BEFORE THE IOWA CIVIL RIGHTS COND41SSION

LEO SCHUPANITZ, Complainant,

VS.

NORTH CENTRAL IOWA PORK PRODUCERS, NORTH IOWA POW LIMITED, and N.I.P., LTD, Respondents.

CP# 04-82-8625

THIS MATTER, a complaint filed by Leo Schupanitz (Complainant) with the Iowa Civil Rights Commission (Commission) charging North Central Iowa Pork Producers, amended to include North Iowa Pork, Limited corrected by amendment to NIP Limited (Respondent), with discrimination in employment based on job-related injuries and subsequent work restrictions, came on for hearing in Clear Lake, Iowa on the 22nd day of December 1986 before Hearing Officer Ione G. Shadduck. The Complainant was represented by Rick Autry, Assistant Attorney General. Respondent was represented by John G. Sorensen, attorney at law. Any rulings on motions and objections reserved will be ruled on in this proposed decision.

The issues in this case are as follows:

Issue 1 - Was the corrected amendment bringing N.I.P., Limited in as a respondent timely filed?

Issue 2 - If the corrected amendment was not timely filed, can N.I.P. Limited be brought in as a Respondent under the doctrine of successor liability?

Issue 3 - Work related injuries are governed by the statute for worker's compensation. Is there a relationship between an injured on the job employee's rights under Iowa Code 601A and the same employee's rights under Iowa Code 85?

Issue 4 - Did Respondent discriminate against Leo Schupanitz on the basis of his disability when it terminated him? Having reviewed the testimony, exhibits, record, and briefs of counsel the Hearing Officer makes the following proposed findings of fact, conclusions of law, rulings, recommended decision and order.

FINDINGS OF FACT

1. The complainant, Leo Schupanitz, timely filed verified complaint CP# 04-82-8625 on March 26, 1982, charging North Central Iowa Pork Producers, RFD3, Clear Lake, Iowa, with discrimination in employment on the basis of job related injury.

2. The complaint was amended on October 11, 1985, to include as respondent North Iowa Pork Limited, RFD3, Clear Lake, Iowa.

3. The complaint was further amended on December 30, 1985, to correct the name of Respondent North Iowa Pork Limited to NIP Limited, RFD3, Clear Lake, Iowa.

4. Investigation of the case was completed on October 16, 1985, probable cause found on November 18, 1985, conciliation attempted and notice of failure issued March 25, 1986, and Notice of Hearing issued September 15, 1986.

5. Leo Schupanitz started work with North Central Pork Producers on May 15, 1981, in a refeeding program. This was a part-time, temporary position. In September 1981, the job was changed to full-time. On November 20, 1981, Leo was promoted to the grower-finisher area. This job included keeping pens clean, water lines open, alleyways clean, gates fixed and limiting the number of pigs in each pen.

6. On or about December 13, 1981, Leo injured his back while on the job. Larry Hirsch, the manager, suggested he see Lyle H. Abbas, a chiropractor. Leo followed through on the suggestion and saw Dr. Abbas several times. He was disabled and off work until January 11, 1982, when he was released to return to work. In his letter to the worker's compensation insurance adjuster, Dr. Abbas diagnosed Leo as having an "acute lumbar back strain of mild to moderate severity... " (See Respondent's Exhibit A). Dr. Abbas stated that: "...it is likely the patient will recover without significant weakness and if he avoids any future injury or strain should have no more difficulty with it." Dr. Abbas told Leo that, when returning to work, he should be careful not to over-lift or overexert his back for several weeks so that it could become stronger. (Transcript 111) Leo returned to see Dr. Abbas on January 29, 1982, complaining of back problems again reportedly from shoveling three days earlier. He was treated on three occasions after that and released with the same instructions as in January. After his last visit on February 5, 1982, Dr. Abbas expressed the opinion that if Leo stayed off work for a couple of months and completely rested his back, he would probably be able to do the same amount of work that he did prior to the injury. But, if he returned to work at that time, he was restricted to lifting 25 pounds and was not to do repeated bending and stooping. Leo returned to work. The restrictions were to continue for a few months until all the symptoms disappeared. The doctor noted that it was possible that there would always be some degree of weakness in his lower back and that he may never again be able to do the same heavy work that he was doing prior to the injury (Transcript 112).

7. Leo had received no complaints about his work prior to the injury while working in the refeeder program. Hirsch, the manager, stated that he had some doubts about promoting Leo to the grower-finisher area. After Leo's return in January, Hirsch asked Dale Heimstra, the person who worked directly over Leo, to talk to Leo about his work problems. Hirsch requested Dale to make up a list of duties for Leo in the hope that such a list would help the situation. Sometime in February 1982, Hirsch informed Leo that he was not doing his job. Dates of record when Leo went to Dr. Abbas after returning to work were January 29, February 1, and February 5. Heimstra, Leo's boss, talked to him about his work on January 25 and February 11. Hirsch talked to him on February 23, gave him 2 weeks notice on March 1, 1982, with termination on March 12, 1982. (Respondent's Exhibit B). The reasons given for the termination were that Leo was not doing his job, i.e., not cleaning the pens, not fixing the water lines, allowing loose gates, and having too many hogs in some of the pens.

8. Larry Hirsch was employed as manager of North Central Iowa Pork Producers from 1976 until November 1983. Dick Rieman, Lao's brother-in-law who worked for North Central, recommended Leo for the temporary position which was open in May 1981. In December, Leo was injured on the job. When Leo returned in January, he was considered by Hirsch to be without restrictions.

9. North Central Iowa Pork Producers was a 700 - sow farrow- to-finish operation involved in breeding stock and marketing hogs which began in 1975. Sam Kennedy was the corporate secretary who functioned as a liaison between the board of directors and management. Larry Hirsch reported monthly to the board of directors and in between the monthly meetings reported to Sam Kennedy. North Central had between 6 and 8 employees. Kennedy stated that the grower-finisher area required more responsibility and more attention to detail than did the refeeding program.

10. A worker's compensation claim was filed on January 8, 1982. Dr. Abbas submitted a letter dated January 12, 1982, to Scott T. Bennett, insurance adjuster, noting that Leo was totally disabled from time of injury (December 13, 1981) until January 8, 1982 and was released to return to work as of January 11, 1982. (Respondent's Exhibit A).

11. Kennedy stated that it is normal practice to accommodate workers who have injuries and they would have accommodated Leo had they been informed of any restrictions. He further stated that Leo was terminated, not because of his injury, but because of his work performance.

12. North Central Iowa Pork Producers Corporation purchased all stock except that of C. Jack Kennedy. C. Jack Kennedy, therefore, remained the sole stockholder. C. Jack Kennedy is the father of Sam Kennedy. The Corporation then sold a portion of its assets in December of 1982, to N.I.P. N.I.P. is a corporation now owned by Sam Kennedy and E.W. Miller. It is now in the business of raising feeder pigs. N.I.P. purchased the facility, stock, and supplies from North Central for $310,000.00. The transition took place over a period of 18 months after purchase of North Central's assets. North Central is still a corporation, but primarily the contract holder of N.I.P.'s purchase contract. That contract was assigned to Mason City Production Credit Association.

13. Identified employees of North Central who became employees of N.I.P. were: Richard Rieman, Steve Kunze, Dale Heimstra, Rickey Rinnels, Jay Montag, and Larry Hirsch. Hirsch, manager of North Central, became manager of N.I.P.

14. Leo earned $2,186.66, from North Central during the year 1982. This would have been for weeks beginning January 14 through March 12. He also received $2,624.75 in unemployment compensation in 1982.

15. Complainant incurred attorney fee expense in the amount of $347.40, when represented by Robert S. Kinsey Ill. (See Complainant's Exhibit 24).

16. After his termination, Leo went to see Dr. Janda at the request of the worker's compensation insurance adjuster. Subsequent visits occurred in May, June, September, October, November and December of 1982. In September he was admitted to the hospital for observation. He was diagnosed as having a musculoskeletal type of low back pain, possibly secondary to underlying degenerative arthritis of the lumbar spine. He was restricted in bending, stooping, with a lifting restriction of 20 lbs. Dr. Janda's opinion was that the healing period would end 12-15- 82, and that he had a permanent, partial physical impairment 10% whole person.

17. On January 17, 1983, a Dr. Walker diagnosed Leo as having a permanent disability of 6% of the body as a whole superimposed upon a preexisting 12% of the body as a whole, due to degenerative changes or a total of 18 % impairment. The parties stipulated before the Industrial Commissioner to a 25 % permanent, partial disability. Total entitlement including commuted value was $24,726.47. (See Complainant's Exhibit 23).

CONCLUSIONS OF LAW

The complaint against North Central Iowa Pork Producers, Inc. was timely filed, processed and the issues in the complaint are properly before the Hearing officer and ultimately before the Commission.

> ISSUE I - Was the corrected amendment bringing N.I.P. Limited in as a respondent timely filed?

The evidence does not indicate that there is an entity named North Iowa Pork, Limited. The amendment of October 11, 1985, attempting to bring in that respondent, was amended on December 30, 1985, to correct the name to NIP Limited. Respondent moved to dismiss the complaint against N.I.P., Limited, as being untimely filed.
The pertinent statutory authority, for limitation on actions is found in Iowa Code section 601A. 15(12):

> 12. A claim under this chapter shall not be maintained unless a complaint is filed with the commission within one hundred eighty days after the alleged discriminatory or unfair practice occurred.

The pertinent authority on amendments to a complaint is found in 240 Iowa Admin. Code §1.3(l):

> 1.3(l) Amendment of complaint. A complaint or any part thereof may be amended by the complainant or by the commission any time prior to the hearing thereon and, thereafter, at the discretion of the hearing officer or commission. The complaint may be amended to include such additional material allegations as the investigation may have disclosed.
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> To prevent unnecessary litigation or duplication, the commission may amend a complaint based upon information gained during the course of the investigation. The scope of the issues at public hearing shall be defined by the facts as uncovered in the investigation and shall not be limited to the allegations as stated in the original complaint. Provided,

however, that when such an amendment is made, the respondent may be granted a continuance within the discretion of the hearing officer if the same is needed to allow respondent to prepare to defend on the additional grounds.

The complaint against N.I.P., Limited was not filed within the statutory 180 day period. The statute, the rule, and case precedent are clear that a new respondent cannot be amended in after the statute of limitations has run. As to N.I.P., Limited, the complaint was not timely, filed. Complainant, however, claims jurisdiction under the doctrine of successor liability.

ISSUE 2 - If the corrected amendment was not timely filed, can N.I.P., Limited be brought in as a respondent under the doctrine of successor liability?

Sometime prior to December 1982, North Central purchased all stock from its stockholders except the stock of C. Jack Kennedy. Kennedy then became the sole stockholder of North Central. In December of 1982, Ernest W. Miller of North Carolina formed N.I.P., Ltd., and purchased North Central's facilities, stock and supplies for $310,000.00. Sam Kennedy, son of C. Jack Kennedy, then purchased one-half of N.I.P., Limited. Ile purchase contract was assigned to the Mason City Production Credit Association. It appears from the evidence that North Central Iowa Pork Producers, Inc. still exists as a corporation, but only as the contract holder of N.I.P.'s purchase contract. Actually N.I.P. came into existence in December 1982 which was after the complaint was filed on March 26, 1982.

In EEOC v. Sage Realty Co., 87 F.R.P. 365, 22 FEP 1660 (SDNY 1980), the court ruled that a successor employer can be added as a party respondent even though the successor was not named within the statutory time period where successor was not in existence at the time the investigation was concluded and the complainant and EEOC did not learn of its existence until after action had been filed. In EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 8 FEP Cases 897, 902-903 (6th Cir. 1974), the court noted that the liability of a successor is not automatic but must be determined on a case by case basis although equity favors successor liability because the successor "benefits" from the discriminatory practice of the predecessor. The court identified relevant factors as follows: 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there had been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether the new employer uses the same or substantially the same work force, 6) whether the same or substantially the same supervisory personnel is used, 7) whether the same jobs exist under substantially the same working conditions, 8) whether the same machinery, equipment, and methods of production are the same, and 9) whether the same product is produced. This approach was adopted in EEOC v. MTC Gear Corp., 595 F.Supp. 712, 35 EPD §34, 745.

In the case at issue, both Sam Kennedy and Larry Hirsch knew of the complaint. (See Complainant's Exhibit 9). Larry Hirsch was manager of North Central and became manager of N.I.P. Sam Kennedy was the Corporate Secretary of North Central and is now half owner of N.I.P. N.I.P. purchased the facility, stock, and supplies from North Central. Approximately six of the 6-8 employees of North Central became employees of N.I.P. It took 18 months to make the transition from the type of production typical of North Central to the type of production typical of N.I.P. The main difference is between "breeding stock" (pigs) and "production of feeder pigs."

North Central is now essentially the holder of the purchase contract from N.I.P., a contract which apparently has been assigned to the Mason City Production Credit Association. It is concluded that N.I.P., Ltd., is liable under the doctrine of successor liability for any discriminatory acts committed by North Central Iowa Pork Producers.

> ISSUE 3 - Work related injuries are governed by the statute for worker's compensation. Is there a relationship between an injured on the job employee's rights under Iowa Code section 601A and the same employee's rights under Iowa Code section 85?
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> Iowa Code section 85.20, provides as follows:
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> > 85.20 Rights of employee exclusive.

The rights and remedies provided in this chapter, chapter 85A or chapter 85B for an employee on account of injury, occupational disease or occupational hearing loss for which benefits under this chapter, chapter 85A or chapter 85B are recoverable, shall be the exclusive and only rights and remedies of such employee, the employee's personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury, occupational disease, or occupational hearing loss against:

> 1. the employee's employer; or
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> 2. any other employee of such employer, provided that such injury, occupational disease, or occupational hearing loss arises out of and in the course of such employment and is not caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.

The employee who is injured on the job has the rights set forth in the code chapters cited above. What are the employee's remedies? Iowa Code section 85.27 provides, in part, for the following:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefore and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

In addition, the employer is liable for paying the employee compensation in an amount which is dependent upon whether the injury produces temporary partial, temporary total, permanent partial, or permanent total disability, plus healing period compensation.

In the case of temporary total disability, compensation is paid until the employee has returned to work or is medically capable of returning to work substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

In the case of temporary partial disability, an employee has a condition which medically indicates that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability. Benefits, under these circumstances, are paid in lieu of temporary total disability and healing period benefits because of the employee's temporary partial reduction in earning ability because of the disability. They are not benefits because the employee is not able to secure work paying earnings equal to earnings at time of injury. If, during the period of temporary partial disability, the employer offers the employee suitable work consistent with the disability, the employee shall accept the work and be compensated with temporary partial benefits. If the employee refuses the suitable work the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of refusal.

If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable, the employer shall pay compensation for a healing period until the employee has returned to work or it is medically indicated that significant improvement is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment the employee was engaged at the time of injury, whichever occurs first.

Compensation for an injury causing permanent total disability is payable during the period of the employee's disability.

Commutation is a lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest at the rate provided in the Code for court judgements.

The pertinent part of Iowa Code section 601A.6, is as follows:

> 1. It shall be an unfair or discriminatory practice for any:
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> a. Person to ... discharge any employee, or to otherwise discriminate in employment against any ... employee because of the ... disability of such ... employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminatory practices prohibited by the subsection.

In the case at issue, Leo was temporarily, totally disabled from the date of injury (12-13-81) to the date of release to work (1- 12-82), and received compensation for that time. The compensation ended when he was medically capable of returning to work substantially similar to the employment in which he was engaged at the time of injury. Leo did return to work and he did return to the same job at which he worked prior to the injury. He was not under any medical restrictions. The letter from Dr. Abbas to the insurance adjuster indicated full recovery of the back injury.

Around the 26th of January 1982, Leo hurt his back again and returned to Dr. Abbas for 2 or 3 treatments. His last visit with Dr. Abbas was on February 5th, after which he was restricted to lifting 25 pounds and told not to do repeated bending or stooping.

When an employee is injured on the job that employee is compensated through the employer's insurance covering that type of liability. One or more medical doctors diagnose the percentage of disability. The parties, employee and employer, may agree on a percentage of disability or the Department of Industrial Services may determine that percentage. In any case, the employee is protected. The compensation continues as long as there is a disability, the employee returns to work, or the employee refuses to return to work. To have the employee return to work or to offer work is to the advantage of the employer. Termination does not necessarily stop the compensation. Since disposition of such cases is either made by another governmental agency (Department of Industrial Services) or agreement of the parties, the first step the Commission should take is to investigate the record of the employee's workers compensation status. This is available from Industrial Services. What type and percentage of disability was found? Did the employer offer the employee the opportunity to return to the same job? a substantially similar job? Was there a refusal? Were there medical restrictions? What were they? Did the employer have work winch the disabled employee could do?

The problem most likely to arise is the case where there is either temporary or permanent partial disability which does not allow the injured employee to fully perform the job held prior to the injury or to perform substantially similar work. In such a case, compensation is paid to the employee. The nature of that compensation must be considered in any back pay award made by the Commission in the event the employer is found to have committed a discriminatory act in terminating the injured employee.

If the employee is terminated and believes the termination was based on the disability, the employee would then have a right under the Civil Rights Act to file a complaint against the employer. That is what occurred in the case at issue. Should Respondent be found in violation of the Act for the termination and an award of back pay made, an analysis of the worker's compensation Leo received and its relation to wages he would have been paid had he not been terminated would have to be made. If the monies are for the same purpose, deduction should be made from any back pay award. It is concluded that the exclusive right under Iowa Code Chapter 85 is the award of compensation to an injured on the job employee and does not exclude the right of the same employee to file a complaint of discrimination under Iowa Code Chapter 601A if the employer fires the employee because of the disability.

> ISSUE 4 - Did Respondent discriminate against Leo Schupanitz on the basis of his disability when they terminated him?
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> Iowa Code section 601A.2(11) provides:
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> 11. "Disability" means the physical or mental condition of a person which constitutes a substantial handicap. In reference to employment, under this chapter, "disability" also means the physical or mental condition of a person which constitutes a substantial handicap, but is unrelated to such person's ability to engage in a particular occupation.

Iowa Code 601A.6(2) provides:

> 1. It shall be an unfair or discriminatory practice for any:
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> a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled Orson is qualified to perform a particular Occupation by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

[Emphasis added]

Taken together, the definition provides for a disability which is a substantial handicap if related or if unrelated to the disabled person's ability to engage in a particular occupation. Section 601A.6 allows an exception when the disability is related to the particular occupation. The phrase "unless based upon the nature of the occupation* is an exception which serves as a defense to the prohibitions listed in this section. In one case the Iowa Supreme Court mentioned *the nature of the occupation" as "akin to" a "bona fide occupation qualification" (bfoq) exception. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162 (Iowa 1982). Courts have consistently interpreted the bfoq exception as an extremely narrow exception to the general prohibition of discrimination. See, e.g., Dothard v. Rawl , 433 U.S. 321, 15 FEP Cases 10 (1977). Subsequent Supreme Court cases have interpreted the phrase "nature of the occupation" without using the BFOQ language. In the case of disabled persons, there are too many different types of disabilities to generalize the disabled as a class and, therefore, the BFOQ defense is not appropriate. The statute qualifies the .nature of the occupation" defense against the class of disabled as follows:

> If a disabled person is qualified to perform a particular occupation by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited...

In other words, the nature of the occupation defense can be rebutted by the complainant by showing that "by reason of training or experience" the complainant is qualified to perform the job, notwithstanding the disability. Frank v. American Freight Systems, Inc., 398 N.W.2d 797 (Iowa 1987). The Court in Frank stated that in most discrimination cases based on disability, individualized consideration must be given to the job and to the applicant's particular circumstances, both as they bear on the employer's "nature of the occupation" defense and the complainant's claim of special training or experience. The Court notes that this would not be true in every disability case, such as when the nature of the disability and the job are so incompatible that generalized rules could be applied. An obvious example is when a blind person applies to be a driver.

It is clear that an employer may require physical qualifications for a job if they are a requirement of the job. An employer may not set physical standards which will arbitrarily eliminate disabled persons from consideration. 240 Iowa Admin. Code 6.2(3). If the essential physical standards are related to the employee's disability the disabled employee must be given an opportunity to prove that, through experience or training, the employee can meet those standards.

The critical issue arises when the disabled employee cannot fully meet the essential physical standards because of the disability. This coincides with the concern expressed earlier in the temporary or permanent partial disability situation. There is no statutory authority requiring reasonable accommodation. The Commission, however, in interpreting the statute, (section 601A.6), promulgated rules requiring reasonable accommodation. 240 Iowa Admin. Code §6.2(6) provides:

> 6.2(6) Reasonable accommodation. An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

In Frank, supra, the Iowa Supreme Court stated that establishing a nature of the occupation defense does not necessarily mean an employer can avoid the effect of its refusal to hire a person, that an employer must make reasonable accommodation for a disability. Frank had a history of back problems in that case and had applied for a truck driver position which required the heavy work of loading and lifting. Frank did not believe he needed accommodation. The Court, however, looked to the probability of future inability to do the heavy work and the fact that other employees would be required to fill in for him. Under the facts of that case, the Court found that such accommodation was not reasonable. In an earlier case, Foods, Inc. v. Iowa Civil Rights Commission , 318 N.W.2d 162 (Iowa 1982), the Court refused to make a literal interpretation of "unrelated to the person's ability to perform..." It concluded that physical or mental disability which constitutes a substantial handicap and which is unrelated to the person's ability to perform means perform "in a reasonably competent and satisfactory manner..." In Foods, the Court recognized that although the Complainant, who had epilepsy, might suffer an occasional seizure in the future, the evidence did not warrant the conclusion as a matter of law that such seizure would present a risk of danger to the Complainant or other persons, especially if the employer reasonably accommodates her condition.

In 240 Iowa Admin. Code §6.3, the Commission promulgated a rule specific to disabilities which arise during employment. That rule provides:

> 240--6.3(601A) Disabilities arising during employment. when an individual becomes disabled, from whatever cause, during a term of employment, the employer shall make every reasonable effort to continue the individual in the same position or to retain and reassign the employee and to assist in his or her rehabilitation. No terms in this section shall be construed to mean that the employer must erect a training and skills center.

In Cerro Gordo Cty. Care Facility v. Caw. R. Comm'n, 401 N.W. 2d 192 (Iowa 1987), the Iowa Supreme Court considered the above rule. It concluded that an employer need not first consider

an employee's retention in the same position before considering reassigning the employee. The, Court further concluded that the "reasonableness' of an employer's accommodation of an employee's disability is a flexible standard and must be measured not only by the disabled employee's needs and desires, but also by economic and other realities faced by the employer. In both this case and the Frank case, the Court referred to its decision of King v. Iowa Civil Rights Comm' , 334 N.W. 2d 598 (Iowa 1983). The King case was a case of discrimination on the basis of religion and the prima facie elements set forth are not relevant to a cam of disability. In Cerro Gordo, the Court recognized that fact but did not establish what the prima facie elements would be. The Court stated as follows:

> Discrimination against the disabled differs from other types of discrimination in that other types, such as racial, religious, or sex discrimination, usually bear no relationship to the individual's ability, to perform the job.

The Court concluded that because of that difference, it is necessary to provide a requirement of reasonable accommodation in order to eliminate discrimination against the disabled.

It is customary in civil rights litigation to establish a prima facie case as the first step in the burden of proof The first element in a prima facie case is the identification of the complainant as a member of a protected class. That is a relatively simple process when the protected class is race, sex, etc. When the protected class is the "disabled," identification becomes more difficult. Up to now, the Commission has identified complainants as members of the protected class of disabled on a case by case basis. The Commission is then guided by the Iowa Supreme Court's rulings to set precedent in future cases. It appears to be a futile and burdensome task to identify persons as members of the protected class of "disabled" without more precise statutory authority. It is recommended that those persons who are substantially handicapped be identified in the statute in order that complaints by those persons who are not substantially handicapped do not dilute the process which protects those who are substantially handicapped. Until such time as there is statutory identification of the persons considered substantially handicapped, it will be necessary to proceed without a clear identification of membership in the protected class, as a first step in establishing a prima facie case. Individualized consideration of complainant's impairment or perceived impairment, whether substantial or not, in relation to the nature of the employment will have to be made. Generally, except for Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522 (Iowa 1985), the Iowa Supreme Court has proceeded in that manner.

Although the Court has attempted to use the disparate treatment theory, such an analysis has not been perfected in disability cases. The complainant first has the burden of proving that an impairment exists. After the employer then delineates the nature of the job which relates to the employee's impairment, the burden shifts to the employee to demonstrate that through experience or training the employee can perform the job in a "reasonably competent and satisfactory manner". The .reasonably competent and satisfactory manner" concept encompasses the "reasonable accommodation' requirement. The Act protects only qualified handicapped persons. That means that, although an impairment may have some effect on job performance, the disabled are protected only if the impairment does not prevent them from performing the job in a

reasonably competent and satisfactory manner. Criteria for accommodation to be considered reasonable have been provided as follows:

1) does not substantially impinge on the rights of other employees;

2) does not create a risk of danger to the employee or co- workers;

3) does not incur more than a de minimus cost to the employer.

Note that although the Court has upheld the Commission's rule setting an "undue hardship" standard, the most recent Supreme court case has affirmed the "de minimus" standard. Dennis K. Brown v. Hy-Vee Food Stores, Inc., No. 85-1082, slip. op. at 5 (Iowa Sup. Ct. June 17, 1987). See also, Frank v. Am. Freight Sys., Inc., 398 N.W.2d 797, 803 (Iowa 1987) and King v. Civil Rights Comm'n, 334 N.W. 2d 598, 604 (Iowa 1983).

It is the opinion of this Hearing officer that the Court would use the undue hardship standard and the Commission should demand it in cases of clear substantial handicap, i.e., persons who cannot see, hear, speak, move without prosthetic devices or mechanized transport systems; persons whose conditions are permanent and who cannot participate in one or more normal life activities in the same way that non-handicapped persons can; persons who have overcome their limitations through experience and training and are qualified to perform their work.

In the case at issue, Leo Schupanitz had an impairment, a back injury which occurred on the job. Although his doctor cautioned him to use care for several weeks until his back became stronger, Leo re-injured his back within a month of his return. His job required lifting and pushing. Lifting and pushing require use of the back. According to Dr. Abbas, Leo did not have restrictions until after his re-injury and treatment on February 5th. The restrictions were 25 pound limit on lifting and no repeated bending or stooping. Hirsch did not receive these restrictions from Dr. Abbas until March 15, after the termination. Leo admitted he had trouble scooping manure and moving the pigs. He said he asked for help and his supervisor had someone help him. Leo admits Hirsch told him that the reason for his termination was that he wasn't doing his job, i.e., cleaning the pens, fixing the water lines, taking care of the loose gates, and having too many hogs in a couple of pens. Leo and Heimstra, his immediate supervisor, did not get along. Brian, Leo's son testified that Heimstra said he would fire Leo if he didn't do his job because of his back. Brian was not a credible witness. Respondent, through either Heimstra or Hirsch, talked with Leo about his unsatisfactory work performance at least three times prior to termination. Furthermore, Leo was provided a written list of things to do in the hope that it would help him do his job satisfactorily. It is not clear whether the list was provided before or after the re-injury.

In this case, the employer did not use the "nature of the occupation" defense. This defense is used when the employer admits that disability is the reason for not hiring or for termination. Instead the employer testified that Leo was not doing satisfactory work. Therefore, the burden shifts to Leo to prove that the real reason for termination was his disability. To do so, he would have to prove that he was doing satisfactory work or could have done the work in a reasonably competent and satisfactory manner with accommodation. The employer then would have to provide evidence that the necessary accommodation would not be reasonable. Depending on the

evidence presented by the employer, Leo would have to prove he could be accommodated without substantially impinging on the rights of coworkers, creating a risk of danger to himself or other employees, or causing more than de minimus cost to the employer. This Leo failed to do. He admitted making mistakes. He admitted he needed help to do the job. He admitted the pigs and loads he moved were greater than the 25 pounds to which he was restricted. The tasks which were found to be unsatisfactory were not necessarily those which were related to his back injury. Even if they were related to the back injury, the Civil Rights Act only protects qualified handicapped persons. "Qualified" means that even though an impairment has some effect on job performance, the impaired person is protected only if the impairment does not prevent the person from performing the job in a reasonably competent and satisfactory manner.

It is concluded that Complainant has failed to meet his burden of proving that Respondent terminated him because of his disability and this case should be dismissed.

RULING ON MOTION FOR DISMISSAL ON BASIS OF AGENCY DELAY

Respondent moved to dismiss the complaint because of the prejudice due to passage of time between the date the complaint was filed (April 1982) and date of hearing (12-22-86). In order to be entitled to a dismissal due to a delay in processing, Respondent must show three things: 1) The agency took longer than a "rational" agency in the exercise of its expert discretion would have, 2) there is prejudice which can be identified with such specificity that the finder of fact can assess the loss of evidence compared to any remaining evidence, 3) there is a cause-and- effect relationship between any inordinate delay and any loss of evidence or testimony. See Norman George v. Clinton Corn Processing Co., Iowa Civil Rights Commission Case Reports Vol. 5, pg. 25, 27 (1979); Taylor v. Department of Transportation , 260 N.W. 2d 521, 523 (Iowa 1977); Cedar Rapids Steel Transportation Inc. v. Iowa State Commerce Comm., 160 N.W. 2d 825 (Iowa 1968). Mere passage of time does not create a defense warranting dismissal. EEOC v. Westinghouse Electric Corp., 592 F. 2d 484, 486 (8th Cir. 1979). The motion to dismiss on the basis of delay is denied.

The Respondent's objection to Complainant's Exhibit 14 is denied. See 240 Iowa Admin. Code 1. 9(11).

RECOMMENDED DECISION AND ORDER

1. The Complainant has failed to establish a violation of the Iowa Civil Rights Act by showing illegal employment discrimination based on physical disability by the Respondent.

2. CP# 04-82-8625 shall be dismissed.

Signed this 15th day of July, 1987.

IONE G. SHADDUCK
Hearing Officer

FINAL DECISION AND ORDER

The Iowa Civil Rights Commission has received and reviewed the Proposed Findings of Fact, Conclusions of Law, Rulings, Recommended Decision and Order of Hearing Officer Ione G. Shadduck dated July 15, 1987.

On August 28, 1987, the Iowa Civil Rights Commission, at the regularly scheduled meeting, adopted the Hearing Officer's Proposed Decision as its own Findings of Fact, Conclusions of Law, Rulings, Decision and Order.

Signed this 28th day of August, 1987.

John Stokes, CHAIRPERSON