BEFORE THE IOWA CIVIL RIGHTS COMMISSION

MICHAEL BIGGLES (LOVELADY), Complainant,

VS.

BLACK HAWK COUNTY HEALTH CENTER

And

BLACK HAWK COUNTY BOARD OF SUPERVISORS,

Respondents.

CP # 04-86-14507

COURSE OF PROCEEDINGS

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Michael Biggles, then known as Michael Lovelady, against the Respondents Black Hawk County Center and Black Hawk County Board of Supervisors alleging discrimination on the basis of disability in the area of employment. The complaint specifically alleges that the Respondents failed to hire Mr. Biggles for a Nurse Aide position on the basis that he was perceived to be disabled due to a prior back injury.

A public hearing on this complaint was held on July 20, 1989 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Black Hawk County Courthouse in Waterloo, Iowa. The Iowa Civil Rights Commission was represented by Teresa Baustian, Assistant Attorney General. The Respondent was represented by Bruce B. Zager, Assistant County Attorney.

The findings of fact and conclusions of law are incorporated in this contested case decision in accordance with Iowa Code 17A.16(l) (1989). The findings of fact are required to be based solely on evidence in the record and on matters officially noticed in the record. Id. at 17A.12(8). Each conclusion of law must be supported by legal authority or reasoned opinion. Id. at 17A.1 6(1).

The Iowa Civil Rights Act requires that the existence of disability discrimination be determined in light of the record as a whole. *See* Iowa Code § 601 A. 15(8) (1989). Therefore, all evidence in the record and matters officially noticed have been carefully reviewed. The use of supporting transcript and exhibit references should not be interpreted to mean that contrary evidence has been overlooked or ignored.

In considering witness credibility, the Administrative Law Judge has carefully scrutinized all testimony, the circumstances under which it was given, and the evidence bolstering or detracting from the believability of each witness. Due consideration has been given to the state of mind and demeanor of each witness while testifying, his or her opportunity to observe and accurately relate

the matters discussed, the basis for any opinions given by the witness, whether the testimony has in any meaningful or significant way been supported or contradicted by other testimony or documentary evidence, any bias or prejudice of each witness toward the case, and the manner in which each witness will be affected by a particular decision in the case.

FINDINGS OF FACT

Jurisdictional Facts:

1. The Complainant, Michael Biggles, then known as Michael Lovelady prior to a legal name change, filed a verified complaint CP # 04-86-14507 with the Iowa Civil Rights Commission, on April 7, 1986, alleging violation of Iowa Code Chapter 601A by discrimination in employment on the basis of perceived physical disability which filing was within the statute of limitations. The complaint was investigated. After probable cause was found with respect to the allegation of physical disability discrimination, conciliation was attempted and failed. All of these facts were admitted or stipulated to by Respondents. (See Request for Admissions by Respondents and Respondents' Response to Request for Admissions; Tr. at 3-4).

2. Notice of Hearing was issued on August 2, 1988. The case was continued indefinitely on November 2,1988, in part because the Commission was without an Administrative Law Judge to conduct the hearing. The final hearing date was set by a scheduling conference memorandum order dated February 22. 1989.

Background of Complainant Biggles:

3. In 1973 Complainant Biggles underwent back surgery as treatment for a back injury which he had sustained. (Cp. Ex. 4; Tr. at 21, 39). The surgery consisted of a back fusion involving four vertebrae and a laminectomy at one of these vertebrae and possibly another. (Cp. Ex. 4). After the surgery, he was placed on light duty by his employer for one week. (Tr. at 38). Since his recovery in 1973 he has had no limitations or restrictions on his activities or employment due to the back injury or surgery. (Tr. at 22, 24). Since that time, he has never asked an employer to place him on light duty. (Tr. at 24).

4. During most of his working life, before and after the surgery, Complainant Biggles has been employed in jobs requiring hard physical labor. (Tr. at 14). Since his recovery in 1973, he has neither suffered back pain nor required further treatment for back problems. (Tr. at 24). Examples of post injury jobs held by Complainant Biggles include Core Handler at John Deere from 1973-77, which involved dipping cylinder blocks into a tank of liquid, and a "squeeze motor" job at Hawkeye Steel involving the repetitive lifting, during eight hour shifts, of molds weighing 55 to 60 pounds. (Tr. at 14, 22- 23).

5. On' April 15, 1982, Complainant Biggles received a certificate for successful completion of the one hundred twenty hour "Nurse Aide/Orderly" course at the Hawkeye Institute of Technology. (Cp. Ex. 2; Tr. at 11-12, 15). He did not obtain employment as a nurse aide until January 1987 when he began employment in that position at Parkview Gardens. (Tr. at 25). He remained employed at Parkview Gardens until February of 1989. (Tr. at 28). During his

employment there, his routine duties included lifting residents into wheelchairs and moving them in bed. (Tr. at 25- 26, 28-29, 56-57).

The Nurse Aide Positions:

6. In March of 1986, Black Hawk County had eleven part-time swing shift vacancies for the position of Nurse Aide 1. (Cp. Ex. 1). Among the varied duties of the position are "(a]ssist[ing] residents with dressing and undressing; bathing (lifting in and out of bath tubs) [and] maintaining clean, dry bed[s], (lifting residents in and out of bed)." (Cp. Ex. 1; Tr. at 76, 78). Qualifications required for the position are:

> Some knowledge of the procedural requirements of cleanliness and patient care. Ability to provide care for and develop rapport with residents; ability to write and speak English, ability to understand and carry out simple oral and written instructions; ability to do routine housekeeping and cleaning work, and to attend to the needs of residents. Must have stamina to be on their feet for considerable lengths of time, be in good general health, and must be able to lift at least 50 lbs. Must have certification of completion of a State of Iowa approved Nurse Aide educational program.

(Cp. Ex. 1).

It is clear that, by reason of his training and experience as of 1986, Michael Biggles was qualified to perform the Nurse Aide position at that time. See Findings of Fact Nos. 3-5.

The Application and Hiring Process:

7. At the time these Nurses Aides positions were being filled, Black Hawk County utilized the following application and hiring procedures: First, the position was posted for three days, as provided by the bargaining agreement, in order to give current employees the opportunity to apply. (Tr. at 71, 72). Second, as there were no bidders, the position was advertised and opened for applications from external applicants. (Tr. at 71). The personnel department was notified of which applicants were selected for interview and of which applicants were the Black Hawk County Health Center's candidates for hire. (Tr. at 71).

8. Once an applicant was selected for hire, he was required to obtain a pre-employment physical form from the personnel department. (Tr. at 71). The applicant would then arrange to have a pre-employment physical at Sartori Hospitals in Cedar Falls. (Tr. at 73). After completion of the physical examination, it must then be reviewed, and the applicant approved for hire, by the personnel department before the applicant becomes an employee. (Tr. at 71-72).

The Physical Examination Component of the Hiring Process:

9. The pre-employment physical component had been in effect since September 1, 1983. (Tr. at 74). All persons selected for employment by Black Hawk County were required to undergo a pre-employment physical examination. (Tr. at 99- 100). This component was developed by Doug

Smentkowski, personnel director, and Tom Pounds, personnel administrator in cooperation with medical personnel. (Tr. at 69, 73-75). This process was developed in hope of avoiding employee placements which might result in serious injuries similar to those sustained prior to it's development. (Tr. at 74-75).

10. In 1986, the ultimate determination as to whether an employee had passed the physical examination component so that he could be hired was made solely by members of the personnel department, i.e. Doug Smentkowski and Tom Pounds, and not by the examining physicians. (Tr. at 75). Mr. Pounds would initially review the physical examination form and accompanying reports, such as radiology reports, to ascertain if he perceived a problem with the applicant's examination. (Cp. Ex. 4; Tr. at 71-72, 75). If he did, he would discuss it with Mr. Smentkowski who, in this case, made the final decision. (Tr. at 75). Neither Mr. Pounds nor Mr. Smentkowski nor anyone in the personnel department had any medical or orthopedic background whatsoever. (Tr. at 99).

11. The physical examination form is composed of two parts: (1) a health history completed by the applicant, and (2) a physician's report completed by the doctor. (Cp. Ex. 4). The physician's report includes the doctor's evaluations of whether the spine is flexible and of whether the applicant is able to do "no lifting," "moderate lifting" or "heavy lifting". (Cp. Ex. 4; Tr. at 73).

12. By 1986, the physical examination included a five view back X-ray in order to accurately show the condition of the applicant's spine. (Tr. at 73-74). In the event the X- ray or other information gathered from the physical examination indicated any prior back surgery or back injury, such injury constituted an automatic disqualification for approximately twenty-nine positions, including but not limited to, the positions of Nurse Aide, jail cook, jail matron, food service workers, and janitorial personnel. (Tr. at 10001, 103). There is no evidence in the record to suggest either that this automatic disqualification was established at the suggestion of medical personnel or that it actually resulted in a reduction of employee injuries. The available evidence suggests that no such recommendation was made. (Tr. at 99). This would be consistent with the understanding that the personnel department had the sole discretion to determine whether or not a candidate was screened out by the physical examination process. (Tr. at 75, 99).

13. In 1987, the physical examination component was scrapped and replaced by a biomechanical evaluation. (Tr. at 83). The automatic disqualifications for prior back injury and surgery were also eliminated at that time. (Tr. at 103). This new system eliminated the X-rays andassessment based on X-rays. (Tr. at 83). Under the biomechanical evaluation, the applicant for a position involving heavy lifting is guided through lifting techniques by a physical therapist who evaluates how well the applicant lifts and whether or not he can do the lifting. (Tr. at 83). If the applicant does not pass the evaluation, the therapist prescribes exercises for the applicant who may, after a stated period of time, retake the examination. (Tr. at 84).

Application of the Physical Examination Component to Complainant Biggles:

14. In March of 1986, Complainant Biggles contacted the Director of Nursing at the Black Hawk County Health Center after applying for the Nurse Aide I position. (Tr. at 17,19, 79). The Director of Nursing made arrangements to interview him, and, by the end of the interview, had

selected him for hire. (Tr. at 17-.18). Mr. Biggles then obtained a pre- employment physical examination form and was examined at Sartori Hospitals on March 19,1986. (Tr. at 19).

15. On the health history portion of his physical examination form, Complainant Biggles indicated that he had back surgery and stated "Disc fulsion (sic) 1973 no Problin (sic) with it." (Cp. Ex. 4; Tr. at 20). In the physician's report, the examining physician noted that the Complainant's general appearance and development was "Good." In the section on the spine he noted "(illegible) laminectomy (illegible)." (Cp. Ex. 4). In the "laboratory and other special findings" section he noted the five view x-ray and stated the results: "previous fusion L4-L5, S." (Cp. Ex. 4). In response to the inquiry "Is the upper spine flexible?," the examining physician responded "Yes." (Cp. Ex. 4). He also found that the Complainant was able to do "Heavy lifting." (Cp. Ex. 4). There is no evidence in these reports or elsewhere in the record specifically indicating that either the past back surgery or the Nurse Aide I duties, including lifting, were likely to result in any future injury to Complainant Biggles or in costs to the Respondents as his employer. (Cp. Ex. 4; Tr. at 99).

16. Upon receipt of Complainant Biggles' physical examination form and accompanying medical reports, Mr. Pounds reviewed them and brought them to the attention of Mr. Smentkowski because of Mr. Biggles' laminectomy and fusion as indicated by the X-rays. Tr. at 75, 98). At the time they reviewed these reports, Mr. Pounds and Mr. Smentkowski were not only aware that the physicians had not indicated that Complainant Biggles would have any problems with the lifting requirements for the job, they were aware that the doctors had specifically approved the Complainant for heavy lifting and had found that the flexibility of his spine was satisfactory. (Cp. Ex. 4; Tr. at 98-99). They were also aware that the physicians either would not or were not able to say whether or not Complainant Biggles' spine would degenerate in the future. Tr. at 99). Despite this knowledge, Mr. Smentkowski decided not to hire the Complainant in accordance with Black Hawk County's policy and practice of refusing employment as Nurse Aides to applicants with prior back surgery or injury. (R. Ex. E; Tr. at 21, 75, 77-78, 100).This decision was made at some time between the examination on March 19, 1986 and Complainant Biggles being informed of his rejection on March 25, 1989. (Cp. Ex. 4; Complaint; Tr. at 19).

17. In light of the physicians' conclusions concerning the flexibility of Complainant Biggles' spine and his ability to lift heavy weights, no accommodation of Complainant Biggles' back condition was necessary in order for him to perform the physical requirements of the Nurse Aide position. (Cp. Ex. 1, 4; Tr. at 98-99). Nor is there any evidence in the record indicating that any accommodation for Mr. Biggles' back condition was either considered or attempted by Respondents prior to his rejection for the Nurse Aide position.

Gross Back Pay:

18. Nurse Aide positions were budgeted at 1200 hours per year for the years 1986 through 1988 inclusive. (R. Ex. C; Tr. at 80, 86, 88). The Respondents have suggested that the determination of gross back pay for these years should be based on a multiplication of this figure, which is prorated to 900 hours for 1986, times the base rate of pay for the position. (R. Ex. C; Tr. at 86; Respondent's Brief at 13- 16). This calculation takes into account periodic increases in base pay and a merit increase in October, 1988. (R. Ex. C).

19. The Respondents' proposed calculation provides an unreliable basis for back pay computation for several reasons. First, there is no guarantee that a Nurse Aide I will work any particular number of hours. A Nurse Aide I may work less, or substantially more than 1200 hours. (Tr. at 80, 90). Second, the 1200 hour figure results in gross back pay amounts of $4,667.00 for 1986; $6236.00 for 1987; and $6438.00 for 1988, amounts which are too low to reflect the actual experience of the two Nurse Aides who were hired at or about the time of Complainant Biggle's rejection. (R. Ex. C). See Findings of Fact Nos. 20-23. Third, the "bare bones" 1200 hour figure fails to take into account any possible shift differentials or overtime which could have been earned by the Complainant if he had been hired. (Cp. Ex. 7, Tr. at 80, 90). Although there was no guarantee of overtime or shift differentials, these positions were posted as swing shift positions which would yield a $.10 per hour shift differential. (Cp. Ex. 1, 7; Tr. at 90). The Nurse Aides hired closest to the time of Complainant's rejection were hired with $.15 per hour and $.10 per hour shift differentials for, respectively, the third and swing shifts. (Cp. Ex 7). See Findings of Fact Nos. 20-22.

20. On March 23 and 24, 1986, respectively, Martin Stoakes and Marjorie Wroe were hired, part-time, into the Nurse Aide I position. (Cp. Ex. 7, R. Ex. E). These are the hires into the position which are closest in time to the decision to reject Complainant Biggles. See Finding of Fact No. 16.

21. Martin Stoakes was hired at the rate of $5.13 per hour plus a $.15 per hour shift differential for third shift work. He received 2% across the board pay raises on July 1, 1986 and July 1, 1987, raising his base rate on those respective dates to $5.23 and $5.33 per hour. He continued at the base rate of $5.33 per hour, with the $.15 per hour shift differential, until September 23, 1988, when he received a 2 1/2% pay increase which increased his base rate to $5.47 per hour. (Cp. Ex. 7; R. Ex. C).

22. Marjorie Wroe was hired at the rate of $5.13 per hour plus a $.10 per hour shift differential for swing shift work. On June 1, 1986, she was transferred to second shift which also had a $.10 per hour shift differential. On July 1, 1986, she transferred to first shift and lost the shift differential. She received 2% across the board pay raises on July 1, 1986 and July 1, 1987, raising her base rate on those respective dates to $5.23 and $5.33 per hour. On or about June 13, 1988, Ms. Wroe began an unpaid leave of absence. Her employment ended on December 13, 1988, when she did not return from the leave. As of that date, her base rate of pay was still $5.33 per hour. (Cp. Ex. 7; R. Ex. C).

23. The annual hours worked and gross wages received by Martin Stoakes and Marjorie Wroe in the Nurse Aide I position from 1986 through 1988 inclusive are stated below:

Name	Year	Hours	Gross Wages
Martin Stoakes	1986(partial)	1198.7	$6522.43
	1987	1608	$9070.52
	1988	1142	$9732.52

TOTAL GROSS WAGES FOR MARTIN STOAKES 1986-1988: $25,325.47.

Marjorie Wroe	1986 (partial)	1109.5	$5872.73
	1987	1612.3	$8904.50
	1988 (partial)	573.5	$3877.68

TOTAL GROSS WAGES FOR MARJORIE WROE 1986-88:$18654.91

(Cp. Ex. 7).

24. On brief and in the record, Respondents have conceded that the earnings of either Marjorie Wroe or Martin Stoakes may be representative of what a Nurse Aide would have earned. (Respondent's Brief at 15; Tr. at 92). Because a determination of what Marjorie Wroe would have earned if she had worked through all of 1988 is more speculative than the established earnings that year of Martin Stoakes, and for other reasons discussed in the Conclusions of Law, it is found that the dollar amount which most accurately reflects what would have been the gross wages of Complainant Biggles in the years 1986 through 1988 inclusive, if he had been hired as a Nurse Aide I by the Respondents, is the amount earned by Martin Stoakes during that period, i.e. $25,325.47.

Termination of the Back Pay Period:

25. The Commission has conceded on brief that Complainant Biggles' income for the first half of 1989 would have exceeded his "would have" earnings with Respondents for that year. (Commission's Brief at 7-8). Therefore, the back pay period should end no later than December 31, 1988.

26. The Respondents assert that the back pay period should end at an earlier date: December 31, 1986. (Respondents' Brief at 12). Their assertion is based on a particular statement in a proposed conciliation agreement, which is a double-spaced typewritten document four and one-quarter legal size pages in length consisting of a caption, a preamble, twelve numbered paragraphs and a signature block. (Cp. Ex. 9; R Ex. A; at 42). This document was prepared by Butch Devine: an Iowa Civil Rights Commission conciliator/mediator. (Cp. Ex. 9; Tr. at 40). Mr. Devine was not a witness at the hearing.

27. This proposed agreement was sent simultaneously to the Respondents and to the Complainant for their review on March 1, 1988. (Cp. Ex. 9; R. Ex. A). The statement in question consists of one sentence in paragraph 4: "It should be noted it was determined that Complainant starting (sic) earning more than he would at Respondents commencing from January 1, 1987 to the present." (Cp. Ex. 9; R Ex. A). This paragraph also reflects a proposed settlement amount of $6,197.58 purportedly based on gross backpay less interim earnings solely for the period of March 23, 1986 to December 31, 1986 inclusive. (Cp. Ex. 9; R Ex. A).

28. Although the Complainant testified that he had no objections to the contents of this document at the time he received it, he was never asked by Mr. Devine after receiving the document whether he had such objections. (Tr. at 45, 52). There is no evidence in the record to indicate that the Complainant was represented by legal counsel during the conciliation process; that he was

aware of the proper methods for calculating gross back pay, interim earnings, or net back pay; or that he was aware of what the gross back pay figures relied on by Mr. Devine were. In the absence of such evidence, his failure to object to or request changes in this statement should be given little weight.

29. There is no evidence in the record setting forth what amounts of gross back pay or interim earnings either before or after December 31, 1986 were actually relied on in formulating the statement made in paragraph 4 or in arriving at the 1986 net back pay figure given therein. There is, in short, no corroborative evidence to support the agreement's conclusion that the Complainant was "earning more than he would at Respondents commencing from January 1, 1987 to the present."

30. The unreliability of the proposed conciliation agreement as a basis for determining any issue involving back pay is also demonstrated by comparing the net back pay figure of $6,197.58 for 1986 alone with the net back pay figures arrived at in this decision. The latter are based on persuasive and detailed evidence in the record concerning gross back pay and interim earnings submitted by the Commission's representative. (Cp. Ex. 6, 7).

31. In light of the above findings, the proposition that the back pay period should terminate as of December 31, 1986 based on the statement made in the proposed conciliation agreement is rejected.

Interim Earned Income and Unemployment Compensation:

32. Complainant Biggles received the following interim earnings and unemployment compensation for the years 1986 through 1988 inclusive:

Year	Gross Earnings And Unemployment
1986	$6150.00
1987	$7097.69
1988	$6213.42

TOTAL INTERIM EARNINGS 1986-1988:$19461.11

(Cp. Ex. 6; R. Ex. C).

Mitigation of Damages:

33. The Respondents assert that the Complainant failed to mitigate his damages because, during the course of attempts to settle the case during conciliation, he rejected an offer of the opportunity to re-apply for positions other than the Nurse Aide position with Black Hawk County. (Respondents Brief at 10-11). These offers were not unconditional offers of any specific job. (R. Ex. B; Tr. at 46-48, 81-82). Rather, they were offers only of the opportunity to apply for clerk or other non-Nurse Aide positions which were conditioned on Complainant Biggles settling the case. (R. Ex. B; Tr. at 46-48, 81-82).

34. That Complainant Biggles did seek and find employment after his rejection by Respondents is reflected by his successfully finding employment, albeit not as financially rewarding as the Nurse Aide I position would have been, in each of the years 1986 through 1988 inclusive. (Cp. Ex. 6; R. Ex. B, C). Only $1,859.44 of his total interim income consisted of unemployment compensation. (Cp. Ex. 6).

35. The amount which Complainant Biggles is due in net back pay is reflected in the formula: Gross Back Pay - [interim earned income + unemployment compensation] = Net Back Pay.

Year	Gross Back Pay	Interim Earnings & Unemployment	Net Back Pay
1986	$6522.43	- $6150.00	= $372.43
1987	$9070.52	- $7097.69	= $1972.83
1988	$9732.52	- $6213.42	= $3519.10
TOTAL NET BACK PAY			**$5864.36**

Credibility Findings:

36. All witnesses at the hearing, Michael Biggles, Ann Rogers, and Tom Pounds, were credible in their testimony.

CONCLUSIONS OF LAW

Jurisdiction:

1. Mr. Biggles' complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code 601 A.1 5(11) (1985). See Finding of Fact No. 1. All the statutory prequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code 601A.15 (1989). See Finding of Fact No. 1.

2. Mr. Biggles' complaint is also within the subject matter jurisdiction of the Commission as the allegation that the Respondent failed to hire him because of disability falls within the statutory prohibition against unfair employment practices. Iowa Code 601A.6 (1985). "It shall be a . . . discriminatory practice for any person to refuse to hire . . . any applicant for employment . . . because of the disability of such applicant." Id.

Complainant Biggles' Disability:

3. " 'Disability' means the physical . . . condition of a person which constitutes a substantial handicap." Iowa Code 601A.2(11) (1985). "Substantially handicapped person" includes "any person who has a physical or mental impairment which substantially limits one or more major life activities . . . or is regarded as having such impairment. 240 Iowa Admin. Code 6.1(1) (now

at 161 Iowa Admin. Code 8.26(l)). "Impairment" includes "any physiological disorder or condition . . . affecting [the musculoskeletal] . . . body system." Id. at 6.1(2) (now at 161 Iowa Admin. Code 8.26(2)). "Working" is a "major life activit[y]." Id. at 6.1(3) (now at 161 Iowa Admin. Code 8.26(3)). The phrase "is regarded as having such impairment" encompasses the person who "has a physical ... impairment that does not substantially limit major activities but that is perceived as constituting such a limitation. Id. at 6.1(5) (now at 161 Iowa Admin. Code 8.26(5)(emphasis added)). The Iowa Supreme Court has recognized that a person who is perceived to be disabled 11 under commission rules 6.1 (1) and (5) .... is 'disabled' as that term is used in Iowa Code section 601 A.6." Frank V. American Freight Systems, Inc., 398 N.W.2d 797, 800 (Iowa 1987).

4. Complainant Biggles has a 'disability' as that term is used in Iowa Code sections 601 A.6 and 601 A.2(11) because he has a physical condition which constitutes a substantial handicap. Iowa Code 601A.2(11) (1985). The condition constitutes a substantial handicap under 240 Iowa Administrative Code section 6.1(1) because:

a. it is a physical impairment as defined by commission rule 6.1(2) [See Finding of Fact No. 3];

b. which was regarded by Respondents as one which substantially limited him in the major life activity of working under commission rule 6.1(5) because:

(1) the impairment did not actually substantially limit his work activities, [See Findings of Fact Nos. 3-6, 15- 17] but

(2) was nonetheless perceived by Respondents as constituting such a limitation as to justify the denial to the complainant of access to a wide variety of jobs, including Nurse Aide 1, despite any training and past work experience indicating his suitability for the job. See Findings of Fact Nos. 3-6, 12, 16.

Order and Allocation of Proof Where There Is No Direct Evidence of Discrimination:

5. 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 persuasion in this proceeding is on the complainant to persuade the finder of fact that the Respondents discriminated against the Complainant because of his disability when it failed to hire him for the Nurse Aide I position. Linn Co-operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981).

6. 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).

7. In the typical discrimination case, which alleges disparate treatment on a prohibited basis, this burden of producing evidence shifts. Iowa Civil Rights Commission v. Woodbury County

Community Action Agency, 304 N.W.2d 443, 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)(emphasis added).

8. 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). Once a prima facie case is established, a presumption of discrimination attaches. Id.

9. 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). Once it has produced such evidence the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

10. The introduction of evidence, by the Respondent, which would allow the finder of fact to rationally conclude that the challenged decision was not motivated by discriminatory animus is sufficient to rebut the prima facie case. Linn Co- operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981). The Respondent need not persuade the finder of fact that it was actually motivated by the proffered reasons. Id. Nonetheless, the nondiscriminatory reason proffered "must be specific and clear enough for the [Complainant] to address and legally sufficient to justify judgment for the [Respondent]." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988).

11. 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.1 0 (1981)).

12. 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 21 7. When the Complainant demonstrates that the Respondent's reasons are pretextual, the Complainant must prevail. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 718 (1983)(Blackmun, J. concurring).

Order and Allocation of Proof Where There Is Direct Evidence of Discrimination:

13. 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). 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 (11973), 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. Price-Waterhouse v. Hopkins, 490 U.S., 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).

14. The reason why the McDonnell Douglas 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. , 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring).

15. In this case, there is direct evidence in the record, and an admission on brief, that the Complainant's perceived disability, i.e. his past back injury and surgery, was the Respondents' sole reason for failing to hire him. See Finding of Fact No 16; Respondent's Brief at 5-6. Given the presence of direct evidence and this admission, the authorities cited above would indicate that the next logical step in the inquiry would be to examine the affirmative defenses of the respondent. Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985).

16. There is, however, a problem. In Frank v. American Freight Systems, Inc., 398 N.W.2d 797 (Iowa 1987), a case in which the employer admitted it failed to hire the plaintiff for a truck driving position due to a back injury, the Iowa Supreme Court indicated that the McDonnell Douglas order and allocation of proof would apply. Frank v. American Freight Systems, Inc., 398 N.W.2d at 800. In Frank, the Court did not, however, address the question of whether the Respondent bears a burden of persuasion in regard to its defenses when there is direct evidence

or admission of discrimination. Given the past deference shown by the Iowa Supreme Court to United States Supreme Court decisions interpreting analogous Federal anti- discrimination laws, it is reasonable to conclude that the Iowa Supreme Court will adopt the order and allocation of proof set forth in Thurston in cases where direct evidence of intentional discrimination is present.

17. Since the Thurston analysis has not yet been adopted by the Iowa Supreme Court, both the Thurston and Frank analyses shall be applied. Like the plaintiff in Frank, Complainant Biggles has established a prima facie case of disability discrimination in employment by showing:

> 1 . He is a member of the protected class "disabled" as defined by the Iowa Code and the Commission's administrative rules.
>
> 2. He applied for an available position.
>
> 3. The Respondents admit that he was rejected due to his disability.

See id. at 799-801. See Conclusions of Law Nos. 3-4, 15. See Findings of Fact Nos. 6, 14, 16.

18. Even under the most traditional McDonnell Douglas analysis, Complainant Biggles has established a prima facie case by showing:

> 1 . He is a member of the protected class "disabled" as defined by the Iowa Code and the Commission's administrative rules.
>
> 2. He applied for an available position.
>
> 3. He was objectively qualified for the position.
>
> 4. He was rejected for the position.
>
> 5. Other applicants, without his disability, were hired.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed. 2d 668, 677 (1973); Woodbury County v. Iowa Civil Rights Commission, 335 N.W.2d 161, 165 (Iowa 1983). See Conclusions of Law Nos. 3-4. See Findings of Fact Nos. 6, 14, 16, 20.

"Nature of the Occupation" Defense:

19. The Respondents, like the employer in Frank, rely on the statutory defense which allows different treatment on the basis of disability in the area of employment if it is "based on the nature of the occupation." Iowa Code 601A.6(l)(a) (1985). This defense is not available "[i]f a disabled person is qualified to perform a particular occupation, by reason of training or experience." Id.

20. Under this defense, the employer bears the burden of persuading the finder of fact that "an overriding, legitimate business purpose for the rule" exists. **See** Frank v. American Freight Systems, Inc., 398 N.W.2d at 802-03. That a burden of persuasion is required is shown by the language of the decision:

> [T]he burden of showing a business necessity for the discrimination is upon the potential employer . . . . The 'nature of the occupation' defense . . . has been established . . . by showing an overriding legitimate business purpose for the rule.... American Freight did sustain its burden of showing a reasonable business necessity for its rule. Id.

21. This defense clearly requires more of the Respondents than the McDonnell Douglas rebuttal of the prima facie case through the production of evidence by which the employer can articulate some legitimate, nondiscriminatory reason for its action. Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Given that this particular defense is proffered, the Respondents bear a burden of persuasion, under the analysis set forth in Frank, just as they would if this defense were considered under the analysis set forth in Thurstonrecognizing that the Respondent bears a burden of persuasion in establishing its defenses once direct evidence of intentional discrimination has been shown.

22. In order to persuade a fact finder that its rule requiring the automatic disqualification of all applicants with prior back surgery or injury for the Nurses Aide I and approximately 28 other positions is "based upon the nature of the occupation," Respondents must prove the rule meets a "business necessity" standard. They must show:

> [T]here exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.

Frank v. American Freight Systems, Inc., 398 N.W.2d at 802.

23. In considering whether this broad automatic disqualification rule meets this test, it should be remembered that:

> [I]n 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 nature and extent of a disability, the needs of a particular job, and the impact of disability on a person's ability to perform that job, are too diverse to permit generalized application of such rules. . . . This would not be true in every disability case of course, because the nature of the disability and the job might in some cases be so incompatible

> that generalized rules could be applied. A rule prohibiting employment of a blind person as a driver would be an obvious example.

Id. at 801.

24. The Respondents acknowledge that the rejection Of Complainant Biggles was based solely on the automatic disqualification due to back surgery and injury and not on any individualized consideration of the job and the applicant as set forth in the above quotation from Frank. See Findings of Fact Nos. 12, 15-16; Respondent's Brief at 6-8. Such an individualized assessment would have shown that Complainant Biggles was (a) qualified to perform the Nurses Aide position by virtue of specialized training in the Nurse Aide position and by extensive past experience involving heavy physical labor, including the repetitive lifting of weights in excess of 50 pounds, (b) the disability had caused him no difficulty with lifting since the surgery in 1973, (c) the only medical assessments available indicated his spine was suitably flexible to do the work and that he was capable of performing heavy lifting, and (d) that there was no medical opinion or other reliable evidence indicating that future injury or costs to the employer resulting from his disability were likely to occur. See Findings of Fact Nos. 3-6, 15-16.

25. In the absence of any individualized consideration, the Respondents must show that the "nature of the disability and the job [are] so incompatible that [this] generalized rule could be applied." Frank v. American Freight Systems, Inc., 398 N.W.2d at 801. In Frank, the employer, a trucking company, successfully made this showing for its rule through (a) expert medical testimony demonstrating that the likelihood of future back pain and disability for the plaintiff truck driver, who had a different back disability than the Complainant here, to be "greater than fifty percent, possibly greater than seventy-five percent"; and (b) orthopedic and workers compensation studies showing the occupational relationship between back injury and increased risk to truck drivers. Id. at 801-03. No countervailing medical testimony was introduced. Id. at 802.

26. The employer was found to have established a reasonable business necessity for its rule because it had shown that there was a substantial likelihood that Frank's condition would result in future harm to him to the extent that it would interfere with his job performance and interrupt the employer's business. Id. It is implicit in the decision that the anticipated harm to the disabled applicant, the interference with his job performance, and the interruption of the employer's business were not minor harm, interference, or interruptions but were so great as to render the rule "necessary to the safe and efficient operation of the business." Id.

27. A similar standard has been expressed in decisions under federal and state laws prohibiting discrimination against the handicapped in employment where courts have held that the employer must show a reasonable probability of substantial harm to the disabled applicant or others in order to enforce a blanket rule excluding him from employment opportunities on the basis of possible future injury. *See e*.g.Mantolete v. Bolger, 767 F.2d 1416, 1422-23 (9th Cir. 1985); Bentivegna v. U.S. Department of Labor, 694 F.2d 619, 621- 622 (9th Cir. 1982);Rozanski v. A-P-A Transport, Inc., 512 A.2d 335, 340 (Me. 1986); Pacific Motor Trucking Co. v. Bureau of Labor and Industries, 668 P.2d 446, 450 (Or. App. 1983); BucyrusErie Corp. v. Wisconsin DLHR, 90 Wis. 2d 408, 280 N.W.2d 142 149-150 (Wis.

1979). A showing of a reasonable probability of substantial harm "cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. [The question must be resolved] in light of the individual's work history and medical history."Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985).

28. The underlying rationale given for this standard, which would apply equally well to the business necessity standard set forth in Frank, is that:

> Any qualification based on the risk of future injury must be examined with special care if the . . . Act is not to be circumvented easily, since almost al I handicapped persons are at a greater risk from work- related injuries. . . . [A]llowing remote concerns to legitimize discrimination against the handicapped would vitiate the effectiveness of the ... act.

Mantolete v. Bolger, 767 F.2d at 1422 (quoting Bentivegna v. U.S. Department of Labor, 694 F.2d at 622, 623).

29. In this case, the only evidence offered to show either (a) that there was a substantial likelihood of future harm to the Complainant which would interfere with his job performance or interrupt the employer's business to the extent that exclusion of the Complainant would be necessary to the safe and efficient operation of the business, or (b) that there was a reasonable probability of substantial harm to the Complainant or others by his employment as a Nurse Aide 1, were the medical reports showing the Complainant's disability and the subjective evaluation of the employer that hiring applicants with prior back injuries or surgery posed an unreasonable risk of future injury to the applicant. See Findings of Fact Nos. 9-12, 15-16.

30. Unlike the Frank case, there was no medical expert testimony demonstrating any specific probability of risk of future injury or any medical reports demonstrating a substantial linkage between prior back injury and surgery and any risk of future injuries to Nurse Aides. Nor is there evidence that either this rule or this particular disqualification was based on medical advice or that the rule resulted in a reduction of medical injuries. The available medical evidence is to the contrary. See Conclusion of Law No. 24. Findings of Fact Nos. 12,15,16. The evidence set forth by Respondents is simply not sufficient to establish a business necessity for the automatic disqualification rule or to show a reasonable probability of substantial harm if the Complainant was hired.

31. Even if the employer's burden with regard to the "nature of the occupation" defense was no more than a burden of production, this burden, to the degree it has been met, has been effectively rebutted by evidence of the Complainant's specialized training and experience as well as the evidence of his medical and work history which demonstrates he was qualified to do the work, including the lifting duties. See Findings of Fact Nos. 3-6, 15-16. Frank, 398 N.W.2d at 800. Any showing made of potential future injury was effectively rebutted by the physician's report approving of the Complainant's spinal flexibility and heavy lifting abilities and testimony demonstrating the physicians were either not willing or not able to predict any future degeneration of the Complainant's spine. See Finding of Fact No. 16.

Reasonable Accommodation:

32. Since Respondents have failed to establish the nature of the occupation defense, it is not necessary to address the question of reasonable accommodation. Frank, 398 N.W.2d at 802. No accommodation of the Complainant's disability is necessary nor was any considered prior to his rejection. See Finding of Fact No. 17. It should be noted, however, that offers to the Complainant to re-apply for non- Nurse Aide I positions, which were made after the rejection of the Complainant and on condition that the case be settled, do not constitute a reasonable accommodation of Complainant Biggles' disability. Cf. Toledo v. Nobel-Sysco, F.2d, 51 Fair Empl. Cas. 1147, 1151-52 (10th Cir. 1989)(post- rejection offer of employment conditioned on settlement is not a reasonable accommodation).

33. Under either the Thurston or Frank analyses, and regardless of whether Respondents' burden in regard to the "nature of the occupation" defense is one of persuasion or of production, it has been established that Respondents' failure to hire Complainant Biggles for the Nurse Aide I position constituted disability discrimination in employment in violation of Iowa Code section 601 A.6(a) (1985).

Remedies:

34. Violation of Iowa Code section 601A.6(a) 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 S 601A.15(8) (1989). 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.

Compensation:

35. The Commission has the authority to make awards of backpay. Iowa Code 601 A.15(8)(a)(1) (1989). In making such awards, interim earnings and unemployment compensation received during the backpay period are to be deducted. Id. The Complainant bears the burden of proof in establishing his damages. Diane Humburd, CP # 03-85- 12695, slip op. at 32-33, (Iowa Civil Rights Comm'n Sept. 28, 1989)(citingPoulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Id. at 34-35, 37 (citing e.g. EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. NA. 1976), *aff'd mem.,* 559 F.2d 1203 (2d Cir.), *cert. denied, 434 U.S. 920 (1977)).* This the Complainant has done. See Findings of Fact Nos. 18-24. The burden of proof for establishing either the interim earnings of the Complainant or any failure to mitigate damages rests with the Respondent, although the Complainant may, as the Complainant has done here, choose to provide evidence of the interim earnings he is willing to concede. Diane Humburd, CP # 03-85-12695, slip op. at 35-37, (Iowa Civil Rights Comm'n Sept. 28, 1989)(citing e.g. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). See Finding of Fact No. 32.

36. The award of backpay in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a backpay 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, backpay 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 backpay in the present case.

37. "Iowa Code section 601 A. 15(8) gives the commission considerable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, No. 88- 934, slip op. at 47 (Iowa January 24, 1990). The Iowa Supreme Court has approved two basic principles 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." Id. at 45. "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.

Use of Comparable Employees for Gross Back Pay:

38. The Commission may "calculate awards [based] on the experience of comparable employees outside of the claimant's protected class."Id. at 47. In selecting between the two comparable employees in this case, the Commission has elected to use the one with the greatest gross wages as opposed to using the lowest paid employee or an average of their wages. See Finding of Fact No. 24. This was done based on the previously stated principle that uncertainties about what the Complainant would have earned should be resolved against the employer. Under these facts, the only certain way to determine exactly what the Complainant would have earned would have been for the Respondent to have hired him in 1986 and let events take their course. See Findings of Fact Nos. 18-19. Since this was not done solely because of the Respondents' discriminatory practice, use of the highest paid comparable employee is appropriate to resolve any doubts under the principles set forth in the Hy- Vee decision. See Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, No. 88-934, slip op. at 45-47, 49 (citing with approval two cases where the highest paid comparable was selected under these principles- Stallworth v. Shuler, 777 F.2d 1431, 1434-35 (11 th Cir. 1985); Grimes v. Athens Newspaper, Inc., 604 F. Supp. 1166 (M.D. Ga. 1985)).

Termination of the Back Pay Period at December 31,1988:

39. The determination that the back pay period should end on December 31, 1988 is based on the principle that the period ends "if the plaintiff ceases to suffer the adverse economic effects of discrimination, as when plaintiff acquires a higher-paying job and his earnings exceed his losses." Shlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 529 (2nd ed. 1989). The Respondent's proposed termination date of December 31, 1986 was rejected because Respondent did not meet its burden of proving that the back pay period should terminate as of that date. Id. See Findings of Fact Nos. 25-31.

Mitigation of Damages:

40. In order to meet their burden of proving that Complainant Biggles failed to mitigate his damages, Respondents must establish:

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

EEOC v. Sandia Corp., 639 F.2d 600,627 (10th Cir. 1980).

41. The Respondents contend that Complainant Biggles failure to accept offers to apply for positions, as distinguished from offers for the positions themselves, which were made in anticipation of and on condition that Complainant Biggles settle the case, constitutes a failure to mitigate damages. See Finding of Fact No. 33.

42. If Complainant Biggles had rejected an unconditional offer of employment his back pay would end at the time of his rejection of the unconditional offer. Ford Motor Company v. EEOC, 458 U.S. 219, 232-34 & n. 18 (1982). However, a mere *offer to apply* for a position, even if it were expressed in terms indicating the offer was unconditional, *does not constitute an unconditional offer of employment* within the holding of Ford Motor Company v. EEOC. Kilgo v. Bowman Transportation, Inc., 789 F.2d 859, 879 (11 th Cir. 1986)(citing Rasimas v. Michigan Department of Mental Health, 714 F.2d 614, 625 (6th Cir. 1983)(interview letter is not an unconditional offer of employment)).

43. Furthermore, the offers to Complainant Biggles to apply were not even unconditional on their face, as they were a part of settlement negotiations and clearly conditioned on Complainant Biggles settling the case. Under these circumstances, even the rejection of the offer of a job, as opposed to an offer to apply, would not suffice to show that Complainant Biggles failed to mitigate his damages:

> The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus, an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised.

Ford Motor Company v. EEOC, 458 U.S. at n.18. When the facts are viewed in light of the above authorities, it is clear that Respondents have not met their burden of proving that Complainant Biggles failed to mitigate his damages.

Interest:

44. Interest begins to accrue on an award of damages from the date of the commencement of the action at the rate of ten percent per annum. Iowa Code S 535.3 (1989). In this case, interest should be paid on damages from the time of the filing of the complaint on April 7, 1986.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Michael Biggles, is entitled to judgment because he has established that the Respondents Black Hawk County Health Center and Black Hawk County Board of Supervisors' failure to hire him for the Nurse Aide I position was based on his perceived disability in violation of Iowa Code Section 601A.6 (1985).

B. Complainant Biggles is entitled to a judgment of five thousand eight hundred sixty-four dollars and thirty-six cents ($5864.36) in back pay for the loss resulting from the Respondents Black Hawk County Health Center and Black Hawk County Board of Supervisors' failure to hire him for the Nurse Aide I position.

C. Interest shall be paid by the Respondents to Complainant Biggles on the above award of back pay damages at the rate of ten percent per annum commencing on April 6, 1986 and continuing until date of payment.

D. Respondents are hereby ordered to cease and desist, with regard to any and all positions of employment with Respondents, from any further practice of automatically disqualifying applicants for employment on the basis of prior back injury or back surgery.

E. Respondents shall mail, within 120 calendar days of the date of this order, written notices to the last known addresses of all applicants for employment with Black Hawk County who were disqualified for employment under the pre- employment physical examination component, during the period from October 6, 1985 to the date the physical examination component was replaced by a biomechanical evaluation, which will indicate that:

1. The applicant was disqualified for employment under the pre-employment physical examination component.

2. The date of the disqualification, the position for which the applicant was disqualified, and the specific reason for the disqualification.

3. The component under which the applicant was disqualified is no longer in use and has been replaced by a biomechanical evaluation. A brief description of the biomechancial evaluation shall be included.

4. The prior disqualification is null and void.

5. The applicant may reapply for any openings for positions for which the applicant was disqualified, as well as for any other open positions for which the applicant believes he or

she is qualified. If there are currently openings in the positions for which the applicant was rejected, he or she shall be notified of this fact; of the deadline, if any, for making application for the position; and shall be provided with a copy of the current job posting or job description for the position. In all cases, the persons notified shall be informed of the proper procedures to follow in order to determine current position openings, position qualification requirements, and how to apply for such positions.

6. If the applicant does reapply, he or she will be considered under current qualification standards and, if in accordance with current procedures, that the biornechanical evaluation will be administered.

F. Respondents shall mail, within 30 days of the date of this order, a press release to all newspapers, television and radio stations located within the Waterloo and Cedar Falls city limits describing the complete notification procedure outlined in paragraph E above, giving a telephone number with the Respondents to which past disqualified applicants may call for further information, and indicating that the press release is being issued as a result of this order. This press release shall be subject to the approval of the Commission. In the event, in the judgment of the Commission's representative, agreement cannot be reached on the language of the press release, the version drafted by the Commission shall be issued by Respondents. A copy of this press release shall also be posted in conspicuous places readily accessible to the public at the Respondents' personnel department and the Black Hawk County Health Center.

G. Respondents shall post, within 30 days of the date of this order, in conspicuous places at the personnel department, and at all locations of the Black Hawk County Health Care Center, in areas readily accessible to and frequented by employees, the notice, entitled "Equal Employment Opportunity is the Law" which is available from the Commission.

H. All of Respondents' future job advertising, for a two year period commencing with the date of this order, shall state "An Equal Opportunity Employer" in type no smaller than the largest type in the advertisement.

I. Respondents shall file a report with the Commission within 150 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs D through H inclusive of this order. In this report the Respondents shall also indicate the exact date on which the pre-employment physical was replaced by the biomechanical evaluation. The Respondents shall also list the names and addresses of all the persons notified in accordance with paragraph E above. Respondents shall retain copies of all notifications sent out in accordance with paragraph E above for one year from the date of mailing, and shall immediately provide copies of these notifications to the Commission on its request at any time during that period.

Signed this the 13th day of February, 1990.

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple

Des Moines, Iowa 50319
515-281-4480

ADOPTION OF PROPOSED DECISION AND ORDER WITH MODIFICATIONS.

1. On March 23, 1990, the Iowa Civil Rights Commission, at its regular meeting, adopted with modifications the Administrative Law Judge's proposed decision and order. The order, as modified below, is incorporated in its entirety in this order as if fully set forth herein.

2. Paragraph E is modified by inserting, immediately prior to the comma in the phrase "under the pre-employment physical examination component," the phrase "due to prior back surgery or back injury".

3. Paragraph F is modified by inserting the following sentence immediately after the first sentence, "The press release shall indicate the notification is being sent only to those persons disqualified for employment under the pre-employment physical examination due to their prior back surgery or back injury."

4. Paragraph H is modified by deleting the phrase "in type no smaller than the largest type in the advertisement." This phrase is replaced by the phrase "in type no smaller than that typically used by the State of Iowa in its newspaper advertisements for personnel." A second sentence is then inserted stating that, "The Respondents shall, within thirty days of the date of this order, determine what size type is typically used by the State of Iowa in its newspaper advertisements for personnel and shall so inform the Commission's representative."

IT IS SO ORDERED.

Signed this the 5th day of April, 1990.

KEN ROBINSON
Chairperson
Iowa Civil Rights Commission

Copies to:

Teresa Baustian
Assistant Attorney General

Michael Biggles
211 Reed Street
Waterloo, Iowa 50703

Black Hawk County Health Care Center
1407 Independence Avenue
Waterloo, Iowa 50703

Black Hawk County Board of Supervisors
Court House
316 E. 5th Street
Waterloo, Iowa 50703

Bruce B. Zager
Assistant Black Hawk County Attorney
3108 Brockway Road
Waterloo, Iowa 50701