's special population program (the program for physically and mentally handicapped), and the City's bus trips programs." (Stip. Nos. 62-63).

12. A significant change in the duties of the vacant recreation supervisor position came about with this opening. Prior to late 1987, supervision of the City community centers was the

responsibility of Recreation Superintendent Robert Eldredge. Due to an overload of work, Eldredge made the decision to transfer these supervision responsibilities to the person selected to fill the vacant position. (Tr. at 60, 220-22, 251-52).

13. As noted in the Stipulation of Facts:

> 64. The City's five community center facilities are multi-million dollar facilities funded in large part by federal funds in the target (impoverished) areas of the City. Control of the environment both inside and outside of the centers is essential. If the Recreation Supervisor was away, the backup for such employee with respect to the Community Centers was Mr. Eldredge himself.

(Stip. No. 64)(emphasis added).

14. Part of these supervision responsibilities included the general responsibility for security of the centers. There were various security problems at the centers and other park facilities. (Stip. No. 64; Tr. at 140-41, 157, 222- 25, 262-63, 321-22). These responsibilities included responding to community center security system alarms. Eldredge had set up a procedure whereby he was the first person called by the alarm company or police department in the event of an alarm. He initially responded to all calls at the centers. (Tr. at 222-25). At times, Eldredge did not wait for the police to arrive and entered the Center alone. (Tr. at 249). This responsibility went to the newly hired Recreation Supervisor after January of 1988. (Tr. at 228, 252).

15. The Model Cities and Logan Community Centers were considered by the Department staff to be the most dangerous or crime prone centers. (Tr. at 9, 140-41, 157).

D. Hiring Procedures:

16. The Respondent's procedures for filling vacant Recreation Supervisor and other positions and the CSC's process for certifying candidates for such positions are described in the Stipulation of Facts:

> 14. The Recreation Supervisor position is an entrance level civil service position. [T]his means it is open to application from both those City employees and those members of the general public who meet the minimum qualifications for the job.
>
> 15. The City Council sets the minimum qualifications in the job descriptions which it approves and adopts by formal resolution for each job classification.
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> 16. When a vacancy occurs in a City department, a requisition is prepared by the Department and submitted to the Research and Budget Office and to the City Manager requesting budgetary authorization to fill the vacancy.
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> 17. Once the authorization is granted by the City Manager, the requisition is forwarded to the CSC which issues an examination announcement. [This

announcement] includes the data from the job description, identifies the vacancy to be filled, the dates of the examination and sets the application deadline.

18. The testing culminates in the CSC determining which applicants are the best qualified candidates and certifying the list of the top ten most qualified candidates in order of their ranking to the City Council. Candidates tied for tenth place are included on the list.

19. The vacancy must then be filled from the certified list but the City Manager may select anyone from the list for appointment without regard to the CSC's ranking of candidates.

20. The Department may interview the candidates upon the certified list to assist it in determining which candidate is best suited to perform the work of the particular vacancy to be filled.

21. The Department Director and his or her senior staff recommend to the City Manager the candidate deemed the most qualified to perform the work of the particular vacancy. The City Manager is the appointing authority.

(Stip. No. 14-21).

17. The member of the senior staff who made recommendations for Recreation Supervisor positions was Robert Eldredge, the Superintendent of Recreation for the City of Des Moines. "All certified candidates were interviewed by Recreation Superintendent Robert Eldredge before the challenged hiring decision for Recreation Supervisor was made." (Stip. No. 65). Eldredge received an eligible list where Complainant Whaley was ranked number 1 and Jack Carey, the applicant hired, was ranked number 7 by the Civil Service Commission. (CP. EX. # 6; Tr. at 218-19). As a practical matter, Mr. Eldredge made all the "appointments to the Recreation Supervisor position" from the time of his hire as Superintendent on July 15, 1974 to his retirement on October 27, 1989. (Stip. Nos. 56; 75; Tr. at 195). As stated in the Stipulations of Fact, "During his tenure of more than fifteen years as the Recreation Superintendent, Mr. Eldredge appointed the following Recreation Supervisors." [This statement is followed by a list of all Recreation Supervisors appointed during Mr. Eldredge's employment]. (Stip. No. 75). While Mr. Eldredge technically made the recommendations for such appointments, all of his recommendations were approved. (Tr. at 219-220, 254-55).

E. In 1987, Complainant, a Member of a Protected Class, Applied, Was Qualified, Was Rejected for the Recreation Supervisor Position Which Was Open, and Had At Least Similar Qualifications to the Male Hired:

18. The specific Recreation Supervisor opening which is the subject this complaint came about in 1987. In late October of 1987, while employed as a Community Center Supervisor, Complainant Whaley, a female, "applied for and was certified by the Civil Service Commission . . . for appointment to the Recreation Supervisor Position." (Stip. Nos. 3, 53). Complainant Whaley was not selected for that position. (Stip. No. 4). Jack Carey, a male, was hired for the

position in February of 1988. (Stip. Nos. 54, 75; Tr. at 243, 249). "Subsequent to Jack Carey's appointment as Recreation Supervisor from the December 7, 1987 certified list, no further appointments were made from the . . . list before it expired [In] December 1988." (Stip. No. 54).

19. Respondent has admitted on brief that Complainant Whaley "established her prima facie case". (City's Post- Hearing Brief at 9). Respondent admitted, among other facts asserted on brief, that Complainant Whaley, (1) "belongs to a protected class under the Iowa Civil Rights Act," (2) "applied for and was qualified to be a Recreation Supervisor," a position for which the City was seeking applicants, (3) "was not selected to fill the position" and (4) had at least similar qualifications to a "non-protected class status applicant [who] . . . was hired." (City's Brief at 6, 9). For reasons stated in the conclusions of law, these admissions of fact are binding on the Commission. See Conclusion of Law No. 5.

III. CREDIBLE DIRECT EVIDENCE IN THE RECORD DEMONSTRATES THAT COMPLAINANT WHALEY WAS NOT HIRED, AND WAS INFORMED SHE WAS NOT HIRED, FOR THE POSITION OF RECREATION SUPERVISOR DUE TO HER SEX:

A. Direct Evidence Provided By the Testimony of Bill Beverly:

1. Direct Evidence That Complainant Whaley Was Not Hired for the Challenged 1987 Recreation Supervisor Position Because a Male Was Preferred:

20. Bill Beverly is a male recreation supervisor who was appointed to that position by Mr. Eldredge in June of 1980. (Stip. Nos. 52, 75).

21. Mr. Beverly credibly testified that the following statement, written, signed and dated by him on March 28, 1988, was true and accurate:

> On at least two occasions in either late December 1987 or early January 1988 Recreation Superintendent Robert C. Eldredge made this statement "because of problems at Model City Community Center and Logan Community Center: I want to hire a male for the Recreation Supervisor position."

(CP. EX. # 13{emphasis added}; Tr. at 144, 151-52). It should be noted that, although this statement appears to be notarized, the parties have stipulated it was not sworn to before a notary public. (CP. EX. # 13; Tr. at 158-59).

22. At the time of hearing, Mr. Beverly could "vividly" recall one specific instance where this statement concerning the challenged position was made by Mr. Eldredge in the presence of him and Ms. Jennifer Marcouiller, a female Recreation Supervisor. (Stip. No. 75; Tr. at 144-45, 152-53, 155).

2. Direct Evidence That Bill Beverly Was Hired for the 1980 Recreation Supervisor Position Because a Male Was Preferred:

23. Mr. Beverly was hired on June 2, 1980. (Stip. No. 75). Mr. Beverly also recalled that, after he was hired for his Recreation Supervisor position, he was informed by Mr. Eldredge that "because of the volatility of my position in adult athletics and some of the things that you run into, that he was looking, he thought at that time, for a male for the position. This was actually after I was hired, because he was concerned about placing females out in those situations." (Tr. at 144-45). This evidence is significant because it provides a prior example of this concern for the safety of female employees playing a role in the hiring decision for a Recreation Supervisor position.

3. Direct Evidence That Only Male Athletic League Play Was Scheduled at Good Park Because of Concern For the Safety of Female Participants:

24. Mr. Beverly and Mr. Eldredge's testimony also indicated that, while there was a policy of minimizing scheduling of all league play at Good Park due to crime concerns, there was also a policy of scheduling only all-male leagues at the Park due to these concerns. (Tr. at 141-42, 252-53). This testimony is significant only because these underlying concerns are similar to those which played a role in the 1987 Recreation Supervisor hiring. While Mr. Eldredge's later testimony downplays or tries to explain away this aspect, both his and Mr. Beverly's testimony acknowledges that the policy was that no female or coed league play was scheduled at Good Park. (Tr. at 141-42, 252-53, 260, 262-64).

25.

> Q. (By Autry): Okay. What about Good Park?
>
> A. (By Beverly): Good Park. It's perceived, I would say, by the white community more than anything else that that is a very rough area, and we--for example, at . . . Good Park, we have the softball diamond there, and we schedule a minimal amount of games because of the perception that it is rough and there is a lot of crime there.
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> Q. (By Autry): Do you schedule any female league games there?
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> A. (By Beverly): No.
>
> Q. (By Autry): Any co-ed league games there?
> A. (By Beverly): No.
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> Q. (By Autry): So you only schedule male games there?
>
> A. (By Beverly): Only schedule male games there.
>
> Q. (By Autry): When did that policy start?
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> A. (By Beverly): To be honest with you, I don't know. We've done it for years that way because of that perception.

(Tr. at 141-42).

> Q. (By Autry): Did you hear Bill Beverly talk about the policy out at Good Park, that they don't put women sports leagues and they don't put co-ed sports leagues in there?
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> A. (By Eldredge): That's right.
>
> Q. (By Autry): Were you aware of that policy?
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> A. (By Eldredge): Yes.

(Tr. at 252-53)(emphasis added).

B. Bill Beverly's Testimony Is Credible:

1. Reasons Why Beverly's Testimony Is Credible:

26. For a variety of reasons, it is clear that Bill Beverly's testimony is credible. The first, and most important, fact which results in this assessment is that Bill Beverly, unlike either Eldredge or Whaley, is a neutral witness who has neither reputation or monetary gain at stake. Mr. Beverly felt he had been well treated by the Department during his thirteen and a half years of employment. He had no grudge against either Mr. Eldredge or the City of Des Moines. (Tr. at 146). There is no evidence in the record indicating he has anything to gain by fabricating Superintendent Eldredge's statements on preferring males, due to safety concerns, for both the challenged 1987 Recreation Supervisor position sought by Complainant Whaley and for the Recreation Supervisor position which Mr. Beverly filled in 1980. Indeed, there is no evidence of any motivation for Mr. Beverly to do anything but tell the truth.

27. Second, Mr. Beverly has a vivid, clear memory of at least one occasion when Mr. Eldredge made the remark about the need for a male for the challenged position due to the problems at Model Cities and Logan community centers. (Tr. at 155).

28. Third, Mr. Beverly's testimony is completely consistent with the statement he signed on March 28, 1988. (CP. EX. # 13; Tr. at 144, 151-52). His memory of the second occasion when Eldredge made this statement concerning the challenged position was less clear at hearing, however, than it was in 1988. (Tr. at 153-55).

29. Fourth, Mr. Beverly's demeanor was that of a credible witness. He gave calm, clear, and relaxed testimony.

30. Fifth, Mr. Beverly's testimony is both internally consistent and consistent with the greater weight of the credible evidence, including the testimony of Complainant Whaley about a similar statement by Mr. Eldredge, which shall be discussed later. See Findings of Fact Nos. 38-41.

2. Respondent's Arguments Challenging the Credibility of Mr. Beverly's Testimony Are Invalid:

31. On brief, the Respondent suggested several reasons why Mr. Beverly's testimony should not be believed. Respondent seems to either suggest that Beverly was referring only to the comment made by Eldredge shortly after the time Beverly was hired in 1980 or to emphasize the length of time between that comment and the challenged position. (City's Brief at 19-21). However, Beverly's testimony indicates that he had a clear recollection of one of the two occasions where Eldredge made similar statements in 1987 or 1988 about the position which is the subject of Complainant Whaley's complaint. (CP. EX. # 13; Tr. at 144-45). In addition, he had a clear recollection of the statement made shortly after his hire. (Tr. at 144-45).

32. The Respondent notes that "Mr. Beverly had no explanation for the appearance of the notary stamp and signature on Notary Paul D. Walley upon his written statement. He testified he wrote the 3/28/88 statement at Complainant's request in his own office and not in the presence of Walley." (City's Brief at 21 [citing Tr. at 151]). All of this testimony seems to be truthful, however, particularly in light of the stipulation, entered into by both Respondent and the Commission, that the statement was not signed in the presence of a notary. (Tr. at 158-59). The record does not reveal how the presence of such a signature and stamp on this document came about. Truthful testimony by a witness to the effect that he does not know how a notary stamp and signature subsequently appeared on a statement handwritten by him does not reflect adversely on the credibility of the witness.

33. The Respondent also asserts that Beverly's testimony, that Eldredge made one of the statements concerning the challenged position at a meeting involving Mr. Beverly, Mr. Eldredge, and Ms. Marcouiller, where he was asked to give input on who to select for the position, is effectively contradicted by the testimony of both Eldredge and Marcouiller. (City's Brief at 21-22[citing Tr. at 147, 155, 244-45, 261-62, 320-21]).

34. Ms. Marcouiller did testify that Eldredge did not ask for her input on who should be selected for the challenged position. (Tr. at 320). However, her response, to the specific question of whether she was present at a meeting with Mr. Beverly and Mr. Eldredge where Eldredge made the statement that he wanted to hire a male for the position, was that "You know, I don't recollect that at all. I honestly do not recollect that conversation or that meeting." (Tr. at 321)(emphasis added).

35. Testimony that a witness does not recollect or remember a meeting is not the same as testimony wherein the witness denies that such a meeting occurred. Ms. Marcouiller's testimony leaves open the possibility that this meeting did occur, although she does not now remember it. If she does not remember whether or not such a meeting occurred, it is obvious she would not recall being asked to give input on the hire of a recreation supervisor at that meeting. When her failure to remember is contrasted with Mr. Beverly's vivid recollection of the meeting, his testimony appears to be the most credible.

36. Other circumstances also indicate that Beverly's version of this event is more credible. Eldredge occasionally discussed the performance of community center supervisors, including Complainant Whaley and Sue Patterson, with Beverly. (Tr. at 140). Marcouiller had interned

with Jack Carey. (Stip. at 69). Since Whaley, Patterson, and Carey were all candidates for the Recreation Supervisor position, it is plausible that Eldredge did discuss the selection for that position with Marcouiller and Beverly. (Stip. Nos. 3, 4, 53; CP. EX. # 6; Tr. at 64-65).

37. Finally, Respondent speculates that, with respect to the policy at Good Park, Mr. Beverly "projected his own mind set upon the circumstances at hand." (City's Brief at 25[citing Tr. at 156-57]). Respondent bases this alleged "projection" upon the fears which it specifically elicited from Beverly on cross-examination, i.e that he would have concerns for the safety of his own wife if she were at either the Model City Community Center or Logan Community Center, neither of which is Good Park. (Tr. at 156-57). In light of the greater weight of the evidence and other factors previously discussed, there is no reason to believe that any of Mr. Beverly's testimony concerning either statements made by Mr. Eldredge or the policy at Good Park is the result of any such "projection." Mr. Beverly's testimony is that of a highly credible, neutral witness.

C. Direct Evidence Provided By the Testimony of Complainant Whaley:

38. Complainant Whaley credibly testified that, when she asked Robert Eldredge why Jack Carey was hired over her for the recreation supervisor position, Eldredge told her: "You don't lack in anything. There's no problem there, but the reason I chose Jack Carey instead of you is because of the problems we were having at Logan and Model Cities. I felt like in this position we need a strong male supervisor." (Tr. at 69)(emphasis added).

D. Complainant Whaley's Testimony Is Credible:

39. Ms. Whaley's testimony is highly credible for a number of reasons. First, this testimony is consistent with the language of her complaint filed on March 8, 1988. (CP. EX. # 8; Notice of Hearing). It is also consistent with the greater weight of the credible evidence, especially the previously discussed testimony of a disinterested witness, Bill Beverly.

40. Second, Complainant Whaley's recollection of the conversation with Mr. Eldredge is clear and detailed. She remembered how shocked she was when Eldredge told her that Carey was hired because he was male. (Tr. at 70, 108-09). She recalled responding that, "You're right, you know, he is a male and he's a nice guy, but I'm a stronger supervisor than he is." (Tr. at 70). She was also able to recite other aspects of their conversation. (Tr. at 70-72).

41. Third, by mid-January 1988, Whaley went to the Equal Opportunity Administrator, Willie Robinson and informed him of what had been said to her by Eldredge. This behavior is consistent with her version of events. (Tr. at 73-76). Her version of this visit is more credible than Mr. Robinson's initial testimony, denying that Whaley had mentioned sex discrimination, as her recollection is clearer and more detailed. (Tr. at 73-76, 299-301, 303-04, 306-08). On cross-examination, however, Robinson recalled "to a certain extent" that he had informed the Commission's investigator (a) that Whaley had told him she was concerned that sex was a factor in this hiring and (b) that she could file a discrimination complaint with him or the Iowa Civil Rights Commission. (Tr. at 307-08). Finally, Complainant Whaley's demeanor was that of a calm, credible witness.

E. Summary of Direct Evidence:

42. The credible evidence demonstrates: (1) that Eldredge stated that he preferred to hire a male for the challenged Recreation Supervisor position because of his concern for the safety of women at the Logan and Model City Community Centers, (2) that Eldredge did hire a male, Jack Carey, for that Recreation Supervisor position due to this concern, (3) that he informed Complainant Whaley of this reason for Carey's hire, and (4) Eldredge had previously indicated that he had hired Beverly for his position in 1980 because Eldredge thought a male would be better able to handle the volatility of the adult athletics position. Both Eldredge and Beverly had also recognized it was a department policy not to schedule women's team sports for Good Park due to a rationale similar to that underlying these hiring decisions, i.e. a concern for the safety of women. There is no evidence, however, that male and female applicants for employment for these positions were informed of the potential dangers and permitted to make the choice of whether they wished to risk facing them. Rather, the direct evidence in the form of Eldredge's statements to Beverly and Whaley, confirms that the decision was made in both instances that a male would be hired due to concerns for the safety of women in the positions.

43. The statements by Eldredge to Whaley and Beverly concerning the filling of the challenged position constitute, standing alone, direct evidence which is sufficiently probative to establish that Complainant Whaley was not hired because of her sex for the Recreation Supervisor position ultimately filled by Jack Carey. They demonstrate that sex was the determining factor in this decision. These statements show what Mr. Eldredge's state of mind was at the time the challenged decision was made. These statements are (1) made by the decisionmaker, (2) directly related to the decisional process, and (3) probative of the employer's reason for the hiring decision.

44. The direct evidence with respect to the filling of Beverly's position and the policy at Good Park is supplemental. It demonstrates that Eldredge's concern for the safety of women also had influenced both the hiring for the prior Recreation Supervisor position filled by Beverly and the scheduling of female and coed teams. A similar concern led Jennifer Marcouiller, in consultation and apparently with the approval of Eldredge, to select a male attendant for an ice rink after a woman had been attacked at one. (Tr. at 321-22).

45. It is obvious from his appointment of seven (7) females and eight (8) males to different Recreation Supervisor positions that Eldredge's failure to appoint Whaley did not stem from a generalized opposition to having women in positions of responsibility. (Stip. No. 75). Nonetheless, the preponderance of the evidence demonstrates there was a concern for the safety of women which played a determinative role in various decisions at the department, including Eldredge's failure to select Whaley for the challenged position. This evidence also demonstrates that Complainant Whaley was specifically informed that her sex was the reason she was not hired.

IV. RULING: THE RESPONDENT'S LIABILITY IS ESTABLISHED BECAUSE IT HAS OFFERED NO AFFIRMATIVE DEFENSE TO THE SHOWING OF SEX DISCRIMINATION

MADE THROUGH THE CREDIBLE DIRECT EVIDENCE OF DISCRIMINATION IN THE RECORD:

46. Unlike cases based on circumstantial evidence of discrimination, the probative direct evidence of discrimination in the record, which has been found to be sufficient to establish that the failure to hire Whaley was due to sex discrimination, places the burden on the Respondent to prove an affirmative defense. Examples of such affirmative defenses, which would be responsive to direct evidence, include the bona fide occupational qualification (BFOQ) defense and the "mixed motive" or "same decision" defense. See Conclusions of Law Nos. 19. On brief, Respondent has proffered none of these affirmative defenses. The defenses set forth by Respondent are that the direct evidence of sex discrimination is not credible, that sex discrimination played no role in the hiring decision, and that the decision took place solely for legitimate reasons. (See generally Respondent's Brief). Respondent also made no mention of any such affirmative defenses in its pleadings. (Response to Complainant's Allegations; Respondent's Prehearing Conference Form). Since no affirmative defense responsive to the direct evidence of discrimination has been offered by Respondent, it has made no showing sufficient to rebut the sex discrimination established by such direct evidence. Thus, Complainant Whaley and the Commission have established the City of Des Moines' liability for failing to hire Whaley due to her sex

V. RULING IN THE ALTERNATIVE # 1: THE RESPONDENT HAS NOT MET ITS BURDEN OF DEMONSTRATING BY A PREPONDERANCE OF THE EVIDENCE THAT, IN THE ABSENCE OF SEX DISCRIMINATION, COMPLAINANT WHALEY WOULD NOT HAVE BEEN HIRED FOR THE POSITION:

A. The Commission Is Not Persuaded That, In The Absence of Discrimination, The City of Des Moines Would Have Reached the Same Decision With Respect to Hiring For the Challenged Recreation Supervisor Position:

47. As noted above, the Respondent's position has been that its hiring decision was solely due to legitimate reasons. Respondent has not raised the "mixed motive" defense but assumed that the order and allocation of proof appropriate to cases relying on circumstantial evidence of discrimination would be utilized in this case, (Respondent's Brief at 6-8). The ruling above rests on the proposition that by not raising the mixed motive defense in its brief or other pleadings, the Respondent has admitted it has no such defense or has waived such defense. See Conclusions of Law Nos. 8-11. Nonetheless, as a ruling in the alternative, the evidence concerning it's proffered legitimate reasons will be examined to see if Respondent has established that it would have reached the same result in the absence of sex discrimination. The Respondent's burden is one of persuasion and not merely one of producing evidence setting forth a legitimate reason for its action. See Conclusions of Law Nos. 31-32. For reasons discussed below, Respondent has failed to meet its burden of establishing by a preponderance of the evidence that Complainant Whaley would not have been hired in the absence of sex discrimination.

B. Respondent's Stated Reasons for Selecting Jack Carey:

48. During his testimony on why he selected Jack Carey for the position, Robert Eldredge focused on two factors: (1) Carey's "real wide experience in a number of things" and (2) "he had ambitions to promote himself through the field of parks and recreation as far as he could go, and I liked that attitude. . . . [He had] a spirit that had a lot of initiative in it and a lot of vitality in it." (Tr. at 238, 239-40). (See Respondent's Brief at 10).

49. The "wide range of things" included experience as an assistant store manager in a grocery store in Colorado, in swimming pool manager positions in Cedar Rapids and Lenox, Iowa, a ski lift operator in Colorado, and Recreation Director for the City of Pleasant Hill, Iowa. (CP. EX. # 14; R. EX. # 1; Tr. at 238-39).

C. The Lack of Credibility of Bob Eldredge's Testimony, Wherein He Denied That He Told Complainant Whaley and Bill Beverly That He Preferred to Have A Male In The Challenged Position, Also Adversely Reflects on His Credibility With Respect To The Reasons He Has Stated for Hiring Carey:

50. Bill Beverly's and Complainant Whaley's testimony, that Bob Eldredge made certain statements which constitute direct evidence of discrimination with respect to the challenged position, is credited for the reasons previously stated. See Findings of Fact Nos. 26-41. It follows that Bob Eldredge's denials of such statements, and his assertion that he would have hired Jack Carey if Carey were a female, are not credited and are unreliable. (Tr. at 248-49).

51. Mr. Eldredge's testimony with respect to his statements made to Whaley and Beverly appears to be willfully false and not the product of a poor memory. Mr. Eldredge's interview with Complainant Whaley occurred on "the first Monday after New Year's" in 1988. (Tr. at 66). Official notice is taken that this would be January 4, 1988. Fairness to the parties does not require that they be given the opportunity to contest this fact. The statement made by Mr. Eldredge to the complainant, wherein he told her that Carey was hired because he felt a strong male supervisor was needed in the position, was made on the following Monday, which was January 11, 1988. (CP. EX. # 8; Tr. at 68-69). The Complaint was filed on March 1, 1988. (Stip. No. 4). Eldredge's first denial of having made this statement was by affidavit filed by the City on March 30, 1988. (Although the existence and nature of the content of this affidavit were stipulated to, its truthfulness and accuracy were not). (Stip. No. 6). Eldredge would probably have had a clear memory of making his statement to Complainant Whaley at the time of this initial false denial, only 2 1/2 months after the statement was made. His testimony wherein he denies making this statement to Whaley, and a similar statement to Beverly, therefore, appears to be a continuation of this falsehood and not a product of poor memory.

52. In reaching this conclusion, other factors used in evaluating credibility have not been ignored. Mr. Eldredge's demeanor, for example, was that of an amiable witness. Nonetheless, a pleasant or confident demeanor does not mean a witness is truthful, especially when his testimony on material facts is contradicted by more credible evidence. See Conclusion of Law No. 26.

53. Such unreliable testimony with respect to these material facts also casts serious doubt on the truthfulness of Eldredge's testimony with respect to other material facts, including, but not

limited to, his purported reasons for hiring Jack Carey for the position. Although the material facts falsely testified to need not be related to other testimony of a witness in order to discredit that testimony, (see Conclusions of Law Nos. 21-22), the false denial of having stated a hiring preference for a male obviously implies that the witness may give other false testimony with respect to his true reasons for a hiring decision. Indeed, Eldredge's statements to Whaley and Beverly contradicted the reasons given by Eldredge in his testimony by showing that the true reasons were different from that given in the testimony. Mr. Eldredge's testimony and a statement in his letter to Complainant Whaley, of January 11, 1988, are the sole evidentiary sources setting forth Respondent's legitimate reasons for preferring Jack Carey over Complainant Whaley. (CP. EX. # 7; Tr. at 238-40). (The letter mentions only Carey's experience and not his ambitious nature.) (CP. EX. # 7). In light of Eldredge's lack of credibility, his testimony and statements setting forth these reasons are not persuasive and are entitled to no weight.

D. Additional Reasons Why The Commission Is Not Persuaded That, In The Absence of Discrimination, Respondent Would Have Hired Jack Carey For The Challenged Recreation Supervisor Position Due to Carey's Ambitious Nature:

1. Stipulations Pertinent to This Issue:

54. The parties stipulated that:

66. In interviewing the certified candidates, Mr. Eldredge asked some questions of non-employees that he did not ask employees simply because the employees were already on staff and familiar with the organization and work expectations of the Department.

67. Mr. Carey, when asked why he wanted the position, replied that he will always look for a job with greater responsibility than the one he presently has.

68. Mr. Eldredge's philosophy when hiring at the level of Recreation Supervisor was to look for someone who was ambitious and wanted to do better, someone who might be hungry for his chair.

(Stip. Nos. 66-68).

2. Although Eldredge Learned of Carey's Ambitious Nature By Asking Him Why He Wanted the Job, Complainant Whaley Was Never Asked Why She Wanted the Position:

55. As noted above, Carey's ambitious spirit was revealed when Eldredge interviewed Carey and asked him why he wanted the Recreation Supervisor position. (Stip. No. 67). When Eldredge interviewed Complainant Whaley, however, he never asked her why she wanted the position. (Tr. at 67-68). Eldredge's testimony to the contrary is not credited due to the impact of his willfully false testimony on other issues of material fact which were previously discussed. (Tr. at 271). See Findings of Fact Nos. 50-53.

56. Although Eldredge told her that he had a list of prepared questions, Whaley was asked only one question during her interview: "what I felt my employer owed me." (Tr. at 67). (This was also one of the questions asked of Carey). (Tr. at 170).

3. Eldredge's Testimony That Complainant Whaley Indicated That She Wanted The Position In Order to Obtain Deferred Compensation Is Also Not Credible:

57. Because his testimony that Whaley was asked why she wanted the job is not credible, Eldredge's testimony as to her response is also not credited. (Tr. at 269-270, 271). Eldredge asserted that Complainant Whaley informed him, at her interview, that she wanted the position in order to eligible to participate in a deferred compensation program which would help fund her daughter's college education. (Tr. at 269-70). In fact, Whaley never mentioned the deferred compensation program at her job interview. (Tr. at 68). The subject was first brought up by Eldredge at the time he informed her she had not obtained the position. (Tr. at 71- 72).

4. There is No Convincing Explanation for The Failure to Ask Complainant Whaley At the Interview Why She Wanted The Job:

58. If an ambitious nature were determinative of this hiring decision, there is no convincing explanation which accounts for the failure to make a similar inquiry of Complainant Whaley. Eldredge did tell Complainant Whaley that he did not ask her the other questions because he knew her so well. (Tr. at 67). This behavior is contrary to Eldredge's testimony of how he handled interviewing candidates who were staff employees he had known for years:

> Q. [By Mickle:] When you are dealing with persons on the [Civil Service] list who have been employees under your direction for some number of years, and dealing with other persons on the list who are unknown to you, can you share with us whether or not that creates any dilemma on your part?
>
> A. [By Eldredge:] You have to really be careful of two things: You know your own people. You know the real good parts and you know the bad parts, and the other people are like complete strangers, and in a lot of ways I suppose they can start out--depending upon what the experience has been with the employees, they can start out with an advantage, not being known at all.
>
> It's just necessary that when you interview everybody on the list, that that be like blanked out as much as any human being maybe can do that; but that's been a dilemma. That was a dilemma off and on in the 40 years that I was in the profession, and that's a condition you accept, and it's one of the responsibilities when you do the hiring process, that if you have applicants who you have worked with and you have strangers, you have to somehow work out in your mind, as much as you possibly can, that everybody is starting from zero, and we'll see who comes out best when you get through, and I guess that's kind of the way I looked at it, that there were just 11 people.

(Tr. at 236-37).

59. The question of why an applicant desires a position also does not fall within the category of questions concerning familiarity "with the organization and work expectations of the Department" which were not asked of staff employees who had applied for the position. (Stip. No. 66).

5. The Evidence In the Record Does Not Show That There Were Other Factors Which Led Eldredge to Believe That Complainant's Ambition Was Less Than That of Carey's:

60. The Respondent suggests, on brief, that Eldridge may have concluded that Complainant Whaley was not as ambitious as Jack Carey because her application was not accompanied by a resume or cover letter, while Carey's was. (Respondent's Brief at 13-14). There is, however, no evidence, either documentary or testimonial, which indicates that the presence or absence of a resume and cover letter played any part in the evaluation of the ambition, or lack thereof, of the respective candidates. Also, the application forms indicate, in bold print, that "[r]esumes will not be accepted in lieu of completion of this part, or any part of this application." (CP. EX. # 5, 14).

61. Complainant Whaley was previously offered appointment to Recreation Supervisor positions in 1976 and 1979. (Stip. No. 51; CP. EX. # 9, 10; Tr. at 80-84). She waived these appointments for a variety of reasons including giving previously laid off Recreation Supervisors a chance for re-employment and fulfilling her commitment to programs at the Four Mile Community Center. (CP. EX. # 10; Tr. at 80- 84). Eldredge informed Complainant Whaley in 1976 that turning down the particular Recreation Supervisor position then open would not harm her chances of obtaining other such openings. (Tr. at 82-83). Eldredge confirmed in his testimony that a candidate's waiver of appointment to prior openings would have no impact on how he would fill future openings. (Tr. at 233).

6. Under These Facts, The Failure To Ask Whaley Why She Wanted the Job, When Such An Inquiry Was Made of Jack Carey, Renders Unpersuasive The Argument That Respondent Would Have Selected Carey In Any Event Due To His Ambitious Nature:

62. Although the parties stipulated that Eldredge had a philosophy of looking for ambitious candidates for positions at this level, they did not stipulate that this philosophy was followed in this instance. (Stip. No. 68). Despite Eldredge's philosophy, this difference in treatment of Whaley and Carey in the interview process casts doubt on whether this reason would have led to the hiring of Carey by the employer in a nondiscriminatory hiring process. If it were so important to Eldredge to learn a candidate's reasons for wanting the position, and, thereby, to learn something of the candidate's ambitions, this question, or other inquiry seeking to determine their goals and ambitions, would have been asked of all the candidates.

63. During her testimony, Whaley was given the opportunity she was never given during the interview, i.e. she was asked why she wanted the job. (Tr. at 61-62). Her response shows that she also was ambitious and sought new responsibilities and challenges:

> Q. [By Autry:] Were you interested in this job?

A. [By Whaley:] Oh, very much.

Q. [By Autry:] Why was that?

A. [By Whaley:] Well because there was three responsibilities. The No. 1 responsibility was senior citizens, which I felt I had a very good background in, and I really enjoyed doing. The second was the special populations, which of course, I told you I started the program, and then I had to give it to Chris. Actually, Chris assumed it when I was moved to Four Mile. The third was the community centers, which was, you know, the love of my life. I spent 13 years out there, and I really thought that there were things going in the community centers that I felt I could help with., you know, go in there and straighten up and change some things. We all have those motivations and goals, I guess.

Q. [By Autry:] How were you feeling about your job as a community center supervisor at that time?

A. [By Whaley:] I felt I was doing an adequate job. I felt bored, and I had told Mr. Eldredge this in the past, that I just, you know, you get to the point where you feel like you've done about everything you can do. Everything comes easy that should be a challenge, and it isn't, so all of a sudden it becomes almost too easy to get up and go to work, the same old job all the time. Plus when I lost RAP funding, you kind of lose some excitement when you have to beg for every dollar that you have to spend out there.

(Tr. at 61-62).

64. The Respondent has not shown what its evaluation of Whaley and Carey's qualifications would have been, with respect to their respective ambitions and goals, if (a) Complainant Whaley had actually been asked her reasons for wanting the job and (b) if her response had been compared to Mr. Carey's in a nondiscriminatory hiring process. Assuming for the sake of argument that the legitimate reasons expressed by Robert Eldredge actually played a role in the decision, Respondent has failed to present evidence separating the influence of the legitimate and illegitimate reasons for the decision. Without such a showing, the Commission is not persuaded that, in a nondiscriminatory interview and selection process, Carey would still have been hired in preference to Whaley. See Conclusion of Law No. 41.

E. Summary of Reasons Why Respondent Has Not Sustained Its Burden of Proving That It Would Have Not Hired Complainant Whaley Absent The Discrimination Because of Jack Carey's Ambitious Nature:

65. For the following reasons, the Respondent has not sustained its burden of proving it would not have hired Complainant Whaley absent the discrimination because of Jack Carey's ambitious nature: First, this reason relies on the testimony and statements of Robert Eldredge which are not credible. Second, Robert Eldredge learned of Carey's ambitions by asking him why he wanted the job, an inquiry which was not made of Complainant Whaley. Third, Eldredge's testimony that

Whaley indicated during the interview that she wanted the job because she wanted to obtain deferred compensation is also not credible. Fourth, there is no convincing explanation as to why no inquiry was made of Whaley as to her reasons for wanting the position. Fifth, there is no evidence in the record demonstrating that other factors, such as the presence or absence of cover letters or resumes, led Eldredge to believe that Whaley was not as ambitious as Carey. Sixth, the Respondent has not shown what its respective evaluation of Whaley's and Carey's ambitions would have been in a nondiscriminatory hiring procedure. In the absence of such evidence separating out the legitimate and illegitimate motives for its action, Respondent has not met its burden of persuasion on this issue.

F. Additional Reasons Why The Commission Is Not Persuaded That, In The Absence of Discrimination, Respondent Would Have Hired Jack Carey For The Challenged Recreation Supervisor Position Due to His Experience:

1. Introduction:

66. Under the mixed motive analysis, the adjudicator must decide, not whether one candidate is preferable to another, but whether Respondent has met its burden of persuasion. In determining whether this burden has been met, however, reference may be made to the respective qualifications of the candidates in light of the employer's requirements. See Conclusions of Law No. 36-40. Respondent has failed to meet its burden in part because the statement of Robert Eldredge that he hired Carey due to his wide range of experience has been found to not be credible. See Findings of Fact Nos. 48-53. The following comparisons of the Carey's and Whaley's qualifications to the requirements of the job, as set forth in the job description and in testimony, and to the reasons related to experience given in the testimony, also support the conclusion that Respondent has not met its burden.

2. Summary of Complainant Whaley's Experience:

67. At the time of her application, on October 23, 1987, Complainant Whaley had held the following positions:

Position	Employer	Hours Worked	Dates Worked In Position
Community Center Supervisor	City of Des Moines	Full Time	2/15/76-10/23/87 and continuing.
Recreation Supervisor	City of Des Moines	Full Time	10/28/74-2/14/76
Recreation Specialist	"	30-40 hrs/wk.	06/74-08/74* (Summer 3 mos)
Recreation Specialist	"	30-35 hrs/wk.	10/73-03/74* (Winter 6 mos)
Recreation Specialist	"	30-40 hrs/wk.	06/73-08/73* (Summer 3 mos)
Recreation	"	30-35 hrs/wk.	10/72-03/73*

Specialist			(Winter 6 mos)
Recreation Specialist	"	30-40 hrs/wk.	06/72-8/72* (Summer 3 mos)
Recreation Specialist	"	30-35 hrs/wk.	10/71-03/72* (Winter 6 mos)
Recreation Specialist	"	30-40 hrs/wk.	06/71-08/71* (Summer 3 mos)
Recreation Specialist	"	30-35 hrs/wk.	10/70-03/71* (Winter 6 mos)
Recreation Specialist	"	30-40 hrs/wk.	06/70-08/70* (Summer 3 mos)
Recreation Leader	"	45 hrs/wk.	06/69-08/69* (Summer 3 mos)
Recreation Leader	"	45 hrs/wk.	06/68-08/68* (Summer 3 mos)
Secondary Education Teacher	Des Moines Christian School	Full Time	06/70-06/73

* This represents the months actually worked in these part time positions as indicated by Complainant Whaley's testimony and her 1974 application for Recreation Supervisor.

** Whaley was transferred to the Community Center Supervisor position when the Recreation Supervisor position she occupied was eliminated.

***The reference on Whaley's application to a part-time "Recreation Supervisor" position appears, based on her testimony, to actually refer to this "Recreation Specialist" position. In keeping with stipulation number 47, all part- time employment with the city after June 1, 1970 is designated "Recreation Specialist."

(CP. EX. # 5; Stip. Nos. 47-50; Tr. at 13-14, 16-19).

68. The duties required by these positions were described on Whaley's application form as follows:

> 1. [Community Center Supervisor]: See that building is open and the everything (including mechanical) is working properly. Arrange all rentals, classes, meetings, anything with buildings or grounds. Manage building including recreation leaders, custodians, secretary, instructors. Supervise Neighborhood Development & Polk County Use of building. Manage $180,000 budget. Set up and conduct classes & programs including purchasing materials & hiring instructors. Administer discipline to disruptive participants.
>
> 2. [Recreation Supervisor]: Had office at Wilkie House. Set up programs for whole Woodland Wilkie Area including schools. Supervised neighborhood

centers (both summers and winters). Created and supervised a program for handicapped. Had a special Senior Citizen group. Met several times a week with RAP [Recreational Activity Program] boards, NP [apparently "Neighborhood Program"] boards, Wilkie House Board, Schools.

3. [Recreation Specialist]: Visited and supervised area parks and school centers. Supervised all personnel for these centers. Dealt with disciplinary problem[s]. Met with area groups and agencies.

4. [Recreation Leader]: Set up and conducted craft and gym-type activities for all age groups in the recreation centers.

5. [Secondary Education Teacher]: Taught Jr. High - Basic math, Algebra, History, Economics. Served as Vice-Principal. Also did books for school to help part-time secretary.

(CP. EX. # 5). Complainant Whaley had received a Bachelor of Science degree in secondary education in June 1970. (CP. EX. # 5).

69. The job description for Community Center Supervisor is also probative evidence of Complainant Whaley's responsibilities in that position:

Definition:

Under general direction, to organize and direct the overall recreation program for a Community Center and to do related work as required.

Examples of Duties:

Plans and administers diversified recreational programs at the Community Center level suited to the needs of the Center's participants and potential participants;

Directs recreational events and programs at the Center;

Assigns, supervises, and evaluates Recreation Leaders and other Center personnel;

Schedules and supervises use of Center facilities;

Studies and analyzes Center recreation programs, participants and attendance and related problems; prepares recommendations to meet community needs revealed;

Coordinates Center staff and neighborhood group activities for full utilization of Center resources;

Receives and resolves participant inquiries or complaints;

Serves as liaison for community groups and Park and Recreation Department;

Inspects Center equipment and program activities for compliance with safety regulations and corrects any unsafe conditions;

Maintains and submits to the Recreation Superintendent financial, personnel and Center program activity reports;

Conducts staff meetings and in-service training for Center personnel;

May act for Recreation Supervisor in his/her absence.

(CP. EX. # 2).

3. Summary of Jack Carey's Experience:

70. At the time of his application, on October 27, 1987, Jack Carey had held the following positions:
Position

Position	Employer	Hours	Dates Worked In Position
Parks & Recreation Director	City of Pleasant Hill	Full Time	11/23/86-10/27/87 and continuing
Customer Service Rep.	ACCO Unlimited	Full Time	04/86-11/86
Store Manager	The Grocery Store	Full Time (Initially Part Time)	08/20/82-3/15/86
Pool Supervisor	Cedar Rapids Parks & Recreation	Full Time	5/15/82-8/15/82
Ski Lift Operator	Breckenridge Ski Area	40+ hrs/wk.	11/81-4/82 (Winter 6 mos)
Aquatic Director and Pool Manager	City of Lenox Park Comm'n	Part Time	04/30/81-09/15/81 (Summer 4.5 mos)
Ski Lift Operator	Breckenridge Ski Area	40+ hrs/wk.	11/80-4/81 (Winter 6 mos)
Aquatic Director	City of Lenox Park Comm'n	Part Time	04/30/80-09/15/80 (Summer 4.5 mos)
Wrestling Coach	City of Des Moines	8 hrs/wk.	12/1/79-2/15/80 (Winter 2.5 mos)

(R. EX. # 1; C. EX. # 14; Tr. at 171-73).

71. The duties required by these positions were described on Carey's application form, and an attachment thereto, as follows:

> 1. [Parks & Recreation Director]: Development and implementation of comprehensive Park & Recreation Departmental programs for the residents of Pleasant Hill. [CP. EX. # 15]. [R]esponsible for providing programming for all age groups. . . . [W]orking with area sports organizations, assisting and coordinating their efforts to offer a unified and consistent recreation program. [R. EX. # 1].
>
> 2. [Customer Service Rep.]: Customer service representative and telemarketer.
>
> 3. [Store Manager]: Grocery Manager. Store Manager in charge of total operation of the store in particular the non-perishable grocery department. Responsible for the hiring & firing of store personnel, inventory marketing and ordering and opening & closing of the business on a daily basis.
>
> 4. [Pool Supervisor]: Pool supervisor, responsible for the operation and supervision of the pool staff during open hours and swimming lessons.
>
> 5. [Ski Lift Operator]: Lift operator, responsible for total operation and personnel of a ski area chairlift. Loading/unloading chairs, customer entertainment and relations.
>
> 6. [Aquatic Director]: Aquatic director, responsible for the operation and supervision of the pool and staff. Hiring of employees, development and implementation of programs for the residents of Lenox.
>
> 7. [Wrestling Coach]: I was in charge of the Brody Jr. High Center as a wrestling instructor. I supervised one other wrestling instructor assigned to this center and together we coached approximately 25 youth that signed up for the program. [R. EX. # 1].

(CP. EX. # 14; R. EX. # 1). Jack Carey had received a Bachelor of Arts degree in recreation in May of 1980. (CP. EX. # 14; R. EX. # 1). As part of his college education he had done an unpaid internship with the City of Des Moines at approximately the same time he was a wrestling coach. His responsibilities included developing two programs, one of which was a wrestling tournament, and assisting the staff with Christmas holiday duties. (Tr. at 174-75).

4. A Comparison of Complainant Whaley's and Jack Carey's Respective Experience In the Areas Emphasized By Respondent's Job Description Indicates Respondent Has Not Met It's Burden of Establishing That The Same Result Would Have Been Reached In a Nondiscriminatory Hiring Process:

72. The Respondent's job description for Recreation Supervisor places an emphasis on supervisory experience as a qualification and on supervisory, planning, and organizational duties in recreational programs. (CP. EX. # 4). The minimum qualifications were:

> Graduation from college in recreation or closely related field, and two years of experience in a supervisory capacity in recreation or a closely related field.

(CP. EX. # 4).

73. The duties of the Recreation Supervisor position, as expressed in the job description, are:

> Under general direction, to assist in planning, organizing, and directing the overall recreation program; to develop a specialized portion of the total program or to lead a specialized recreational activity; supervises the work of playground and community center supervisors and recreation leaders; assists in planning, organizing, and directing centers, special projects or groups, and summer playgrounds; assists in the hiring of recreation leaders, securing of facilities for activities and planning of programs; conducts staff meetings and in-service training; maintains necessary records of activities; works with community organizations to obtain their interest in community recreation; conducts special programs at recreation centers; investigates special recreation problems and makes recommendations; performs related work as required.

(CP. EX. # 4).

74. Further detail on Complainant Whaley's and Jack Carey's qualifications are given below. See Findings of Facts Nos. 76-99. The application materials and testimony summarized above, however, indicate that Complainant Whaley had longer and more responsible experience in supervising, planning, and organizing recreational activities than Jack Carey. The evidence above simply does not support the proposition that Respondent has shown, by a preponderance of the evidence, that, in a nondiscriminatory hiring process, Respondent would have chosen Carey over Whaley due to his experience.

5. The Challenged Recreation Supervisor Position Had Three Major Areas of Responsibility:

75. As previously noted, it was stipulated that the work assignments required for the challenged Recreation Supervisor position included three areas: (1) Direct responsibility for the operation of all community centers; (2) the special population program for the physically and mentally handicapped; and (3) the bus trips programs. See Finding of Fact No. 11. The bus trips programs were actually just a part of the senior citizens programs for which this Recreation Supervisor position, formerly held by Christine Larson since 1974, was responsible. (Stip. at 62-63; Tr. at 11, 61). The community center supervision responsibility was added to the position with this opening. (Tr. at 60). This involved monthly meetings with center supervisors concerning activities and policy matters, compilation of data on these topics, and visits to the centers. (Tr. at 164). Thus the three major responsibilities for the challenged position were: (1) Community

center supervision; (2) Special populations programs; and (3) Senior Citizen's programs. (Tr. at 161).

6. When the Respective Objective Qualifications and Experience of Complainant Whaley and Mr. Carey Related to These Three Major Areas of Responsibility Are Compared, the Commission Is Not Persuaded That the Preponderance of the Evidence Shows That, In the Absence of Discrimination, Carey Would Have Been Hired In Preference to Whaley:

76. When the respective objective qualifications and experience of Complainant Whaley and Jack Carey related to these areas are compared, it cannot be said that Respondent City of Des Moines has demonstrated by the preponderance of the evidence that Carey would have been hired over Whaley in a nondiscriminatory hiring process due to his wide range of experience:

77.

a. Community Center Supervision:

(1) Complainant Whaley:

(a) Whaley had been a Community Center Supervisor for eleven years and eight months. She had started as supervisor of the Four Mile Community Center in 1976. This was at the very beginning of the Community Center program, shortly after the Four Mile Center was constructed. (Stip. No. 50; CP. EX. # 5; Tr. at 199-200, 201-02). The duties of this position have already been summarized. See Findings of Fact Nos. 68-69. When Ms. Whaley began this position she supervised a full-time and part-time custodian, a part- time clerical helper, and 2 to 3 recreation leaders. After subsequent budget cuts, she supervised 1 full-time custodian, a part-time clerical helper and 2 or 3 recreation leaders. Throughout this time, she also supervised teachers contracted to teach specific classes. (Tr. at 55-56). Her budget during that time varied from a low of $50,000 to $60,000 to a high of $80,000 to $90,000. She also had a separate Recreational Activity Program (RAP) budget which started at $18,000 and was subsequently decreased. (Tr. at 37). Her nine evaluations by Robert Eldredge for the period from October of 1978 to February of 1988 always gave her an "Over- all Rating" of "outstanding", i.e. "performance consistently exceeds standard requirements." Throughout this time, Eldredge also always rated her supervisory ability as "outstanding," i.e. "Excellent in planning and organizing effectively. Excellent in training and developing employees fully. Accepts responsibility readily and capably. Has long range program." During her entire employment as Community Center Supervisor, Whaley, ranked in 8 categories on a scale of "Unsatisfactory," "Improvement Required," "Standard" and "Outstanding," never ranked below "Standard" in any category. (CP. EX. # 3).

(b) When Whaley was a Recreation Supervisor, she supervised neighborhood centers during both the summers and winters. She also created and supervised a

program for the handicapped. She also supervised a special senior citizens group. (CP. EX. # 5). Her initial budget was $20,000 in 1974. (Tr. at 23-24).

(c) As a Recreation Specialist, Whaley supervised 20 area parks in addition to school centers. (CP. EX. # 5; Tr. at 20). This involved the supervision of somewhere from 20- 25 employees during the summers of 1971-1973 to 40-50 employees. (CP. EX. # 14; Tr. at 21).

(d) As a Recreation Leader, Whaley directed the recreation programs at Bates Park and Stone Park during the summers of 1968 and 1969. This involved setting up and conducting craft and gym type activities. (Stip. No. 47; CP. EX. # 1, 5).

(2) Jack Carey:

(a). There is no evidence in the record indicating that, at the time he applied, Jack Carey had ever worked out of or supervised any of the five community centers, i.e Four Mile, Pioneer-Columbus, Southeast, Model Cities, and Logan. (Tr. at 9, 201-02). There were no community centers at Pleasant Hill. His budget was somewhere between $75,000 and $100,000. (Tr. at 177). Official notice is taken that, according to impartial census data from the Job Service of Iowa, the 1980 population of Pleasant Hill Iowa was 3,493. The parties agreed at hearing that official notice would be taken of this fact. (Tr. at 327-28).

(b). During his year at Pleasant Hill, Carey developed and implemented park and recreation programs. He supervised two part-time employees during the summer and hired instructors for specific programs. (Tr. at 177-78). Carey had also supervised an unknown number of staff during his pool supervisor/acquatic director and ski lift jobs. During those respective positions, he had been responsible for the operation of the pools and ski lift. He had also supervised another wrestling coach while in that part-time position. (R. EX. # 1; C. EX. # 14).

(c) In non-recreational employment, Carey had also supervised three or four part-time people during the winter months while store manager at The Grocery Store. The rest of the time he worked alone. He had supervised the total operation of the store. (R. EX. # 1; C. EX. # 14; Tr. at 173-74).

78.

b. Special Populations Programs:

(1) Complainant Whaley:

(a) "Special populations programs" refers to programs for disabled persons. (Tr. at 11). The Special Populations Program was assigned to Chris Larson, the incumbent of the challenged Recreation Supervisor position, when Complainant

was moved to the Community Center Supervisor position. (Stip. No. 62; Tr. at 11, 62).

(b) Complainant Whaley created and supervised the Special Populations Program when she was originally Recreation Supervisor between 1974 and 1976. (Stip. No. 48- 49; CP. EX. # 5; Tr. at 26, 62). She set up two handicapped programs, which served sections of 50 to 60 disabled persons at a time, most of whom came from group homes in the area. She modified game and craft activities so they would be appropriate and safe for these client populations. (Tr. at 26-27). She had also hired a disabled person who helped coordinate the program. She also supervised Recreation Leaders in the program. (Tr. at 27-28).

(2) Jack Carey:

(a) While Carey was Parks and Recreation Director at Pleasant Hill, that department had no programs for the handicapped. (Tr. at 186).

(b) Carey had experience of some kind working with the handicapped while he was an intern during college. The extent and nature of this experience are not reflected in the record. He then also participated in a program which matched up college students with disabled clients to act as a peer group, role-model-type relationship. (Tr. at 186).

79.

c. Senior Citizens Programs:

(1) Complainant Whaley:

(a) Bob Eldredge recognized that "seniors" were one of Complainant Whaley's areas of expertise. (Tr. at 241). Eldredge also recognized "she worked well with seniors." (Tr. at 243).

(b) As Community Center Supervisor, Whaley hired and supervised a senior citizen specialist. With her, Whaley set up a once a week recreational program for seniors. This included games, speakers, music, and potlucks. Congregate meals have been served five days a week at Four Mile Community Center since 1976. Other senior citizen programs at the center included crafts such as needlepoint and knitting. There were also card, pool and chess tournaments and senior citizens exercise classes. (Tr. at 38-40). In addition, Whaley also conducted at least two bus trips per summer for senior citizens for a minimum total of 24 trips. These were day-long trips to locations as far away as the Amanas. These were large, commercial buses which held 40-47 passengers. On many occasions, two buses or a bus and a van were taken. (Tr. at 40-42). Elderly programming also included a Christmas party for 200-350 seniors and smaller parties for other holidays. (Tr. at 42-44).

(c) As Recreation Supervisor, Whaley and a coordinator were responsible for providing recreational programming for a senior citizens' congregate meals site serving 50-60 people five days a week. This programming involved providing speakers, entertainment, or games such as cards, chess and checkers. (CP. EX. # 5; Tr. at 24-26).

(2) Jack Carey:

(a) Bob Eldredge indicated Jack Carey was not "known for having any one area of expertise," but noted "his overall experience in a lot of these areas through his--all the jobs he had." (Tr. at 243).

(b) Jack Carey's first experience with doing recreational programming for senior citizens was when he was Parks and Recreation Director for Pleasant Hill in 1986-87. (Tr. at 180). This included a weekly cookies and punch one hour meeting in a community room with card playing or other games. After May of 1987, Carey also coordinated monthly senior citizen bus trips in the Des Moines area. (Tr. at 181). These trips were taken in a school bus which held 15 to 20 people. (Tr. at 182).

80. In summary, Complainant Whaley's experience, with respect to the three major areas of responsibility for the challenged Recreation Supervisor position, is longer, more extensive, more relevant, and involved greater responsibility than the experience of Jack Carey.

7. When A Comparison Is Made of Those Skills, Knowledge, and Responsibilities Identified by Respondent as Being Possessed By Carey Due to His "Wide Range of Experience" to Those Possessed By Whaley, the Commission Is Not Persuaded That the Preponderance of the Evidence Shows That, In the Absence of Discrimination, Carey Would Have Been Hired In Preference to Whaley:

81. In his testimony, Robert Eldredge gave Carey's "real wide experience" as being a reason for his selection. (Tr. at 238). The credibility problems with this reason were discussed previously. See Findings of Fact Nos. 50-53. While discussing this reason, Eldredge identified specific skills, knowledge and responsibilities which he associated with some of the past jobs held by Jack Carey. (Tr. at 238-29). Set forth below, however, is an examination of Carey's and the Complainant's past jobs and skills which demonstrates that her skills, knowledge, and responsibilities in these areas were as great or greater than Carey's. Under these circumstances, the Commission is not persuaded that, in a nondiscriminatory hiring process, the same decision would have been made.

a. Logistical and Marketing Skills:

82. Eldredge noted that, during Carey's employment as store manager at The Grocery Store, he would have had experience with "inventorying, ordering, detail work, actually marketing, those kinds of things are excellent skills to have whether you talking about a head of lettuce or a

macrame class, to know how to advertise and market and logistically plan programs, I thought that was excellent." (Tr. at 238-39).

83. Whaley's extensive logistical and marketing skills are shown by a mass of evidence in the record. As Community Center Supervisor, Whaley was expected "to plan and administer diversified recreational programs . . . suited to the needs of the Center's participants . . .; [s]chedules and supervises use of Center facilities; [c]oordinates Center staff and neighborhood group activities for full utilization of Center resources; [m]aintains and submits to the Recreation Superintendent financial, personnel and Center program activity reports." (CP. EX. # 2).

84. Complainant Whaley made out budget requests and was responsible to allot and plan carefully so as not to exceed the budget. (Tr. at 36-37). Whaley submitted requisitions and ordered all the supplies for the community center, including custodial and recreational supplies. (Tr. at 33- 34).

85. Whaley also planned and organized a multitude of classes, special events, bus trips, parties, bazaars (misprinted as "bizzares" in the transcript) and other activities serving hundreds of children, adults, and senior citizens. (Tr. at 38-55). These included the senior citizen events previously discussed such as the Christmas party drawing 200-350 people. Also included are events for children such as Easter egg hunts, a Christmas party drawing 150 children, and bus trips. (Tr. at 42, 45, 50). There were four "sessions" a year with 30 classes per session not specifically directed to senior citizens. (Tr. at 47, 49- 50). In addition, Whaley organized a summer carnival which drew 650 people. (Tr. at 51). Two bazaars per year, featuring craft or rummage-type sales, were organized to raise money for recreational programs. These drew crowds of up to 1,000 people. (Tr. at 52-54).

86. With respect to "detail work", it should be noted that Eldredge always acknowledged in her nine evaluations covering the period from October of 1978 to February of 1988 that Whaley was "outstanding" with respect to "quality of work performed." This meant that she "consistently shows the highest degree of accuracy, neatness, completeness, thoroughness, excellent craftsmanship." With respect to logistically planning programs, as previously noted, Whaley's ratings during this period always indicated she was "excellent in planning and organizing effectively." (CP. EX. # 3).

87. Jack Carey's experience as a grocery store manager did include the weekly ordering of nonperishable groceries, stocking and resetting the shelves twice a week, and keeping the inventory current. (CP. EX. # 14; Tr. at 173).

b. Some Knowledge of the Areas of Responsibility Involved With the Different Recreation Supervisor Positions:

88. Eldredge testified that:

> [Carey] had been involved with swimming pools. He had been involved with skiing. He had been involved as an intern with us not only in sports, with the wrestling bit, and that sort of thing, but an intern with our department who also

> spent some time with the other recreation supervisors, so that he got a taste of what areas of responsibility were involved in all those jobs.

(Tr. at 239). While this testimony mentions involvement with swimming pools and skiing, it seems to emphasize Carey's internship and the knowledge he acquired with respect to the recreation supervisor jobs. If the paragraph is intended to also refer to Carey's "taste" of the areas of responsibility pertinent to skiing and swimming pools, there is no evidence in the record indicating why such knowledge would be pertinent to the challenged Recreation Supervisor position or why such a "taste" would outweigh the Complainant's far greater knowledge of the Des Moines Park and Recreation system and the Recreation Supervisor position which may be inferred from Complainant Whaley's far greater experience with that system.

89. It may be and is reasonably inferred that Whaley, based on her over 19 years of experience with the Park and Recreation Department, including a year and four months as a Recreation Supervisor, had considerably more than "a taste" of what areas of responsibility were involved in all the Recreation Supervisor jobs. See Findings of Fact Nos. 67-69, 77-79. In addition, Whaley would attend monthly staff meetings also attended by Recreation Supervisors. (Tr. at 146, 149, 150). At these meetings, staff would become "somewhat familiar with each other's operations just because of the way that staff meetings were conducted." (Tr. at 148). Whaley's testimony also reflected knowledge of the responsibilities of the Recreation Supervisors. (Tr. at 10- 11, 61-62).

90. Jack Carey's internship responsibilities with the City of Des Moines consisted of (a) developing a wrestling tournament and one other program, the nature of which is not reflected in the record, and (b) assisting the staff with Christmas holiday duties. (Tr. at 174-75).

c. Park Responsibilities:

91. While discussing his reasons for hiring Carey, Eldredge also testified, "[H]e got the job at Pleasant Hill as park and recreation director, so he had park responsibilities." (Tr. at 239). Eldredge attached no significance to the fact Carey was the first Parks and Recreation Director at Pleasant Hill. (Tr. at 241).

92. Complainant Whaley also had experience with park responsibilities. In addition to managing the Four Mile Community Center building, which included a full-size college gym, a multi-purpose game room, officers, and lockerooms, Whaley also managed the small park that surrounds the center. The park included an open shelter, some picnic tables, volleyball and horseshoes. (Tr. at 31-32).

93. As a Recreation Specialist, Complainant had been responsible for the supervision of 20 parks and 20-50 employees at those parks during the summers from 1970 to 1974. As a Recreation Leader, she had been responsible for summer recreation activities at Bates Park and Stone Park in 1968 and 1969. See Finding of Fact No. 77.

94. Jack Carey, during his one year at Pleasant Hill, Carey developed and implemented park and recreation programs. He supervised two part-time employees during the summer and hired

instructors for specific programs. There were a total of two parks at Pleasant Hill. (CP. EX. # 14; R. EX. # 1; Tr. at 177-78).

d. Ability to Interact With Different Kinds of People:

95. While comparing Complainant Whaley and Jack Carey, Robert Eldredge also testified that:

> [Whaley and Carey] were both excellent. I think the biggest comparison . . . that hit my mind is Sandy's experience, at least all her years as the community center supervisor, had been in many cases circumscribed by a neighborhood boundary, and Jack Carey had been able to work far afield in a lot of areas that have validity in parks and recreation and in a lot of places and work with a lot of different kinds of people, which I felt was a distinct advantage in a job that would have citywide-immediate citywide responsibility.

(Tr. at 241).

96. The comparative "validity in parks and recreation" of Complainant Whaley's and Jack Carey's work experience with respect to (a) the Respondent's job description for Recreation Supervisor, (b) the major responsibilities of the job as reflected by stipulation and the testimony in the record, and (c) by the specific qualities demonstrated by Carey's experience which are mentioned in Eldredge's testimony have already been presented. By these measures, Whaley's total experience was more relevant to the Recreation Supervisor job than Carey's. See Findings of Fact Nos. 67- 94.

97. The record shows that Complainant Whaley had the ability to work with all different kinds of people. All but one of Eldredge's ten evaluations of Complainant Whaley for the period from October of 1977 to February of 1988 always gave her the highest rating of "outstanding" with respect to "Relationships with People" i.e. "Extremely able to deal with people. Radiates enthusiasm and cheerfulness. Always making friends." The evaluation for October of 1979 to October of 1980 gave her the second highest rating of "standard", i.e. "Is tactful, helpful, courteous, friendly, agreeable, successful in dealing with other people. Offers to help others." (CP. EX. # 3).

98. As Community Center Supervisor, Complainant dealt with a wide variety of people, not all of whom could have been from the Four Mile Community Center neighborhood. These included dozens of instructors for topics ranging from cooking to belly-dancing. (Tr. at 47-49). As previously noted, the events and activities organized by Whaley drew hundreds of people. See Findings of Fact Nos. 75, 89. The seniors Christmas party was so popular that it drew persons from as far away as Marshalltown. That party had to be coordinated with the parties at the other community centers because, otherwise, it would also draw all the people from their areas. (Tr. at 44).

99. As previously noted, as Recreation Specialist, Whaley supervised 20 parks in Des Moines. As Recreation Leader, she worked in two other parks. These positions also provided her with the opportunity to interact with a wide variety of people. See Finding of Fact No. 77.

G. Summary of Reasons Why Respondent Has Not Sustained Its Burden of Proving That It Would Have Not Hired Complainant Whaley Absent The Discrimination Because of Jack Carey's Wide Range of Experience:

100. For the following reasons, the Respondent has not sustained its burden of proving it would not have hired Complainant Whaley absent the discrimination because of Jack Carey's wide range of experience: First, this reason relies on the testimony and statements of Robert Eldredge which are not credible. Second, a comparison of Complainant Whaley's and Jack Carey's respective experience in the areas emphasized by respondent's job description for Recreation Supervisor does not support the conclusion that Carey would have been hired in a nondiscriminatory process. Third, a comparison of Whaley's and Carey's experience with respect to the major areas of responsibility for this position also does not support such a conclusion. Finally, a comparison of Whaley's and Carey's skills, knowledges, and responsibilities to those mentioned by Eldredge when discussing Carey's past jobs and the reasons for hiring him does not support the conclusion that Carey would have been hired in a fair process.

VI. RULING IN THE ALTERNATIVE # 2: THE COMMISSION AND THE COMPLAINANT HAVE NOT ONLY ESTABLISHED A PRIMA FACIE CASE BUT HAVE DEMONSTRATED THAT THE LEGITIMATE NON-DISCRIMINATORY REASONS FOR THE FAILURE TO HIRE COMPLAINANT ARTICULATED BY RESPONDENT ARE PRETEXTS FOR DISCRIMINATION:

101. Complainant Whaley established a prima facie case of discrimination under the order and allocation of proof utilized in cases relying on circumstantial evidence of discrimination. Respondent concedes that she established a prima facie case. See Findings of Fact Nos. 18-19.

102. Respondent articulated, through the production of evidence, in the form of the testimony of Robert Eldredge, legitimate non-discriminatory reasons for its actions. These reasons were (1) Carey's "real wide experience in a number of things" and (2) "he had ambitions to promote himself through the field of parks and recreation as far as he could go, and I liked that attitude. . . . [He had] a spirit that had a lot of initiative in it and a lot of vitality in it." (Tr. at 238, 239-40). See Finding of Fact No. 48.

103. The Commission concludes these reasons are pretexts for discrimination in light of the combination of the following facts: (a) the Respondent's reasons are false and unworthy of credence and (b) the inference of intentional discrimination remaining from the prima facie case.

104. Some of the reasons for concluding that the reasons given for hiring Carey over Whaley are false have already been discussed. See Findings of Fact Nos. 50-53. In addition to these reasons, Complainant Whaley had far better objective qualifications for the challenged position than Jack Carey. This is true whether measured by the qualifications set forth in Respondent's job description, the criteria mentioned by Robert Eldredge in his testimony, or by the major job responsibilities shown by stipulation and testimony in the record. See Findings of Facts Nos. 67-96. Such a wide disparity in objective qualifications is also probative of discriminatory intent in this case. See Conclusion of Law No. 46.

105. With respect to the subjective reasons relating to ambition, vitality and initiative, pretext is found because the Complainant, unlike Mr. Carey, was never given the opportunity at her interview to state the reasons why she wanted the position. The procedure followed in this regard also varied from the procedure which Eldredge testified he followed in interviews. Also, the record demonstrated Complainant Whaley was ambitious. See Findings of Fact Nos. 63-64. The use of these subjective measures under these circumstances reflects a potential for discriminatory abuse which is sufficiently high to establish intentional disparate treatment on the basis of sex. See Conclusion of Law No. 48.

106. Other evidence of intentional discrimination is found in the violation of Respondent's affirmative action program with respect to the City's Equal Opportunity Appointment Policy. See Conclusion of Law No. 49. As indicated in the stipulations and testimony, the Equal Opportunity Administrator was to have been notified and given the opportunity to review the proposed hiring decision prior to a final offer. He could then ensure it conformed to the Affirmative Action Plan and make appropriate recommendations. He could attempt to block the appointment. The Equal Opportunity Administrator was denied this opportunity with respect to the challenged position as he was not notified until after the offer and acceptance of the position had been completed. (Stip. Nos. 22-34; Tr. at 288, 290-92, 298-300, 304-05, 311-312). The preponderance of the evidence in the record points to sex discrimination in this hiring. When viewed in the light of this record, this failure to follow the normal procedure of notifying the Equal Opportunity Administrator prior to filling a position is further evidence of discriminatory intent.

107. The Respondent's reasons are also found to bepretexts for discrimination because the Complainant and the Commission demonstrated through the credible direct evidence in the record that sex discrimination is the more likely reason for the failure to hire Complainant Whaley. See Findings of Fact Nos. 20-21, 38-43, 50-53.

108. The Commission finds that the Complainant and Commission have established sex discrimination in the Respondent City of Des Moines's failure to hire Complainant Whaley for the challenged Recreation Supervisor position.

VII. LACHES:

A. Respondent's Position:

109. In the first footnote in Respondent's brief, the City of Des Moines notes that two of its witnesses, Willie Robinson and Jennifer Marcouiller were asked questions by the Commission's representative "concerning their ability to recall facts and circumstances from late 1987 and early 1988 as they testified in January 1994." Respondent suggested that the Commission's attorney attempted "to denigrate" Marcouiller's testimony "because of the passage of time." While mentioning these concerns, the City did not explicitly argue either that any memory flaws which these witnesses may have sustained were due to the Commission's delay in processing the case or that such flaws or delay materially prejudiced the Respondent. (Respondent's Brief at 2-3 n.1 (citing Tr. at 313, 323)).

110. Respondent argues that "the delay in bringing this contested case to hearing is entirely attributable to the Commission and Complainant." Without citation to any legal authority on the issue, Respondent suggests that "any adverse consequences flowing from such delay must be borne by the Commission and the Complainant." Respondent does not suggest what those consequences might be. (Respondent's Brief at 2-3 n.1). While there is no specific reference to laches in the footnote, this footnote is apparently intended to refer to this affirmative defense. Respondent bears a burden of persuasion which requires it to establish such an affirmative defense by clear, convincing and satisfactory proof. See Conclusion of Law No. 55. It is not necessary, however, to rule on this issue on the merits because of the Respondent's failure to raise it in a timely and effective manner.

B. Ruling on Motion to Dismiss:

111. On September 28, 1993, Respondent filed a Motion to Dismiss. (Motion to Dismiss). On October 19, 1993, Respondent's motion to dismiss, based in part on the doctrine of laches, was overruled after a taperecorded in person hearing before the undersigned. The motion was overruled on the grounds that Respondent had failed to introduce any evidence which showed either unreasonable delay or material prejudice by any delay on the part of the Commission and the Complainant in the processing of this case. (Ruling on Motion to Dismiss).

112. The Ruling found the following facts which are pertinent to the issue of delay:

> 1. The complaint in the instant case was filed with the Iowa Civil Rights Commission on March 8, 1988. (Notice of Hearing). Conciliation was attempted and failed. (Letter to Respondent of September 15, 1993). The case was assigned to the undersigned Administrative Law Judge on September 15, 1993. (Assignment to Administrative Law Judge). Notice of Hearing was issued on October 13, 1993. (Notice of Hearing).
>
> 2. Although various dates have been asserted in Respondent's Brief [in support of its motion to dismiss] for the filing of the city's initial response to the complaint, the filing of further documents, the interview of Mr. Eldredge, and the probable cause finding, there is no evidence in the record supporting or contradicting the dates of these events. (Respondent's Brief at 1-2). In the absence of supporting evidence in the record, these facts are not established.
>
> 3. Various other facts are also asserted on brief with respect to the past and present composition of the Park and Recreation Department's supervisory staff, Mr. Eldredge's retirement and Mr. Delorenzo's resignation, the length of time the selected applicant has been in the position, the number of such positions in the city, and the complainant's promotion to Senior Administrative Aide. (Respondent's Brief at 5-6). There is no evidence in the record supporting or contradicting these asserted facts. In the absence of supporting evidence in the record, these facts are not established.

> 4. There are assertions on brief that "[a]ny relief granted to Complainant will not affect the alleged perpetrators of discrimination. Further, it will disrupt and impair the efficiency, morale and discipline of City staff themselves having no part in the challenged action." (Respondent's Brief at 5-6). There is no evidence in the record supporting or contradicting these asserted facts. In the absence of supporting evidence in the record, these facts are not established.
>
> . . .
>
> 6. While the record establishes that there has been a passage of time since the filing of the complaint, Respondents have introduced no evidence establishing what date the investigation began, when probable cause was found, when conciliation attempts occurred, whether there has been an unreasonable delay in the processing of this complaint by the Commission or Complainant, or whether Respondents have been prejudiced by such delay. There is no evidence in the record establishing these facts.

(Ruling on Motion to Dismiss). By failing to make a record of unreasonable delay or material prejudice at the hearing on the motion to dismiss, Respondent failed to make an objection to these proceedings which was both timely and effective. This failure cannot be cured by again raising the issue on brief after hearing. Thus, Respondent has failed to establish its laches defense. See Conclusions of Law No. 56-57.

VIII. REMEDIES:

A. Back Pay and Back Deferred Compensation:

113. The parties have stipulated to a number of facts with respect to back pay and deferred compensation. (Stip. Nos. 35-46, 60, 76). The key facts include these:

> 35. The City's administration of its pay plan is governed . . . by the Supervisory, Professional and Management (SPM) Rules and Regulations for employees not within a bargaining unit.
>
> . . .
>
> 37. The Recreation Supervisor position is in the SPM group.
>
> . . .
>
> 39. All City employees are eligible to contribute up to $7,500 of their annual base salary to the City's deferred compensation program. For SPM employees who defer compensation, the City contributes a sum equal to that contributed by the employee except that the City's contribution may not exceed three percent (3%) of the employee's annual base salary.

. . .

> 43. To determine the applicable salary for a City position, reference must be made to the Salary Schedule covering the dates in question for the particular . . . SPM employees. Within the pay range there are graduated pay increases (Step 1 through Step 5). The beginning rate for a new employee is normally the lowest step in the established pay range for the classification. In unusual situations, a pay rate above the minimum rate may be authorized to: (1) meet difficult recruiting problems or to obtain a person with markedly superior qualifications; (2) correct salary inequities or give credit for prior service, or (3) recognize outstanding performance.
>
> 44. After appointment or promotion a City employee is eligible for a pay increase to the step pay rate midway between his or her entrance rate and the next higher step pay rate at the end of six month's satisfactory service. Upon completion of twelve months service the employee is eligible for a pay increase to the next higher step pay rate.
>
> 45. The date of the twelve month step pay increase constitutes the employee's anniversary date and he or she is eligible for one-step increases annually on this anniversary date until he or she reaches the top step of the pay range.

(Stip. Nos. 35, 37, 39, 43-45).

114. The Recreation Supervisor position, although it had higher pay and greater responsibilities than other positions in the department, was not part of a promotional ladder. Thus, if a current employee was hired into the position, it was an "appointment" and not a "promotion." (Stip. No. 14; Tr. at 210-12).

115. The complainant had "markedly superior qualifications" for this position. She had prior service in the Recreation Supervisor position. Her evaluations reflected her consistently outstanding performance. See Findings of Fact Nos. 77, 86, 97. Under these conditions, it is more likely than not that, in a nondiscriminatory process, Complainant Whaley would have been hired into the Recreation Supervisor position at step 2. (Stip. No. 43).

116. The parties stipulated that:

> If the Complainant had been appointed to the Recreation Supervisor position on January 11, 1988, she would have earned through the close of 1993 additional salary and longevity pay of . . . $18,789.72 if she had commenced the position at Step 2 of the Salary Schedule.

(Stip. No. 76-Chart 3). Therefore, Complainant is due $18,789.72 in back pay exclusive of deferred compensation and interest through the close of 1993.

117. Complainant contributed to deferred compensation at the rate of 3% of her salary. (Tr. at 104-05). However, since she has not been an SPM employee, she received no matching funds. She would have received such matching fund contributions from the city, for amounts deferred up to 3% of her annual base salary if she had been hired into the Recreation Supervisor position. (Stip. No. 37, 39, 60; Tr. at 104).

118. The amount due Complainant Whaley in matching deferred compensation funds for the years 1988 to 1993 inclusive may be determined by (a) adding the stipulated earnings for the Recreation Supervisor commencing at step 2 for those years; and (b) multiplying that sum by three per cent (3%).

119. These stipulated earnings are:

Year	Earnings of Recreation Supervisor Commencing At Step 2
1988	$24,605.71
1989	$27,399.98
1990	$29,897.79
1991	$32,599.85
1992	$34,138.13
1993	$35,450.10
Total	$184,091.56 earnings of Recreation Supervisor Commencing at Step 2 for the years 1988-1993.

(Stip. No. 76-Chart 1).

120. The amount due Complainant Whaley in matching deferred compensation for the years 1989-1993 inclusive is equal to three per cent of $184,091.56, which is $5522.75.

121. Complainant Whaley is also due back pay for the year 1994. This amount shall be calculated by deducting Whaley's actual earnings from the amount she would have received in 1994 if she had been appointed to the Recreation Supervisor position at step 2 on January 11, 1988.

122. If Complainant Whaley continued to defer pay under the deferred compensation program in 1994, she shall also be provided matching funds for all amounts deferred up to 3% of what her base salary would have been if appointed to the Recreation Supervisor position at step 2 on January 11, 1988.

123. Complainant Whaley should also receive interest on her back pay and deferred compensation amounts to compensate her for the lost value of the use of the money awarded.

B. Front Pay and Front Deferred Compensation:

124. As long as her pay is less than what it would have been if hired as a Recreation Supervisor, Complainant Whaley shall be paid at a rate equal to what she would have been paid if appointed to the Recreation Supervisor position at step 2 on January 11, 1988.

125. Throughout the remainder of her employment with the City, provided that Complainant Whaley is deferring compensation, she shall receive matching deferred compensation from the City in an amount up to the maximum then provided for incumbents in the Recreation Supervisor position or the amount provided to incumbents in her position, whichever is the greater.

C. Emotional Distress Damages:

126. Complainant Whaley suffered substantial and serious emotional distress because of the discrimination inflicted on her by the Respondent. Her reactions included the following forms of distress: disbelief, extreme disappointment, frustration, embarrassment, and anger over the blatant sex discrimination she was confronted with. (Tr. at 73, 106-08).

127. The memory of these events will be with her forever. Complainant Whaley credibly testified:

> I will never forget the words. . . . [I]t's kind of like the thing with Kennedy when he got shot. Everybody says do you know where you were when Kennedy got shot. That's the one thing that stuck in my mind, ["]a strong male supervisor["]. I'll never forget those words, and I'll never forget looking at him when he said it to me.

(Tr. at 108-09).

128. Complainant Whaley had been "extremely excited" about the challenge of moving on the Recreation Supervisor position. "This was the job I had wanted, and it was finally open." (Tr. at 105). Her initial reaction was anger and frustration over not being able to have the job because she was female. (Tr. at 73, 106). She was so embarrassed over not having been given the job that she didn't go to the central office for several days because she didn't want to face her coworkers. (Tr. at 106-07).

129. For several months, Whaley couldn't help but to continue to think about the situation. (Tr. at 106-08). "It just eats at you, more than anything." (Tr. at 106-07). She would think about this while she was driving down the street or when she was working. (Tr. at 107-08). She credibly testified:

> I would lay awake at night. At first, I couldn't even go to sleep because you just play this thing over and over again. . . [W]hen you're in bed, that's all you're thinking about. When you wake up in the morning, that's all you're thinking about. It got worse after they hired Jack Carey. Not that he's a bad person, but every time I saw him I would start thinking about it all over again.

(Tr. at 107-08).

130. Whaley not only lost sleep, but also cried out of frustration and anger over the situation. (Tr. at 73, 108). She met with John Delorenzo, Parks and Recreation Department Director, because she needed to find out whether she had any future with the City or whether she should go back to teaching. (Tr. at 73-74).

131. Complainant Whaley also suffered a substantial loss of income due to the sex discrimination in this case. It can be and is reasonably inferred that such loss of income would cause emotional distress. See Findings of Facts Nos. 116, 120. See Conclusion of Law No. 77.

132. Given the duration and severity of the emotional distress suffered by Complainant Whaley due to discrimination, an award of ten thousand dollars ($10,000) would be full, reasonable, and appropriate compensation for the distress.

CONCLUSIONS OF LAW

I. Jurisdiction and Procedure:
A. Timeliness:

1. Complainant Sandra Whaley's complaint was timelyfiled within one hundred eighty days of the alleged discriminatory practice. Iowa Code *S* 601A.15(11) (now 216.15(11)). See Finding of Fact No. 3. 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 *S* 601A.15 (now 216.15). See Finding of Fact No. 4.

B. Subject Matter Jurisdiction:

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

II. Official Notice:

3. Official notice was taken of specific facts. See Findings of Fact Nos. 51, 77.

> 10. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Iowa Code § 17A.14(4) (1991). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980).

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 160 (1992). Judicial notice may be taken of impartial census statistics. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 769 (Iowa 1971).

III. Stipulations:

4. There are numerous stipulations of fact in this case. A "stipulation" is a "voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate [the] need for proof." BLACK'S LAW DICTIONARY 1269 (5th ed. 1979). Stipulations as to fact are binding on a court, commission or other adjudicative body when, as in this case, there is an absence of proof that the stipulation was the result of fraud, wrongdoing, misrepresentation or was not in accord with the intent of the parties. In Re Clark's Estate, 131 N.W.2d 138, 142 (Iowa 1970); Burnett v. Poage, 239 Iowa 31, 38, 29 N.W.2d 431 (1948).

IV. Admissions on Brief:

5. There are several allegations made on brief by a party which are binding on the Commission because such allegations are adverse to the party making them. See Findings of Fact Nos. 19, 48-49.

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

Maxine Boomgarden, CP # 07-86-14926, slip. op. at 59 (Iowa Civil Rights Comm'n October 12, 1993). Thus, the Commission is bound to take as true the facts admitted by the Respondent which established a prima facie case under the pretext method of proof. See Finding of Fact No. 19.

6. Furthermore:

> [T]he Commission must take as true . . . that . . . respondents assert, and are therefore limited to, only the . . . reasons cited on their brief as being their legitimate, non-discriminatory reasons for [their actions toward complainant].
>
> 7. This does not mean that any respondent to a charge of discrimination articulates a legitimate non-discriminatory reason merely by identifying it on brief. That must be done through the production of evidence which, assuming it were believed, would set forth a lawful, non-discriminatory reason for the action alleged to be due to discrimination. Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 517 (Iowa 1990). Rather, the Respondents' legitimate non- discriminatory reasons are limited to those set forth on brief,

> because by identifying only certain reasons on brief, the Respondents have admitted that those are the only reasons they may have articulated. The Respondents are bound by that admission. See Larson at 572. This admission is binding on the Commission in its adjudicative capacity and it may, therefore, consider only those reasons so identified on brief. See Id.; Grantham, 257 Iowa at 230-31.

Id., slip. op. at 59-60.

7. Under the above principles, the Commission must take as true that only the reasons set forth on brief are those being offered by Respondent as legitimate, nondiscriminatory reasons for the failure to hire Whaley. This does not mean that such reasons are the true reasons or that merely setting forth such reasons on brief is sufficient to rebut the prima facie case. Rather, under these principles, when using the pretext method of analysis, the Commission is limited to determining whether the Respondent has produced sufficient evidence for the nondiscriminatory reasons given on brief to rebut the prima facie case. The Commission may not speculate as to other possible legitimate, nondiscriminatory reasons not mentioned on brief. See Findings of Fact Nos. 48-49.

V. Respondent's Failure to Raise the Mixed Motive or Same Decision Defense on Brief or On It's Pleadings Waives the Defense:

8. Respondent has failed to raise the "mixed motive" or "same decision" defense on brief or on in its pleadings. See Findings of Fact Nos. 46-47. This defense may arise "[w]here direct evidence [of discrimination] is presented and the employer suggests other factors [i.e. motives in addition to discrimination] influenced the decision." Landals v. George A. Rolfes Company, 454 N.W.2d 891 (Iowa 1990)(cited in Civil Service Commission v. Iowa Civil Rights Commission, 522 N.W.2d. 82, 88 (Iowa 1994). "[T]he employer [then] has the burden of proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the improper factor." Id. For the reasons stated below, the failure of Respondent to raise this defense on brief or on pleadings constitutes either a waiver of the defense or an admission that it has no mixed motive defense and that the only defenses it has are those which are asserted on brief and in it's pleadings.

9. First, since the Respondent has asserted only certain defenses on brief or in its pleadings, it is limited to those defenses. Cf. Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991)(citing Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)(employer bound to reasons for termination set forth on brief). Larson was an unemployment insurance case. Id. The Court held that an employer was bound by the reasons for termination of an employee which were stated in its brief filed with the Employment Appeal Board. Id. Since the employer had stated that the employee was terminated for inability to do work, a reason which would not disqualify the employee for benefits, it was bound by this statement. Id. Based on this admission, benefits were granted, although the employer attempted to argue that the employee had been terminated for misconduct. Id.

10. Second, the Respondent's failure to urge a defense before the administrative law judge constitutes a waiver of that defense. See 161 IAC 4.3(15) (formerly 240 IAC 1.9(12)("Any objection not duly made before the hearing officer shall be deemed waived"). Cf. Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 382 (Iowa 1986)(citing e.g. 240 IAC 1.9(12)(error not preserved at the Commission level is waived--issue must be raised before the agency).

11. Third, the defenses which are offered by Respondent are not consistent with the theory of a mixed motive case. When, as here, a complainant alleges discrimination and a respondent to a charge asserts there is "no discriminatory actuation," Callan v. Confederation of Oregon School Administrators, 317 P.2d 1252, 57 Fair Empl. Prac. 1696, 1698 (Ore. Ct. App. 1986), the case is "not a mixed motive case." Id. See Findings of Fact Nos. 46-47.

VI. Order and Allocation of Proof - The Burden of Persuasion:

12. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding was on the Commission and the complainant to persuade the finder of fact that sex discrimination has been proven. See Iowa Code S 216.15(7)(burden of proof on Commission); Linn Co-operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981)(burden of proof on complainant). Of course, in discrimination cases as in all civil cases, the burden of persuasion is "measured by the test of preponderance of the evidence," Iowa R. App. Pro. 14(f)(6), and not by proof beyond a reasonable doubt or other standards.

13. The burden of persuasion must be distinguished from what is known as "the burden of production" or the "burden of going forward." The burden of production refers to the obligation of a party to introduce evidence sufficient to avoid a ruling against him or her on an issue. BLACK'S LAW DICTIONARY 178 (5th ed. 1979).

VII. The Direct Evidence Method of Proof:

14. "Direct evidence" is that "evidence, which if believed, proves existence of [the] fact in issue without inference or presumption." It is "that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect". BLACK'S LAW DICTIONARY 413-14 (1979). Either policies which on their face call for consideration of a prohibited factor or statements by relevant managers reflecting bias constitute direct evidence of discrimination. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 477-78 (2nd ed. 1989).

15. Examples of direct evidence that sex or another protected class status is a motivating factor in an employment decision include comments by decisionmakers expressing a preference for employees who are members of a particular protected class or comments indicating that stereotypes of members of a particular protected class played a role in the challenged decision or practice. See e.g. Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d

268, 288 (1989)(promotion); Barbano v. Madison County, 922 F.2d 139, 143, 54 Fair Empl. Prac. Cas. 1287, 1290, 1292 (2nd Cir. 1990)(hiring); Buckley v. Hospital Corporation of America, 758 F.2d 1525, 1530 (11th Cir. 1985)(discharge); Storey v. City of Sparta Police Department, 667 F. Supp. 1164, 45 Fair Empl. Prac. Cas. 1546, 1551 (M.D. Tenn. 1987)(hiring).

16. 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 discriminates against the complainant because of 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)(evidence sufficiently probative as policy was facially discriminatory; practice discriminated on basis of age; affirmative defenses rejected; violation of ADEA found). 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 Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982); Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 530 (Iowa 1985), is inapplicable. Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'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); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 473, 476 (2nd ed. 1989).

17. The reason why the McDonnell Douglas or "pretext" or "circumstantial evidence" order and allocation of proof is not applicable where there is direct evidence of discrimination, and why the employer's defenses are then treated as affirmative defenses, i.e. the employer has a burden of persuasion and not just of production, is because:

> [T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination.

Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring). See also Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990).

18. In this case, there is direct evidence in the record that sex was the motivating factor in Respondent's failure to hire Complainant Whaley for the Recreation Supervisor position. See Findings of Fact Nos. 21-22, 38, 42-43. There is also supplemental direct evidence that a concern for the safety of women also affected other employment and policy decisions. See Findings of Fact Nos. 23-25, 42, 44-45. However, "[t]he argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of [civil rights laws] to

allow the individual woman to make that choice herself." Dothard v. Rawlinson, 433 U.S. 321, 335, 15 Fair Empl. Prac. Cas. 10, 16 (1977).

18A. After careful examination, this direct evidence has been found to be sufficiently probative to establish sex discrimination with respect to Whaley's hiring and the other matters. See Findings of Fact Nos. 20-45. The statements about the challenged position were "'[c]omments which demonstrate a discriminatory animus in the decisional process' [and] were uttered by [an individual] closely involved in employment decisions." Radabaugh v. Zip Feed Mills, 997 F.2d 444, 62 Fair Empl. Prac. 438, 441 (8th Cir. 1993)(quoting Price-Waterhouse, 490 U.S. at 278 (O'Connor, J. concurring). They could hardly be characterized as "'stray remarks in the workplace,' 'statements by non- decisionmakers', or 'statements by decisionmakers unrelated to the decisional process.' Id. Certain legal principles concerning the credibility of witnesses, which are discussed later in this decision, were applied in determining the probative nature of this evidence. See Conclusions of Law Nos. 20-29.

19. The inquiry, however, does not end there, for the affirmative defenses of the Respondent, if any, 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). Examples of possible affirmative defenses which address direct evidence of discrimination include (a) that the protected class status (e.g. sex in this case) is a bona fide occupational qualification (BFOQ) for the position, see e.g. id., 469 U.S. at 124, 105 S. Ct. at ___, 83 L.Ed. 2d at 535; or, (b) the "mixed motive" or "same decision" defense. See Conclusion of Law No. 8. Since the Respondent failed to raise any such affirmative defense, it's liability for discrimination is established. This reasoning accounts for the main ruling on liability in this case. See Finding of Fact No. 46.

VIII. Credibility and Testimony:

20. In addition to other factors mentioned in the findings of fact on credibility, the Administrative Law Judge and the Commission have been guided by the following principles: First, it has been recognized that, when other witnesses have a interest in litigation which plausibly might affect their testimony, the testimony of those witnesses who are disinterested will often be entitled to the greatest weight. See, Lareau & Sacks, Assessing Credibility in Labor Arbitration, 5 The Labor Lawyer 151, 178-79 (1989); See also Kaiser v. Strathas, 263 N.W.2d 522, 526 (Iowa 1978)(interest of witness, remote or otherwise may be taken into account). This principle was among those factors applied in accepting the credibility of the testimony of Bill Beverly. See Finding of Fact No. 26.

21. Second, "[w]hen the trier of fact . . . finds that any witness has willfully testified falsely to any material matter, it should take that fact into consideration in determining what credit, if any, is to be given to the rest of his testimony." Arthur Elevator Company v. Grove, 236 N.W.2d 383, 388 (Iowa 1975). "[T]he facts disputed in litigation are not random unknowns in isolated equations-- they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." NLRB. v. Pittsburgh Steamship Company, 337 U.S. 656, 659 (1949).

22. This case provides an example of the application of this principle. Because of Eldredge's willfully false testimony denying his inculpatory statements to Whaley and Beverly, his other testimony concerning the reasons for Carey's hire and Whaley's rejection was also disbelieved. Cf. Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed. 2d 268, 289, 109 S.Ct. 1775 n.14 (1989) (mixed motive case rejecting the "baffling" suggestion "that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision"); Fuentes v. Perskie, ___ F.2d ___, 65 Fair Empl. Cas. 890, 894 at n.7 (3rd Cir. 1994)(pretext case--"factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons even if no evidence undermining those remaining rationales in particular is available."). See Findings of Nos. 53, 57, 65, 100, 104.

23. Third,

> [T]he trier of fact is not . . . required to accept and give effect to testimony which it finds to be unreliable although uncontradicted. Testimony may be unimpeached by any direct evidence to the contrary and yet be so . . . inconsistent with other circumstances established in the evidence, . . . , as to be subject to rejection by the . . . trier of the facts.
>
> . . .
>
> The [factfinder] . . . might well scrutinize closely such testimony as to its credibility, taking into consideration all the circumstances throwing light thereon, such as the interest of the witnesses, remote or otherwise.

Kaiser v. Strathas, 263 N.W.2d 522, 526 (Iowa 1978)(citations omitted).

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

25. The factors cited above, such as consistency with the other circumstances in the record, interest, conduct and demeanor have been used in determining credibility in this case. See Findings of Fact Nos. 26-37, 39-41, 50-53.

26. With respect to witness demeanor, however, caution must be exercised, as many traditional demeanor clues and notions are false. See, Lareau & Sacks, Assessing Credibility in Labor Arbitration, 5 The Labor Lawyer 151, 154-55. (1989). For example, "research shows pleasant

facial characteristics are among the characteristics of those who lie." Id. at 155. Witness who either don't know what they are talking about or are liars may display a confident demeanor. Id. at 154. See Finding of Fact No. 52.

27. Fifth, "[d]eference is due to hearing officer [now administrative law judge] decisions concerning issues of credibility of witnesses." Peoples Memorial Hospital v. Iowa Civil Rights Commission, 322 N.W.2d 87, 92 (Iowa 1982)(citing Bangor and Aroostook Railroad Co. v. ICC, 574 F.2d 1096, 1110 (1st Cir.), cert. denied, 439 U.S. 837, 99 S.Ct. 121, 58 L.Ed2d 133 (1978)(deference is due by reviewing court to ALJ findings on credibility even when agency has reached a contrary decision)).

28. Such deference is given because the administrative adjudicator who views the witnesses and observes their demeanor at the hearing is "in a far superior position to determine the question of credibility than is this court." Libe v. Board of Education, 350 N.W.2d 748, 750 (Iowa Ct. App. 1984). "Factual disputes depending heavily on the credibility of witnesses are best resolved by the trial court" Capital Savings & Loan Assn. v. First Financial Savings & Loan Assn., 364 N.W.2d 267, 271 (Iowa Ct. App. 1984)(quoted in Board v. Justman, 476 N.W.2d 335, 338 (Iowa 1991)).

29. The extent of this deference is best demonstrated by the factual situation set forth in this statement by the United States Supreme Court:

> Only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said . . . [W]hen a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson v. City of Bessemer City, 470 U.S. 564, 575, 37 Fair Empl. Prac. Cas. 396 (1985).

IX. Ruling In the Alternative # 1: Mixed Motive Analysis:

30. In addition to the main ruling, alternative rulings were made with respect to the mixed motive analysis, which was discussed in the Commission's brief and the pretext analysis, which was discussed in both the Commission's and the Respondent's brief. (Commission's Brief at 17-29; Respondent's Brief at 6-28). (Since the Commission and Respondent file simultaneous post-hearing briefs, the Commission could not have known the mixed motive defense would not be raised on Respondent's brief). While discussing the mixed motive analysis, however, the Commission did not admit in its discussion of facts that there actually was a mixture of legitimate and illegitimate motives. It only referred to "several conceivable reasons for preferring Carey's qualifications [which] appear in the record." (Commission's Brief at 13)(italics in original).

31. "Where direct evidence is presented and the employer suggests other factors influenced the decision, the employer has the burden of proving by a preponderance of the evidence that it

would have made the same decision even if it had not considered the improper factor." Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990)(citing Price- Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268, 293)(emphasis added). "When . . . an employer considers both sex and legitimate factors at the time of making a decision, that decision was 'because of' sex." Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268, 282 (1989)(emphasis added).

32. This defense is an affirmative defense. Id. 104 L.Ed. 2d at 289. The Respondent bears the burden of persuading the finder of fact by a preponderance of the evidence that "it would have made the same decision even if it had not taken sex into account." Id. & 293. With the 1991 amendments to Title VII of the Civil Rights Act of 1964, Congress rejected the Supreme Court's holding that this showing could effect a complete defense. Now, only a limitation of damages, but not a complete defense, can be effected by the Respondent if it meets this burden of proof. See Washington v. Garrett, 10 F.3d 1421, 1432 n.15 (9th Cir. 1993). Compare Price-Waterhouse, 104 L.Ed. 2d at 293 (complete defense to liability effected if Respondent meets burden of proof) with 42 U.S.C. SS 2000e-2(m); 2000e- 5(g)(2)(B) (limitation on remedies). The persuasive effect of this change in Title VII on Iowa law has not yet been determined. The Commission finds this statutory change to be persuasive as it better effectuates the "principal purpose" of the act, which is to eliminate illegal employment discrimination. See Iowa Code S 216.18 (statute to be liberally construed to effectuate its purposes); Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 170 (Iowa 1982)(elimination of employment discrimination a "principal purpose" of the Act).

33. To establish this defense:

> [T]he employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, proving "that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." . . . An employer may not, in other words prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Price-Waterhouse, 104 L.Ed.2d at 289. (emphasis added).

33. Although objective evidence must be presented, the Respondent's ultimate burden is one of persuasion and not mere production of objective evidence. Id. "The employer has not yet been shown to be a violator, but neither is it entitled to the . . . presumption of good faith concerning its employment decisions. [A]t this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire." Price Waterhouse, 104 L. Ed. 2d at 297-98 (O'Connor, J., concurring).

34. The ultimate question is one of human motivation, i.e. "what motivated someone and what the person would have done absent that motivation," an issue that involves many credibility and other evaluative choices. Ayers v. Western Line Consolidation School District, 555 F.2d 1309, 18 Fair Empl. Prac. Cas. 1407, 1411 (5th Cir. 1977).

35. The Respondent did not meet its burden of persuasion because it's evidence came from a source which was not credible and for other reasons set forth in the findings of fact. See Findings of Fact Nos. 65, 100.

36. Among the other factors weighed in determining that Respondent did not meet it's "same decision" burden were the comparative qualifications of Complainant Whaley and Jack Carey. It is permissible to use such comparisons when deciding whether or not an employer has proven that it would have made the same hiring decision in a nondiscriminatory process. See Barbano v. Madison County, 922 F.2d 139, 145, 146, 54 Fair Empl. Prac. Cas. 1287 (2nd Cir. 1990).

37. The Barbano case involved the failure to hire a woman, Maureen Barbano, for the position of Director of a Veterans Service Agency due to her sex. Id., 922 F.2d at 141. In considering whether the Board of Supervisors had proven that it would not have hired Barbano in the absence of discrimination, the trial judge found that two of the Board's four reasons for preferring the male hired over Barbano were supported by the record. Id., 922 F.2d at 145.

38. These two reasons were the preferred applicant's interest in veteran's affairs and military experience. Id. The trial court noted, however, that neither of these were listed as requirements in the job description. Id. The trial court "found that given Barbano's 'education and experience in social services,' [the defendants] failed to carry their burden of proving by a preponderance of the evidence that absent discrimination, they would not have hired Barbano." Id.

39. On appeal, the Second Circuit Court of Appeals affirmed the trial court and rejected the argument that the trial court "'impermissibly substituted its own opinion on the matter' in rejecting their reasons for not hiring Barbano." Id.:

> This is a curious argument for [the defendants] to offer, since [the trial judge] as the trier of fact was required to have an opinion-- more precisely, to make a finding--on whether the asserted reasons for the [failure to hire] sustained [the defendant's] burden of proving that they would not have hired Barbano absent discrimination. In any event, our review of the record indicates that the district judge did not commit error.
>
> . . .
>
> [The appellate court then set forth Barbano's and the preferred applicant's qualifications in detail.]
>
> . . .

> To be sure, both candidates were qualified for the Director's position, and it is not our job--nor was it the district court's--to decide which one was preferable. However there is nothing to indicate that [the trial judge] misconceived his function in this phase of the case, which was to decide whether [defendants] failed to prove by a preponderance of the evidence that they would not have hired Barbano even if they had not discriminated against her. The judge found that defendants had not met that burden. We must decide whether that finding was clearly erroneous and we cannot say that it was.

Id., 922 F.2d at 145-46.

40. Care was also taken in this case to ensure that the focus in determining whether the Respondent met its burden was "not who the fact finder thinks the employer should have hired, but who the employer would have hired had it not considered [sex]." Civil Service Commission v. Iowa Civil Rights Commission, 522 N.W.2d 82, 89 (Iowa 1994). Therefore, like the court in Barbano, the comparative qualifications here were measured by the employer's standards, such as the job description, Barbano, 922 F.2d at 145, job requirements that were stipulated to by the parties and reflected in the testimony, and the reasons set forth in the testimony of the Recreation Superintendent, Robert Eldredge (even though this testimony was not believed). See Findings of Fact Nos. 50- 100. Like the employer in Barbano, the Respondent has failed to meet its burden of persuasion.

41. Also considered with respect to how the "ambition" reason would have been resolved in a non-discriminatory process under the employer's averred standards, were the differences between the interview procedures set forth by Eldredge in his testimony and those actually applied to the Complainant. See Findings of Fact Nos. 55-56, 58, 59, 62. The Respondent failed to show how, in a nondiscriminatory process where Complaint Whaley would have been asked why she wanted the job, the Respondent would have evaluated her answer. See Finding of Fact No. 64. Thus, the Respondent has failed to "carry the burden of separating out the impermissible motives from the permissible." Hopkins v. Price-Waterhouse, 920 F.2d 967, 973 (D.C. Cir. 1990)(citing Price-Waterhouse, 109 S.Ct. at 1804 (O'Connor, J. concurring). "[T]he decision must go to the employee should the employer fail to carry this burden." Id.

X. Ruling In the Alternative # 2: Pretext or Circumstantial Evidence Method of Proof:

42. The order and allocation of proof known as the "pretext," "circumstantial evidence," or "McDonnell-Douglas" method was described in the Dorene Polton case:

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

26. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). This showing is not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

27. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, non- discriminatory reason for its action. Id.; Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). If the Respondent does nothing in the face of the presumption of discrimination which arises from the establishment of a prima facie case, judgment must be entered for Complainant as no issue of fact remains. Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). If Respondent does produce evidence of a legitimate non-discriminatory reason for its actions, the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

28. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981)).

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

Dorene Polton, 11 Iowa Civil Rights Commission Case Reports 152, 162 (1992).

43. The Respondent has admitted on brief that Complainant Whaley established a prima facie case of discrimination. See Finding of Fact No. 19. It has also been found that Respondent produced evidence of legitimate, nondiscriminatory reasons to rebut the prima facie case. See

Finding of Fact No. 102. Thus, the issues move to pretext and the ultimate finding of discrimination. There are a variety of ways in which it may be shown that Respondent's articulated reasons are pretexts for discrimination, not all of which are enumerated below. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978); La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Cas. 913, 922 n.6 (7th Cir. 1984).

44.

> 30. [Pretext may be proven] by evidence showing:
>
> > (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the [challenged employment action], or (3) that the proffered reasons were insufficient to motivate the [challenged employment action].
>
> Bechold v. IGW Systems, Inc., 817 F.2d 1282, 43 Fair Empl. Prac. Cas. 1512, 1515 (7th Cir. 1987).

Ruth Miller, 11 Iowa Civil Rights Commission Case Reports 26, 48 (1990). Pretext in the instant case was demonstrated by findings of fact indicating that the reasons articulated by Respondent were from an incredible source, see Findings of Fact Nos. 50-53, that they did not actually motivate the failure to hire, see Finding of Fact No. 107, and were insufficient to motivate the failure to hire since they resulted from an interview process where the preferred candidate was given the opportunity to give his reasons for wanting the job while the complainant was not. See Findings of Fact Nos. 55-62.

45.

> 31. In addition, "[t]he reasonableness of the employer's reasons may . . . be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext." Loeb v. Textron, Inc., 600 F.2d 1003, 1012, 20 Fair Empl. Prac. Cas. 29, 35 n.6 (1st Cir. 1979). The focus, however, is on the employer's motivation and not its business judgment. Id.

Id. at 48-49.

46. In this respect it should be noted that wide disparities in the qualifications of the complainant and the preferred applicant are probative of discrimination. See Callan v. Confederation of Oregon School Administrators, 317 P.2d 1252, 57 Fair Empl. Prac. 1696, 1698 (Ore. Ct. App. 1986):

> It is self-evident that if a male applicant is hired instead of a female applicant with clearly superior credentials, the disparity in their suitability for the job is probative of discrimination. In the normal case, the tendency of a disparity of

> qualifications to prove--or disprove--discrimination will vary proportionately to the degree and obviousness of the disparity. Evidence of relative qualification must be evaluated with those obvious considerations in mind.
>
> . . .
>
> Our only disagreement with defendant's argument is its implication that courts cannot make the fine distinctions between comparative qualifications in their weighing of evidence in discrimination cases. We nevertheless do agree with defendant's implication that, when the distinctions are so fine as to be beyond objective calibration, the employer's subjective evaluation of the applicants' qualifications will seldom weigh heavily in favor of a finding of discrimination.

Id. at 1698-99. The disparities in qualifications in the instant case are readily capable of objective calibration and are probative of discrimination. Unlike the case in Woodbury County v. Iowa Civil Rights Commission, 335 N.W.2d 161, 168 (Iowa 1983), this is not a case involving similarly or equally qualified applicants where the employer has been found to have misjudged the applicants. By the employer's own standards, the Complainant, who was considered "excellent" and rated "outstanding" by the employer, had far longer, far more responsible, and far more relevant experience for the position. See Findings of Fact Nos. 67- 100, 104. And, of course, the findings of pretext here do not rely solely on the difference in qualifications. See Lucas v. Dover Corp., 857 F.2d 1397, 1403-04 (10th Cir. 1988)(deference given to employer assessment of qualifications "in the absence of some evidence of impermissible motives").

47.

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

Ruth Miller at 49. In this case, the reasons for the failure to hire her given in the letter to Complainant Whaley varied from that given the Commission. The letter to Whaley mentioned only the "experience" reason and not the "ambition" reason for the failure to hire. See Finding of Fact No. 53.

48. While the use of subjective criteria is not per se discriminatory, subjective practices must be closely scrutinized as they provide a ready mechanism for discrimination. Jauregui v. City of Glendale, 852 F.2d 1128, 1135-36 (9th Cir. 1988). Given the facts in this case concerning the interview procedures and the potential for abuse inherent in subjective mechanisms, the use of the "ambition" criteria was discriminatory. See Finding of Fact No. 105.

49. "Although the failure to follow an affirmative action plan is not a per se violation of Title VII, evidence that an employer violated its own affirmative action plan may be relevant to the question of discriminatory intent." Stender v. Lucky Stores, 803 F.Supp. 259, 330, 62 Fair Empl. Prac. Cas. 11, 66-67 (N.D. CA 1992)(citing e.g. Gonzales v. Police Dept., 901 F.2d 758, 761, 52

Fair Empl. Prac. Cas. 1132 (9th Cir. 1990); Craik v. Minnesota State University Board, 731 F.2d 465, 472, 34 Fair Empl. Prac. Cas. 649 (8th Cir. 1984). See Finding of Fact No. 106.

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

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

Maxine Boomgarden, slip. op. at 64 (citing St. Mary's Honor Center v. Hicks, ____ U.S. ____, 113 S.Ct. 2447, 62 Fair Empl. Prac. Cas. 96, 100 (1993)); Washington v. Garrett, 10 F.3d 1421, 1433, 63 Fair Empl. Prac. Cas. 540, 549 (9th Cir. 1993)(Under Hicks "a factfinder . . . is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more"); Anderson v. Baxter Healthcare Center, 13 F.3d 1120, 63 Fair Empl. Prac. Cas. 1016, 1019 & n.3 (7th Cir. 1994)(rejecting as dicta language in Hicks indicating that anything more than a prima facie case and disbelief of employer's reasons is required to show discrimination). The Supreme Court noted that the disbelief of the employer's articulated reasons is particularly likely to support a finding that these reasons are pretexts for discrimination when the disbelief "is accompanied by a suspicion of mendacity." St. Mary's Honor Center v. Hicks, ____ U.S. ____, 113 S.Ct. 2447, 62 Fair Empl. Prac. Cas. 96, 100 (1993). There is considerably more than "a suspicion of mendacity" affecting the reasons articulated by Respondent in this case. See Findings of Facts Nos. 50-53.

50. In pretext cases, "the rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct, when it noted that, upon such rejection, 'no other proof of discrimination is required.' 970 F.2d at 493." Id., 62 Fair Empl. Prac. Cas. at 100. While this Commission is not legally compelled to find discrimination when the employer's reasons are disbelieved, it may do so, see id., and has done so in this case. See Finding of Fact No. 103.

51. Pretext has also been shown by direct evidence persuading the Commission that discrimination was more likely than not the true explanation for the failure to hire Complainant Whaley. See Conclusion of Law No. 42. See Finding of Fact No. 107. There was also direct evidence of past acts of discrimination. See Findings of Fact Nos. 23- 25, 42, 44. Evidence of such past acts is probative on the issue of the employer's motive or intent. Hamer v. Iowa Civil Rights Commission, 472 N.W.2d 259, 263 (Iowa 1991).

52. Thus, under the pretext analysis, Complainant has met her burden of persuasion with regard to establishing sex discrimination in violation of Iowa Code section 601A.6 (now S 216.6).

XI. Laches:

53. The Respondent appears to have addressed the issue of laches in its posthearing brief. See Finding of Fact No. 109. It is "extremely rare for laches to be effectively invoked" when a complainant has filed her administrative civil rights complaint with the agency within the time

provided for by the pertinent statute of limitations. See Bouman v. Block, 940 F.2d 1211, 1227, 60 Fair Empl. Prac. Cas. 1000, 1011 (9th Cir. 1991)(applying this principle when the plaintiff had timely filed her administrative complaint with the EEOC within the 300 day statute of limitations). In this case, the parties have stipulated that the complaint was timely filed with the Iowa Civil Rights Commission. See Finding of Fact No. 3, 112.

54. In determining whether a case is one of those rare ones where laches applies, it must be remembered that "the doctrine [of laches] is applied to do, and not to defeat justice." Regal Insurance Company v. Summit Guaranty Corp., 324 N.W.2d 697, 704 (Iowa 1982). The doctrine is based upon the public policy which seeks to discourage stale claims. Davidson v. Lengen, 266 N.W.2d 436, 439 (Iowa 1978). It focuses on the issue of whether unreasonable delay in litigation has resulted in material prejudice to a defendant. Id.

55. Both unreasonable delay and material prejudice must be proven by the defendant, Brewer v. State 446 N.W.2d 803, 805 (Iowa 1989), by clear, convincing and satisfactory evidence. Chicago, Rock Island, and Pacific Railroad Company v. City of Iowa City, 288 N.W.2d 536, 541 (Iowa 1980). "Prejudice must be shown. . . . Prejudice 'cannot be inferred merely from the passage of time.'" C.O.P.E.C. v. Wunschel, 461 N.W.2d 840, 846 (Iowa 1990)(quoting with approval Cullinan v. Cullinan, 226 N.W.2d 33, 36 (Iowa 1976)).

56. In the context of an administrative civil rights hearing, an objection of unreasonable delay in the complaint process "must be made before a case has proceeded through a full-blown evidentiary hearing." Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 170 (Iowa 1982)(emphasis added). The court in Foods also held that "In any event [the respondent to the charge of discrimination] has not shown that it's substantial rights were prejudiced by the Commission's alleged delay." Id.

57. It is implicit in these statements that the respondent is required to raise an objection and to make an evidentiary record, before the Commission, of unreasonable delay and of any resulting material prejudice in order to obtain a ruling on the objection prior to the contested case hearing. See id.

58. The very purpose of requiring such an objection to proceedings before hearing is to give the agency an opportunity to act while there is still time for correction. Schwartz, Administrative Law S 10.3 p. 629 (1991). Of course, the objection could only be sustained on a record of evidence supporting the objection. A pretrial hearing on the objection or motion raising laches gives the Respondent the opportunity to meet its burden of proving laches and thereby obtain a dismissal of the case prior to any scheduled contested case hearing. See Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 170 (Iowa 1982). In the event the objection is overruled, the record established at the hearing on the objection becomes part of the record of the contested case. See Iowa Code S 17A.6(a), (b). Thus, the hearing also gives Respondent the opportunity to preserve error for judicial review. Id. at 17A.19(1).

59. In this case, Respondent completely failed to present evidence of undue delay or of material prejudice at the hearing on the motion to dismiss. See Finding of Fact No. 111. Laches must be

supported by pleaded proof. Argument does not suffice. In Re Lunt, 235 Iowa 62, 78, 16 N.W.2d 25 (1944).

60. The only facts shown in the record at that time pertinent to the issue were the passage of time from the date of filing on March 8, 1988, to the date conciliation failed on September 15, 1993, to the date Notice of Hearing was issued on October 13, 1993. See Finding of Fact No. 112. Such evidence is not sufficient to prove either delay, let alone unreasonable delay, EEOC v. Warshawsky & Co., ___ F. Supp. ___, 56 Fair Empl. Prac. Cas. 889, 896 (N.D. Ill. 1991)(the bare fact that 4 years elapsed between filing of complaint and EEOC's filing of suit does not demonstrate delay), or material prejudice. C.O.P.E.C. v. Wunschel, 461 N.W.2d 840, 846 (Iowa 1990)(prejudice may not be inferred from the passage of time). Because Respondent failed to make a timely and sufficient objection and record of unreasonable delay and material prejudice prior to the hearing, it has failed to establish its affirmative defense of laches.

XII. Remedies:

61.

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

Maxine Boomgarden, slip. op. at 88.

A. Compensatory Damages: Back Pay:

1. Purposes of Back Pay:

62.

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

Maxine Boomgarden, slip. op. at 91.

2. Principles to Be Followed In Computing Back Pay:

63. The following principles were followed in determining Complainant Whaley's back pay and deferred compensation amounts:

> 78. . . . [T]wo basic principles [are] to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 530-531 (Iowa 1990). "It suffices for the [agency] to determine the amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. at 531.

Maxine Boomgarden, slip. op. at 91-92. Also of importance was the requirement that this Commission adhere to the factual stipulations of the parties. See Conclusion of Law No. 4. See Findings of Fact Nos. 123.

B. Compensatory Damages: Front Pay:

64. An award of "front pay" is made with respect to wages and deferred compensation. See Findings of Fact Nos. 124-25. Such an award is authorized by the Iowa Civil Rights Act. Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 532 (Iowa 1990). "Front pay is designed to compensate the discriminatee for the future economic injury that [s]he is likely to suffer between the date of judgment and the date [s]he is placed in h[er] rightful place or some other defined date. R. Belton, Remedies in Employment Discrimination Law 346 (1992). When, as here, installment in the position denied has not been shown to be immediately available as a remedy, a front pay award is justified. See id. at 353. Under these circumstances, the complainant is presumptively entitled to front pay. Id.

C. Compensatory Damages: Emotional Distress:

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

65. The following principles were applied in determining whether and what amount of damages for emotional distress should be awarded: In considering the question of emotional distress damages, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures for more than a century," Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971).

66. Sex discrimination in employment is a serious matter. It demands a substantial remedy. The Iowa Civil Rights Act was enacted, in part, to provide such a remedy. See Iowa Code SS 216.6, 216.15(8)(a)(8). 67. By 1978, it became clear to the legislature that the extremely limited remedies originally enacted in 1965 were woefully inadequate to carry out the remedial purposes of the act. Therefore, the act was amended, effective January 1, 1979, to give the Commission

the power to award "actual damages." 1978 Iowa Acts ch. 1179 S 16. These are synonymous with "compensatory damages". The purpose of such authority is not to remedy only out-of-pocket losses while ignoring proven emotional distress damages, but to "make whole" the victims of discrimination for all losses suffered as a result of discrimination. See Iowa Code S 216.15(8)(a)(8)(1993); Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525-26 (Iowa 1990); Chauffers, Teamsters, and Helpers v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986). "[T]he real purpose behind a civil rights award is to make the person whole for an injury suffered as a result of unlawful employment discrimination." Allison-Bristow v. Iowa Civil Rights Commission, 461 N.W.2d 456, 459 (Iowa 1990).

68. "[D]amages for emotional distress are recoverable under our civil rights statute." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525 (Iowa 1990). In 1986, the Iowa Supreme Court held:

> We agree with those jurisdictions allowing the award of emotional distress damages by the civil rights commission or its equivalent. This result seems only natural because emotional distress is generally a compensable injury, and the language of the statute allows actual damages which are synonymous with compensatory damages. Allowing the award of emotional distress damages is also consistent with the commission's discretion in fashioning an appropriate remedy.

Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986). A victim of discrimination is to receive "a remedy for his or her complete injury," including damages for emotional distress. Hy-Vee at 525-26.

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

> [Such action] offends standards of fair conduct . . . the [victim of discrimination] may suffer mentally. "Humiliation, wounded pride and the like may cause very acute mental anguish." [citations omitted]. We know of no logical reason why . . . damages should be limited to out-of- pocket loss of income, when the [victim] also suffers causally connected emotional harm. . . . We believe that fairness alone justifies the allowance of a full recovery in this type of tort.

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

70. Other courts have also made observations which apply to this case:

> Evidence of distress was received. That distress is not unknown when discrimination has occurred. . . . But as the trial progressed it became more apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. . . . Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That . . . is perhaps the injury which is felt the most and the one which is the greatest.

Belton, Remedies in Employment Discrimination Law 408 (1992)(quoting Humphrey v. Southwestern Portland Cement Company, 369 F. Supp. 832, 834 (W.D. Tex. 1973).

71.

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

Id. (quoting Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985)(quoting Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979)).

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

72. Among the many forms of emotional distress which may be compensated are "anger," "upset," "hurt," Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24- 29 (1982)(citing Fraser and 121-129 Broadway Realty v. New York Division of Human Rights, 49 A.D.2d 422, 376 N.Y.S.2d 17 (1975)), "humiliation, wounded pride, and the like." Niblo v. Parr Mfg. Co., 445 N.W.2d at 355.

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

73. Emotional distress damages must be proven. Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980). These damages must be and have been proven here, as in any civil proceeding, by a preponderance or "greater weight" of the evidence and not by any more stringent standard. Iowa R. App. Pro. 14(f)(6).

74. Sex discrimination in employment violates:

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

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

4. Emotional Distress Caused by Discrimination is to Be Compensated:

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

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

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

6. Evidence of Near Depression, and Crying In This Case Helps Establish Emotional Distress Although Such Damages Can Be Awarded In the Absence of Evidence of Economic Loss or Physical or Mental Impairment:

77. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). There was, however, substantial finanical loss in this case as indicated by the back pay figures. Nonetheless, the evidence of crying and near depression by the Complainant, may also be considered when assessing the existence or extent of emotional distress. See Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988)(depression).

7. Determining the Amount of Damages for Emotional Distress:

78.

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

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

79. Although awards in other cases have little value in determining the amount an award should be in another specific case, Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990), there are many examples of such awards, ranging from $500 to $150,000, for emotional distress in discrimination cases. See e.g. Belton, Remedies in Employment Discrimination Law 416 n.78 (1992)(listing awards in 19 cases; 17 of which were for $10,000 or over). While any award should be tailored to the particular case, one commentator has noted that "a $750 award for mental distress is 'chump change.' Awards must be made which are large enough to compensate the victim of discrimination adequately for the injury suffered." 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 60-61 (1982).

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

81.

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

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

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. Complainant, Sandra J. Whaley and the Iowa Civil Rights Commission are entitled to judgment because they have established that the failure to hire Complainant Whaley by the Respondent City of Des Moines was based on sex discrimination in violation of Iowa Code Section 601A.6 (now 216.6).

B. Complainant Whaley is entitled to a judgment of eighteen thousand seven hundred eighty-nine dollars and seventy-two cents ($18,789.72) in back pay against Respondent City of Des Moines for the loss resulting from the failure to hire her.

C. Complainant Whaley is entitled to a judgment of five thousand five hundred twenty-two dollars and seventy- five cents ($5522.75) in back (matching) deferred compensation against Respondent City of Des Moines for the loss resulting from the failure to hire her.

D. Complainant Whaley is entitled to a judgment of ten thousand dollars ($10,000.00) in compensatory damages against Respondent City of Des Moines for the emotional distress she sustained as a result of the discrimination practiced against her by the Respondent.

E. Interest at the rate of ten percent per annum shall be paid by Respondent City of Des Moines to Complainant Whaley on her awards of back pay and back deferred compensation, as set forth in paragraphs B, C, and G of this order, commencing on the date payment would have been made if Complainant had been hired into the Recreation Supervisor position on January 11, 1988 and continuing until date of payment.

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

G. Under the authority of City of Des Moines Police Department v. Iowa Civil Rights Commission, 343 N.W.2d 836, 839-40 (Iowa 1984), the Respondent City of Des Moines shall provide to the district court, on enforcement of this order, affidavits setting forth the data necessary for the district court to calculate the amounts of back pay and of deferred compensation due Complainant Whaley for the year 1984 under the standards set forth in Findings of Fact Nos. 121 and 122.

H. Respondent City of Des Moines shall pay front pay and front deferred compensation to Complainant Whaley as set forth in Findings of Fact Nos. 124 and 125.

I. Respondent City of Des Moines is hereby ordered to cease and desist from any further practices of sex discrimination in hiring.

J. Respondent City of Des Moines shall post, within sixty (60) days of the date of this order, in conspicuous places at its the Park and Recreation Department central office and the five community centers, in areas readily accessible to and frequented by employees, the notice, entitled "Equal Employment Opportunity is the Law" which is available from the Commission.

K. Within sixty (60) days after the day this order becomes final, Respondent City of Des Moines shall institute a written policy informing all personnel at the Park and Recreation Department with the authority to hire or recommend for hire that: (a) all hiring and recommendations for hire shall be made with the understanding that it is usually up to the applicant able to perform a job to determine whether or not a job is too dangerous for him or her; (b) stereotypical concerns about jobs or locations being "too dangerous for women" have no place in the hiring process; and (c) applicants may, nevertheless, be uniformly informed of dangers or hazards associated with particular jobs. This policy is subject to the approval of the Commission's representative. In the event agreement cannot be reached, the Commission's version of this policy shall be distributed.

L. Within 120 days of this order, the current incumbents of the Park and Recreation Department Director and Recreation Superintendent positions shall review, and maintain available for reference, the publication Successfully Interviewing Job Applicants which is available from the Commission.

M. Respondent City of Des Moines shall file a report with the Commission within 120 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs H through K inclusive of this order.

Signed this the 27th day of December, 1994.

_____

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50309
515-281-4480

NUMC PRO TUNC ORDER

FINDINGS OF FACT:

1. After reviewing the proposed decision, the undersigned realized that, through inadvertence, an omission and a mistake were made. First, the undersigned forgot to include an intended provision for the award of hearing costs which is required by Commission rule in cases where the complainant or the Commission prevail.

2. Second, due to a typographical error, paragraph G of the Decision and Order section refers to the year "1984" instead of "1994" which is the appropriate year for the award of further back pay and back deferred compensation as is evident from a review of Findings of Fact numbers 121 and 122.

CONCLUSIONS OF LAW:

1. Administrative rules are interpreted and construed under the same rules as statutes. Motor Club of Iowa v. Dept. of Transportation, 251 N.W.2d 510, 118 (Iowa 1977). Thus, the word "shall" in the Commission's administrative rule stating "the respondent shall pay the 'contested case costs' incurred by the commission" in those cases where "the complainant or the commission prevails in the hearing," 161 IAC 4.7(1), means that the award of these costs is a duty imposed on the Commission. Iowa Code S 4.1 (30)(a). It is self-evident that the purpose of this rule is to enable the Commission to recover costs incurred in the hearing process so that its ability to enforce the act in meritorious cases shall not be impaired by the expense of such costs. See id. Thus, the costs provision is not merely a directory provision related to order and

promptness in the proceeding, but is mandatory. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 170 (Iowa 1982). By finding that the Commission and the Complainant prevailed in the hearing, the Administrative Law Judge impliedly found that costs should be awarded to the Commission as required by the rule. See 161 IAC 4.7(1). Thus, the error of failing to mention this mandatory award in the proposed decision may be corrected by this nunc pro tunc order. See 20 Am. Jur.2d Costs S 88 (1965 & Supp. 1994).

2. The nunc pro tunc order may be used to retroactively correct errors in an original decision, including "evident mistakes," in order to "show now what was actually done then." Feddersen v. Feddersen, 271 N.W.2d 717, 718, 719 (Iowa 1978). Thus, correction of the evident mistake with respect to the year set forth in paragraph G of the Decision and Order is appropriate.

DECISION AND ORDER:

1. The following new section is added to the Conclusions of Law:

X(A). Hearing Costs:

> 52A. The Commission has requested the assessment of hearing costs to Respondents. (Commission's Brief at 34). An administrative rule of the Iowa Civil Rights Commission provides, in relevant part, that: "If the complainant or the commission prevails in the hearing, the respondent shall pay the 'contested case costs' incurred by the commission." 161 IAC 4.7(1). "Contested case costs" include only:
>
> > a. The daily charge of the court reporter for attending and transcribing the hearing.
> >
> > b. All mileage charges of the court reporter for traveling to and from the hearing.
> >
> > c. All travel time charges of the court reporter for traveling to and from the hearing.
> >
> > d. The cost of the original of the transcripts of the hearing.
> >
> > e. Postage incurred by the administrative law judge in sending by mail (regular or certified) any papers which are made part of the record.
>
> 161 IAC 4.7(3).
>
> 52B. Since the Commission and the complainant have prevailed in this case, an order awarding contested case costs is appropriate. The record should be held open so a bill of costs may be submitted after this decision becomes final. See Connie Zesch-Luense, CP # 05-88-17707, slip op. (Iowa Civil Rights

Commission November 4, 1994)(Final Order adopting proposed decision which included assessment of hearing costs).

2. The following new paragraph is added to the Decision and Order section of the Proposed Decision:

> N. Respondents are assessed all hearing costs allowed by Commission Rule 4.7(3) and which were actually incurred in the processing of this public hearing. The precise calculation of costs shall be as shown on the bill of costs which is to be issued under the executive director's signature after this decision becomes final. The record shall be held open for this purpose.

3. Paragraph G of the Decision and Order section is amended by striking "1984" and replacing it with "1994."

IT IS SO ORDERED on this the 3rd day of January 1995.

_____

Donald W. Bohlken
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple Street
Des Moines, Iowa 50309
515-281-4480
FAX 515-242-5840

FINAL DECISION AND ORDER:

1. On this date, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order with all the modifications set forth in the Commission's Exceptions to the Proposed Decision and Order filed on February 8, 1995. The proposed decision and order, including the Nunc Pro Tunc order issued on January 3, 1995, as so modified, is hereby incorporated in its entirety as if fully set forth herein.
Signed this the 24 day of February, 1995.

_____

Jeff Courter
Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319
515-281-4480

Copies to:

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Rick Autry
Assistant Attorney General

Note: The City's Motion for Rehearing was denied by the Commission effective March 24, 1995. The City filed a petition for judicial review of this decision with the Polk County District Court. The Court affirmed the Commission's decision on October 2, 1995. The City subsequently complied with all requirements of the Commission's decision and order.