BEFORE THE IOWA CIVIL RIGHTS COMMISSION

RUTH MILLER (CLAY), Complainant,

VS.

PAGE COUNTY SHERIFF'S DEPT., PAGE COUNTY BOARD OF SUPERVISORS, PAGE COUNTY GRIEVANCE REVIEW BOARD, and RON FRANKS, SHERIFF, Respondents.

CP # 04-86-14561
CP # 03-86-14360
CP # 08-85-13343

**COURSE OF PROCEEDINGS**

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Ruth Miller against the Respondents Page County Sheriff's Department, Page County Board of Supervisors, Page County Grievance Review Board, and Sheriff Ron Franks alleging discrimination on the basis of sex in employment. Ruth Miller filed three discrimination complaints against the Page County Sheriff's Department, the Page County Board of Supervisors, and Sheriff Ron Franks. The second complaint filed also named the Page County Grievance Review Board as a Respondent.

In the first complaint Ms. Miller alleges that, in March 1985, she was never asked if she wanted a shift change to the 4:00 to 12:00 o'clock shift, which was granted to a less senior female who had an affair with Sheriff Franks; that on three or four occasions occurring during the period of March through May 1985, Sheriff Franks made verbal or physical sexual advances toward her which she rejected; that, subsequent to her rejection of these advances, she was twice denied a rotating shift change in May 1985; was given a written reprimand by Sheriff Franks in June 1985; and was denied a previously promised opportunity to work the day shift during the first week of July 1985.

In her second complaint Ms. Miller alleges that, in retaliation for the filing of her first complaint and on the basis of her sex, in August 1985 she was reprimanded for failing to ask the Sheriff or Chief Deputy before arranging for a co-worker to work her shift; was denied the day shift jailer position; and was not given the opportunity to transport a prisoner. Ms. Miller also alleges other discriminatory and retaliatory actions by Sheriff Franks, i.e. that he continued to refuse to fill the day shift jailer position; failed to change her designation to "J-1", failed to call her in for overtime in January 1986; and informed her that she would be expected to rotate weekends with the other jailers. In addition, she alleges that the Board of Supervisors and the Grievance Review Board retaliated against her by denying her grievance concerning shift changes and assignment of "J numbers".

In her third complaint Ms. Miller alleges that, in retaliation for the filing of her first two complaints and on the basis of her sex, she was terminated by Respondents Franks, the Page County Sheriff's Department, and the Board of Supervisors from her position as jailer.

A public hearing on this complaint was held on October 31 and November 1, 1989 before the Honorable Donald W. Bohiken, Administrative Law Judge, at the Page County Courthouse in Clarinda, Iowa. The hearing then resumed on November 3,1989 in the Conference Room of the Public Employees Relations Board in Des Moines, Iowa. The Complainant, Ruth Miller, was not represented by counsel. She waived her right to be present at the last day of the hearing. The Respondents Page County Sheriff's Department, Page County Board of Supervisors, Page County Grievance Review Board, and Sheriff Ron Franks were represented by Richard 0. McConville and Keith E. Uhl, Attorneys at Law. The Iowa Civil Rights Commission was represented by Rick Autry, Assistant Attorney General.

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.16(l).

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

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

**RULINGS ON OBJECTIONS TO EVIDENCE**

1. A number of objections were made to the admissibility of either testimony or exhibits. Many of these objections were simply noted in the record because evidence which would be excluded under the rules of evidence in a jury trial may be admitted in administrative hearings. Iowa Code § 17A.14(l). When this procedure is followed, the objection, if it is found to be valid, may affect the weight given to the exhibit or testimony objected to, but the exhibit or testimony is admitted in the record and no ruling on the validity of the objection is made in the proposed decision.

2. Other testimony and exhibits were admitted subject to the objections with the understanding that the objections to them would be ruled upon in this decision. Iowa Admin. Code § 4.2(5).

This procedure is often followed when one of the objections is that the proffered evidence is irrelevant, immaterial, or unduly repetitious or when the objection raises some other ground upon which the evidence may be excluded, such as the violation of a discovery rule.

See Iowa Code § 17A.13(l), 17A.14(l) (1989); Iowa R. Civ. Pro. 134 (b)(1)(B).

3. The Respondents objected to any testimony of Debra Kidney "about a different time and different place that has nothing at all to do with Ruth Miller as being not relevant and material in the issues that Ruth Miller has raised on her claim." (Tr. at 146). They objected to "anything that she's going to say that doesn't have anything to do with Ruth Miller or the time in which Ruth Miller was employed by the Page County Sheriff's office." (Tr. at 147) The Commission's response was that, although Debra Kidney may not have been present when Ruth Miller was harassed, her testimony was necessary to demonstrate a pattern or practice of harassment at the Page County Sheriff's department. (Tr. at 147).

4. The testimony of Ms. Kidney was concerned with incidents of alleged sexual harassment by Sheriff Franks at the Page County Sheriff's Department which occurred prior to the employment of Ruth Miller. In determining whether such testimony should be admitted, it must be remembered that:

> The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives. . . . Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices-evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.
>
> Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial.

Hawkins v. Hennepin Technical Center, 900 F.2d 153, 155-56, 52 Fair Empl. Prac. Cases 885, 687 (8th Cir. 1990)(sex discrimination and retaliation case).

5. Ms. Kidney's testimony should be admitted for three reasons. First, "[e]ven though the circumstances surrounding [the witness'] complaints may have occurred before the time period covered by [the complainant's] complaint, her testimony is relevant to demonstrate that harassment may be defendant's.-it's standard operating procedure rather than an unusual or isolated practice." Goodall v. Sedgwick County, 43 Fair Empl. Prac. Cas. 1683, 1685 (D. Kan. 1985). See Bundy v. Jackson, 641 F.2d 934, 940 & n.3 (D.C. Cir. 1981); Rudow v. New York City Commission on Human Rights, 474 N.Y.S.2d 1005, 1009, 123 Misc.2d 709 (N.Y. Sup. Ct. 1984). Second, such testimony is relevant for determining what were the Respondents' reasons

for terminating the Complainant. Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524, 1532 (11th Cir. 1983)(such testimony is allowed under Federal Rule of Evidence 404(b) to show employer's ,'motive. . . intent ... [or] plan. . ." Equivalent rule in Iowa is Iowa R. Evid. 404(b)). Third, the Commission **is** entitled to present evidence of an "atmosphere of condoned sexual harassment in a workplace" because such an atmosphere "increases the likelihood of retaliation for complaints in individual cases." Hawkins v. Hennepin Technical Center, 900 F.2d 153, 156, 52 Fair Empl. Prac. Cases 885, 887 (8th Cir. 1990).

6. Ms. Kidney's testimony is not only relevant for the reasons stated, its probative value is greater than any prejudicial effect it may have. Evidence of "other . . . wrongs, or acts" is admissible under Iowa Rule of Evidence 404(b) when the evidence is relevant and its prejudicial effect does not substantially outweigh its probative value. State v. Plaster, 424 N.W.2d 226, 229 (Iowa 1988). Respondent's objections to Ms. Kidney's testimony are overruled.

7. Complainant's Exhibits numbers 51 and 52 are letters from Complainant Miller's therapist to Assistant Attorney General Autry. Exhibit 51 was offered to show the number of visits which the Complainant had with her therapist from 1986 through 1989. (Tr. at 223). Exhibit 52 was offered solely to corroborate the Complainant's testimony to the effect that she had received therapy and had discussed the termination, Sheriff Franks, and the harassment with the therapist at some of these sessions. (Tr. at 223, 228). Exhibit 51 was objected to on the grounds that it was inappropriate to show the total number of therapy sessions without showing the number of sessions at which the problems with the sheriff was discussed. (Tr. at 223-24). This objection is overruled as it goes to the exhibit's weight and not to its admissibility.

8. Exhibits 51 and 52 were also objected to on the grounds that they constituted expert testimony which was introduced without a ten-day notice to the Respondents as provided for in Iowa Code section 17A.14 (apparently this was meant as a reference to 17A.13) and Iowa Administrative Code section 1614.3(17). (Tr. at 225). In addition they were objected to because they were not verified and therefore inadmissible under 17A.14(l) and (3). (Tr. at 225). Respondents also argued that these letters constituted unsworn testimony given in violation of Iowa Administrative Code section 161-4.3(11). (Tr. at 225). Respondent also urged that these exhibits constituted expert opinion offered without the expert having been qualified. (Tr. at 226). Respondents further objected to the letters as being inadmissible as offers of expert opinion,is on the truthfulness of Ruth Miller and Sheriff Franks. (Tr. at 226). Finally, they were objected to as expressing expert opinions on ultimate issues of fact in this case. (Tr. at 226).

9. In ruling on these objections, the limited purpose for which these exhibits were offered must be kept in mind. No opinions of any kind are stated in Exhibit 51. It simply lists the number of therapy sessions Ruth Miller attended for each of the years 1986-89. Although opinions are expressed in Exhibit 52, it was not offered for those opinions but, as previously noted, for the purposes of showing certain facts, i.e. that the Complainant had received therapy and had discussed the termination, Sheriff Franks, and the harassment. with the therapist. Under these circumstances, all objections to these exhibits based on the erroneous premise that they were offered for the opinions, expert or otherwise, expressed therein are overruled.

10. Iowa Code sections 17A.14 (1) and (3) do not require that exhibits be verified. Nor are these exhibits "testimony given at a commission hearing" which is governed by Iowa Administrative Code section 1614.3(11). "Testimony properly means only such evidence as is delivered by a witness on the trial of a cause, either orally or in the form of affidavits or depositions." BLACK'S LAW DICTIONARY 1324 (5th ed. 1979). Therefore these objections are also overruled. Complainant's Exhibits numbers 51 and 52 remain in the record for the limited purposes for which they were offered.

11. During the course of the hearing, testimony was elicited from Glenda Donahue on a sexual relationship she had with Sheriff Franks prior to the time he became sheriff. (Tr. at 350). The testimony was offered by Complainant to "show that there was a relationship, there was a hiatus from the relationship, and it resumed. " (Tr. at 350). This testimony was objected to by Respondents on grounds of relevancy and materiality. (Tr. at 350-51). Glenda Donahue's testimony concerning her sexual relationship with Sheriff Franks which ended prior to the time he became sheriff does not tend to prove or disprove a fact of consequence in this case. Iowa R. Evid. 401. Therefore this testimony is stricken from the record as it is irrelevant. Iowa Code § 17A.14(l).

12. Complainant's Exhibit J purports to be a copy of a letter and envelope from Erlinda Foster to the Iowa Civil Rights Commission. It was offered to impeach the credibility of hearsay statements by Erlinda Foster made within Respondents' Exhibit 147B, which had been previously admitted in evidence. (Tr. at 576-77, 746, 747). Exhibit J was objected to as being irrelevant as it was not properly identified.

13. The Commission's representative offered a professional statement to the effect that he "Xeroxed this document from the case file at the Iowa Right Commission, that Erlinda Foster filed . . . with the Commission against the Page County sheriff and that case was administratively closed after preliminary screening." (Tr. at 753). A "professional statement" by an attorney may, of course, be considered a evidence of the facts presented in, the statement. Se State v. Williams, 315 N.W.2d 45 (Iowa 1982).

14. A letter may be authenticated by indirect o circumstantial proof, G. Richter, Evidentiary Trial Objections 94 (1984)(citing Champion v. Champion, 117 N.W.2d 107 (Mich. 1962)), including the letter's "appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with circumstances." Iowa R. Evid. 901 (b)(4).

15. The circumstances here include the letter and envelope being obtained from a case file for a complaint filed by Erlinda Foster against the Page County Sheriff's Department. The case had been administratively closed. (Tr. at 753). The parties agreed that Ms. Foster lives in Clarinda, Iowa. (Tr. at 752).

16. The envelope is postmarked with the Clarinda, Iowa postmark which indicates it was mailed on July 30, 1987. Erlinda Foster's name, her return address in Clarinda, and a stylized capital letter "F" are given on a printed label in the upper left hand corner of the envelope. The envelope is addressed to the "Iowa Civil Right Commission" (sic) in care of "Mr. L. Martin." It is date stamped as being received by the Commission on July 31, 1987.

17. The letter, which is typewritten, is also date stamped as being received by the Commission on July 31, 1987. The salutation states "Dear Mr. Martin". In the first two paragraphs, the letter cites the complaint number, mentions that the complaint was administratively closed, and indicates her disagreement with such closure. She goes on to state reasons why she felt the closure was improper. The letter is not signed, but does have a closing stating "Thank you. Erlinda Foster."

18. Official notice is taken of the facts that (a) Louis Martin was employed as the Director of the Commission's Compliance Division during the 1986 fiscal year which ran from July 1, 1985 to June 30, 1986, Iowa Civil Rights Commission Annual Report for 1986; (b) that he was still employed with the Commission as a Public Service Executive III during part of the Fiscal Year 1988; Salary Book: List of Employees of the State of Iowa for the Period July 1, 1987 to June 30, 1988, and (c) that the Compliance Division has responsibility for doing the administrative reviews which may lead to a case being administratively closed. Iowa Civil Rights Commission Annual Reports for fiscal years 1986 and 1988. Fairness to the parties does not require that they be given an opportunity to contest these facts.

19. The contents and circumstances cited above are sufficient to support a finding that this letter is what it purports to be. The return address and postmark indicate that the letter came from Clarinda, which was acknowledged to be Ms. Foster's home. It is unlikely that the printed address label would have come from a source other than Ms. Foster. The consistency between the date stamps on the envelope and the letter, and between the name of the addressee given on the envelope and the person named in the salutation in the letter indicate that the letter was the one contained in the envelope.

20. The case number and the administrative closure are confidential information which would only be known to Commission staff, the Respondent, and Ms. Foster. See Iowa Code § 601A.15(4) and Iowa Admin. Code 161-3.2. Since the compliance division is responsible for administratively closing cases, it is logical that Ms. Foster's letter would be directed to Mr. Martin, the Director of that division to express her disagreement. These facts tend to demonstrate that Exhibit J is a letter from Erlinda Foster to Mr. Martin expressing her disagreement with the administrative closure of her case. Therefore, the objections to Exhibit J are overruled.

**FINDINGS OF FACT**

Jurisdictional Facts:

1. On July 31, 1985 the Complainant, Ruth Miller (then known as Ruth Clay), filed her first complaint CP # 08-85-13343 with the Iowa Civil Rights Commission alleging sex discrimination in employment which is prohibited by Iowa Code section 601A.6. (Complaint). The last date of a specific violation indicated in the complaint is June 28, 1985. Official notice is taken that July 31, 1985 is thirty- three days after June 28, 1985. Fairness to the parties does not require they be given an opportunity to contest that fact.

2. On February 28, 1986 and April 21, 1986, respectively, Ms. Miller filed her next two complaints, CP # 03-86-14360 and CP # 04-86-14561, both of which alleged sex discrimination in employment and retaliation which are prohibited by Iowa Code sections 601A.6 and 601A.11. The last dates of specific violations indicated in the complaints are, respectively, January 31, 1986 and April 7, 1986. Official notice is taken that February 28, 1986 is twenty- eight days after January 31, 1986. Official notice is taken that. April 21, 1986 is 14 days after April 7, 1986. Fairness to the parties does not require that they be given an opportunity to contest these facts.
3. The complaints were investigated. After probable cause was found, conciliation was attempted and failed. (Notice of Hearing). Notice of hearing was issued on April 10, 1989. The case was continued to October 31, 1989 by a Ruling dated August 22,1989.

Background:

4. Complainant Ruth Miller, a female, was employed as a jailer by the Page County Sheriff's Department from February 6, 1984 until her termination on April 10, 1986. (Tr. at 14). Throughout her employment Ms. Miller was known as Ruth Clay. The Complainant began her employment as a part-time jailer. Her shifts would vary from the hours of 4:00 p.m. to 12:00 midnight or 12:00 midnight to 8:00 a.m. depending on whether or not a female was incarcerated. (Tr. at 106). A part-time jailer's duties involve maintaining jail security and making various records such as jail logs which record the activities within the jail during each jailer's shift. (Tr. at 17; CP. EX. # 1, 4).

5. Complainant Miller eventually became a full-time jailer. For several months after Complainant Miller went to full-time status, she and chief jailer Kathy Smith worked double shifts in order to cover the jail. (Tr. at 107). This continued until the complement of jailers was supplemented by the hire of another part-time jailer. (Tr. at 107). After that time, a regular schedule was set up by the chief jailer, Kathy Smith. (Tr. at 17). Kathy Smith worked the day shift from 8:00 a.m. to 4:00 p.m. Carol Haffner and Carol Kirkpatrick worked the 4:00 p.m. to 12:00 midnight shift on different days. Complainant Miller worked from 12:00 midnight to 8:00 a.m. (Tr. at 68). This schedule continued through midnight on March 31, 1985 when Carol Kirkpatrick left on maternity leave. (Tr. at 114; CP. EX. # 4).

6. During Complainant Miller's employment, jailers were assigned "J numbers." These were communication codes which were assigned by date of hire. As such it reflected one's seniority level at the jail. (Tr. at 19). The J-1 number, which would represent the jailer with the highest seniority, was never assigned to anyone but the chief or head jailer. (Tr. at 19).

7. Kathy Smith was hired by Sheriff Franks in April of 1982 as a part-time jailer. (Tr. at 16). She then progressed from swing shift to day jailer. She became head jailer or chief jailer in April of 1983. In that position she trained and maintained the performance of the other jailers. She ordered supplies. She helped the civil deputy in the front office. She also did all scheduling of all other jailers. She quit on July 31, 1985. She was reemployed as a jailer, not the chief jailer, in January of 1986. She voluntarily left her job on March 31, 1986. (Tr. at 17).

8. There were no written personnel policies in effect at the Page County Sheriff's Department during the time of Complainant Miller's employment. (Tr. at 4950,485; CP. EX. 15).

9. Sheriff Ron Franks has been Sheriff of Page County since June of 1980. Prior to that, he had served as deputy sheriff of Page County since August of 1972. (Tr. at 590). As secretary of the schools committee of the Iowa State Deputies and Sheriff's Association, he attends regular meeting in Des Moines. These meetings are usually held on the third Wednesday of each month. (Tr. at 590).

10. Mike Williams, the chief deputy with the department since January of 1984, had the title of jail administrator from at least October 1984 until February 1, 1986, when Sheriff Franks officially took over jail administration. (Tr. at 194-95, 5,30, 547-48; CP. EX. # 25A, 40). The sheriff also took over administration of the jail in late May of 1985 when Mike Williams was on vacation. (Tr. at 54; CP. EX. # 11). During the time that Mike Williams served as jail administrator and Kathy Smith served as chief jailer, the chain of command for jail matters would have been (1) Sheriff Franks, (2) Mike Williams, (3) Kathy Smith, (4) jailers.

Past Practices of Sexual Harassment at the Page County Sheriff's Department:

*Debra Kidney:*

11. Debra Kidney was hired in July of 1980 by Sheriff Franks as a secretary-receptionist. (Tr. at 146). She later became a civil deputy. In that position she performed the same duties as she had as secretary receptionist with the additional duty of serving papers. (Tr. at 146). She left her employment with the Page County Sheriff's Department on January 16,1984, less than one month prior to Complainant Miller's hire. (Tr. at 14,146; CP. EX. G).

12. During Ms. Kidney's employment, Sheriff Franks made sexual remarks and advances toward her. (Tr. at 148-49, 151-53). Ms. Kidney told Kathy Smith that Sheriff Franks would persist in making advances toward her and would not stop. Franks told Smith that he cared very much for Kidney and didn't know what was wrong with her. (Tr. at 35). In response to his advances, Ms. Kidney would stay away from Franks. (Tr. at 35, 152). Sheriff Franks told Smith that if Debra Kidney did not change her attitude and get a little friendlier, she would be "out of there." (Tr. at 35).

13. In August of 1980, Sheriff Franks told Kidney that he had personal feelings for her and stated he hoped it would not interfere with their relationship. (Tr. at 148-49). Ms. Kidney replied that it would not because she was married and wanted to keep the relationship professional. (Tr. at 149). In 1981, Ms. Kidney rode with Sheriff Franks to civil school in Des Moines. He told her that, if he had anything to drink, he might not be able to control his feelings for her. This remark made Ms. Kidney nervous and she made it a point to stay with the female deputies. He then, late at night, asked her to discuss his feelings for her in his room. She refused saying it was not a proper place to discuss it. (Tr. at 149).

14. At another time, Ms. Kidney had an argument with another deputy, Bob Stotts, which she wanted to discuss with Franks. They went to the Hitching Post in Maryville, Missouri to discuss it. (Tr. at 150). On the way back, Franks told her that he could make her feel sexually enhanced

without alcohol or drugs. This upset Ms. Kidney and she informed him that she didn't wish to hear anymore comments of that nature. (Tr. at 151).

15. On another occasion, Sheriff Franks, Debra Kidney, Kathy Smith, and Kelly Phillips had dinner in Essex. While there, Sheriff Franks took each of them for rides on his motorcycle. When Ms. Kidney took her ride, Sheriff Franks asked for a kiss which she refused. (Tr. at 151).

16. After Ms. Kidney refused Sheriff Franks' advances work became more difficult for her. He wouldn't give her the information required for her to perform the procedures needed for civil work. When Ms. Kidney avoided Sheriff Franks, he would become upset. (Tr. at 152). Without specifically mentioning sex, Sheriff Franks offered her a five percent raise if she became more friendly toward him. She informed him that she was being professional and friendly with all. Franks responded by treating her in a rude manner and insinuating that she was stupid in front of others. (Tr. at 153).

17. "Courtesy" is one of the topics addressed in a three page written reprimand, dated January 10, 1984, from Sheriff Franks to Debra Kidney. (CP. EX. E). This reprimand indicates that is " an initial step, which could lead to the suspension or termination of your employment." The section on courtesy states, in part:

> A. You will conduct yourself at all times in a courteous and respectful manner towards all employees, including the sheriff. This shall be done either in a group or one on one basis. The sheriff requires this during the duration of time in the office or work related matters. This is requested to continue for non-working hours to preserve working relations.
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> B. The defensive attitude displayed in the past will cease. When an explanation is requested by the sheriff, you will be expected to relate to him in an open-minded conversation, with the same courtesy in return on the part of the sheriff.

(CP. EX. E).

18. The reprimand also suggests that Debra Kidney develop an interest in sheriff's department activities through "attendance at games or parties." (CP. EX. E). Six days after receiving the reprimand, Debra Kidney resigned because of the stress placed on her and her family though the demands of Sheriff Franks and concern that he would ruin her job reputation. (Tr. at 160).

*Kathy Smith:*

19. During the time Kathy Smith was the favored female, Sheriff Franks not only helped her to wash or dry dishes, to prepare lunch, and to perform jail checks, he also mopped the catwalk for her, brought her Coca-Cola, gave her rides in the county on patrol, and gave greater deference to her suggestions on changes in jail operations. (Tr. at 28, 33, 34, 36, 42).

20. in January of 1985, Ms. Smith went to the Uniform Crime Reporting school in Des Moines. (Tr. at 29-31). She and Sheriff Franks went together. Franks had arranged for a meeting of the

schools committee of the Iowa State Deputies and Sheriff's Association to coincide with her trip to Des Moines. (Tr. at 30-31). When they went out to dinner at a nightclub, Sheriff Franks kissed her before they left the car. They later talked about how most men would not "hit on" her because she was intimidating. She stated that was not something she did in her life. Sheriff Franks then commented that would be a good challenge for him, to get her into bed in a short amount of time. She informed him that this would be an empty challenge as it would not transpire. (Tr. at 32). When she returned to work, the favored treatment she had received previously ended. (Tr. at 33). She was back to being chief jailer with all the responsibilities that would normally entail without Franks performing some of her duties. (Tr. at 34).

*Glenda Donahue:*

21. Glenda Donahue was initially hired by Sheriff Franks as a bailiff on August 1981. (Tr. at 336-37). She then worked as a part time contract road deputy in Essex, Iowa from approximately September 1981 until September 19, 1983, when she was suspended from the deputy position until November of 1983. (Tr. at 337, 355-57, 417; CP. EX. # 60; R. EX. # 84). She also worked as a part-time jailer from April of 1982 until November of 1983. (Tr. at 338, 417). At that time she became a part-time deputy and full-time jailer office assistant. (Tr. at 338; CP. EX. # 61). She worked as full-time jailer for one to one and one-half months. (Tr. at 339). She then worked as civil deputy from January 1984 until July of 1984 when she was promoted to Office Deputy. (Tr. at 339; CP. EX. # 62). She continued in this position until her termination on June 30, 1988. (Tr. at 339).

22. In September of 1981, Ms. Donahue received on the job training in the functions of road deputy for the town of Essex. (Tr. at 355-57). The training consisted of riding around with Sheriff Franks or Robert Naico who showed them the area which she would cover on patrol. During the course of this training, Sheriff Franks would indicate he wanted to have sexual relations with her. (Tr. at 356). At first, Ms. Donahue refused while indicating she wanted to maintain only a professional relationship. (Tr. at 357). Eventually, however, Ms. Donahue began a sexual relationship with Sheriff Franks which lasted until January of 1986. This relationship involved intercourse which was voluntary in the sense that Ms. Donahue was not forced to engage in such activity against her will. (Tr. at 357-72). At times, for example, she requested sex from Sheriff Franks. (Tr. at 36667).

23. During the course of this relationship, however, there were particular sexual advances made toward Donahue by Franks during working hours at work locations which were clearly unwelcome. At times, Sheriff Franks' reaction to being refused sex was to become upset and slam the door. (Tr. at 363). On one occasion, while Ms. Donahue was working the Essex area, Sheriff Franks came in after midnight wanting sex. (Tr. at 362, 400). Franks had been drinking and Donahue informed him that she wasn't interested. Franks backed her up against a high conference table while she kept telling him "no." Thinking that Franks was going to take her against her will, she put her hand on her weapon. At this point, Franks ceased making the unwelcome advance. (Tr. at 362).

24. in January of 1986, Ms. Donahue accompanied Franks to a farm crisis school in Des Moines. (Tr. at 366). On the way back to Clarinda, they engaged in sexual relations. (Tr. at 369; CP. EX.

1). This was the last time they had sexual relations with each other. (Tr. 371-372). At that time, Ms. Donahue informed Sheriff Franks that she was not going to perform sexually for him anymore. (Tr. at 370-71). The sheriff did not request sexual favors from her again. (Tr. at 372).

25. The Commission has asserted, on brief, that sex discriminatory practices other than the making of unwelcome advances occurred with regard to Ms. Donahue:

> The evidence ... shows a link between the sexual favors and employment actions of the Sheriff. The first time since Franks was Sheriff was followed shortly by Donahue being hired by the Sheriff. In 1984 and 1985 Donahue has no reprimands. It is a probative "coincidence" that within two weeks of Donahue deciding to distance herself the Sheriff gives her a reprimand. She then received reprimands involving the number of hours worked though this same conduct was allowed without mention in 1985. Ex. I pg 7. In 1985 Sheriff Franks was still receiving sexual favors from Donahue.

(Commission's Brief at 30).

26. The greater weight of the evidence does not support the link suggested by the Commission. First, the sexual relationship which began between Franks and Donahue in September of 1981 began after her hire as bailiff and contract road deputy, not before. See Findings of Fact Nos. 28-29.

27. Second, although there is no evidence of reprimands of Ms. Donahue in 1984 and 1985, she was suspended during 1983, a time when she was providing sexual favors to Sheriff Franks. (Tr. at 337, 417; CP. EX. # 60; R. EX. # 84).

28. Third, it is true that on January 29, 1986, the same month in which she had earlier informed Franks that she would no longer engage in sexual relations with him, Ms. Donahue received a memorandum from him asking her to explain the postponement of a sheriff's sale. (Tr. at 372; CP. EX. # 65). This is the "reprimand" mentioned by the Commission on brief. (Commission's Brief at 30). She admitted, however, making the mistakes which caused the postponement of the sale. (Tr. at 372-73, 413, 506; R. EX. # 82).

29. Fourth, there were occasions in 1985 when Ms. Donahue accumulated unauthorized compensatory time without receiving a reprimand. (CP. EX. 1). Nonetheless, there is no evidence in the record to indicate that Sheriff Franks' refusal, in April of 1986, to pay unauthorized overtime was claimed to have been discriminatory or even disputed by Ms. Donahue. (CP. EX. # 67). A later memorandum to her from the sheriff, dated June 11, 1986, also addresses her working unauthorized hours. (CP. EX. # 68). This reprimand occurred approximately five months after she had informed Franks that she would no longer engage in sex with him. Although she disagreed with this memorandum, she did not allege that she was reprimanded because of her earlier refusal to continue providing sexual favors. (CP. EX. # 70).

30. Ms. Donahue asserted her belief, in a letter to the Page County Civil Service Commission dated February 20, 1987, that she had received a reprimand and suspension notice on February 9,

1987 because "I no longer will grant to the sheriff any sexual pleasures." (CP. EX. # 75). This reprimand and suspension occurred over a year after the last sexual advance made to her by Franks. The suspension and reprimand of February 9, 1987 were resolved by @ @@, agreement reached on March 9, 1987 between Sheriff Franks and Ms. Donahue. (Tr. at 379, 410-1 1; CP. # 76). The greater weight of the evidence does n, support Ms. Donahue's belief.

Events In February and March 1985 Concerning Complainant Miller and Sheriff Franks:

31. By January 1985, Complainant Miller had informed Kathy Smith that she was experiencing personal problems. (Tr. at 37-38). Ms. Smith informed Sheriff Franks that Ms. Miller might need time off because of these personal problems. (Tr. at 37). In February of 1985, Sheriff Franks asked Complainant Miller if she needed time off. (Tr. at 112). By early March of 1985, Sheriff Franks had been made aware that the personal problem Complainant Miller was experiencing was that she believed her husband was having an affair. (Tr. at 111-13, 593). Sheriff Franks asked her if she needed time off or if there was anything else he could do to help. (Tr. at 111, 594). A few days later, Sheriff Franks invited her to a St. Patricks Day party, to be held on March 17, 1985, which he indicated was being held for all deputies, jailers and other Sheriff's Department staff. (Tr. at 113). He indicated that she ought to attend, let her hair down, and enjoy herself. (Tr. at 113). Ms. Miller, who came with a female friend, and other sheriff's department personnel attended the party. (Tr. at 3839,103). Sexual Advances Made Toward Complainant Miller By Sheriff Franks:

32. In mid-March 1985, after this conversation concerning the St. Patrick's Day party, Sheriff Franks began to suggest to the Complainant that she go to jail school and meet with him in Des Moines. He assured her that he would make the arrangements, get a room and that no one would know. She refused these advances. (Tr. at 1 1 3-14; CP. EX. # 1 0, 1 1; First Complaint at 2).
33. After midnight on April 12, 1985, Complainant Miller was sitting on a barstool at a counter in the jail kitchen. (Tr. at 119, 445-46; First Complaint at 2). Sheriff Franks pulled her off the barstool into the hall way. He tried to put his arms around her and kiss her while she pushed him away. (Tr. at 119). She managed to pull away and run back into the kitchen. (First Complaint at 2).

34. On May 20, 1985, Sheriff Franks told her that she would go to jail school with him. She indicated that she would go as long as it was "upfront" and there was no "hanky- panky" expected. (Tr. at 120; CP. EX. # 10). Although Franks did not make direct comments concerning sex at this time, Complainant Miller was justified in perceiving this as a sexual advance based on his earlier comments linking sex and jail school.

35. Complainant miller informed Kathy Smith about the sexual advances made toward her by Sheriff Franks. (Tr. at 88-89). On June 3, 1985, she grieved the advances and personnel actions which she felt had occurred because she rejected the advances. The Board of Supervisors was aware of this grievance. (CP. EX. # 10, 12, 13). The grievance review board's determination that "these charges are not grievable and must be dealt with separately from this..... procedure," was the only action taken (CP. EX. # 17).

Credibility Findings:

36. Sheriff Ron Franks' testimony was highly unreliable and, with few exceptions, is cited in support of a finding of fact only when it constituted an admission against the interest of the Respondents, or when it was supported by credible evidence or other indicia of reliability. The very first allegation of discrimination made by Complainant Miller raises the issue of whether Sheriff Franks favored employees who engaged in sexual relations with him. Sheriff Franks testified that, with the exception of his wife, he had not engaged in sexual relations with any persons employed by the Sheriff's Department during the time he was sheriff and, specifically, had not engaged in sexual relations with Glenda Donahue. (Tr. at 664-65, 667-69, 705-06). This willfully false testimony was impeached by a letter written by Sheriff Franks to the Commission wherein he stated that, in January of 1986, Glenda Donahue had manipulated his penis with her hand and then "entered into oral sex" with him. (CP. EX. 1). This statement was received by the Commission on October 10, 1988. (CP. EX. 1). Sheriff Franks' testimony was also effectively contradicted by Glenda Donahue, who credibly testified to having sex on a number of prior occasions with Sheriff Franks. (Tr. at 358-65).

37. Furthermore, in March of 1986, Sheriff Franks asked Glenda Donahue to sign a document which falsely stated that she had never engaged in sexual relations with the sheriff since her hire. (Tr. at 373). He requested this because rumors had been circulating about a sexual relationship existing between him and Ms. Donahue. (CP. EX. 1). Ms. Donahue initially refused to sign this document. (Tr. at 373). She subsequently wrote her own statement, dated March 10, 1986, which falsely stated that she had not engaged in sexual relations with the sheriff. (Tr. at 374; CP. EX. # 66, CP. EX. 1). She wrote this statement because she knew Sheriff Franks was upset and she did not want to lose her job. (Tr. at 374). Since Sheriff Franks required Glenda Donahue to submit a false report, other reports written by Franks or submitted at his request should be viewed with skepticism as being of doubtful credibility in the absence of other credible supporting evidence.

38. Complainant Miller was a credible witness. She did testify that, in May 1985, when she asked the Sheriff whether one had to sleep with somebody to get a changes made in the sheriff's office, he responded by becoming angry and coming around from his side of the desk to her side and then proceeding out the door. (Tr. at 126, 450). She further testified that his coming around the desk frightened her. (Tr. at 126, 450). Although the Sheriff's coming around the desk was not mentioned in her deposition, when she was asked to name the times the Sheriff had accosted her, or in her complaint, she explained that she had not done so because she saw the Sheriff' behavior only as demonstrating that he was angry and not as an incident of sexual harassment or discrimination. (Tr. at 451-54, 485). Her testimony, taken as a whole, is internally consistent and reflects no contradictions on material matters. She did admit adverse facts such as her responsibility for failure to lock an inside jail door on July 2, 1985 . (Tr. at 249; CP. EX. # 19, 20).

39. Kathy Smith was a credible witness in regard to her testimony at hearing. It should be noted, however, that she signed what appears to be a notarized document addressed to the Commission which contains several statements which she asserted in her testimony were false. (Tr. at 56, 86-90; CP. EX. # 2). Therefore, any statements made in this document should be viewed with caution. These false statements were: (1) That Complainant Miller did not confide to anyone about Sheriff Franks' advances prior to being denied a shift change three months later; (2) That

she found "the mention of an alleged 'affair' [in the complaint] between the Sheriff and a less senior female jailer as a means for the jailer to gain the four to midnight shift, totally ludicrous and an insult to the integrity and the intelligence of all members of this department, and the Sheriff"; and, (3) That "1, myself, would not work such a job with my morality and principles being impugned on a daily basis by anyone, let alone by my supervisor." Of these three statements, only the first would be considered material in this case.

40. This document was written at the request of Sheriff Franks who had asked Ms. Smith, in August of 1985, to write something dispelling the allegations made in the Complainant's first complaint. (Tr. at 57). It is the typed version of a letter Ms. Smith had written to Sheriff Franks. That is, it was typed for her to sign after she had submitted a handwritten version. (Tr. at 58).

41. It is impossible to say whether or not the notarization statement, indicating the document is a sworn statement, was present on the document at the time Ms. Smith signed it. Ms. Smith does not recall whether or not the statement was present. (Tr. at 102). An examination of the notarization statement, which is given in typed capital letters, reveals that these capital letters are of a different type than the capitals in the remainder of the document.

42. The Sheriff's request occurred after Ms. Smith had quit her employment as head jailer. (Tr. at 17, 57). Ms. Smith came to the office and discussed the matter with Sheriff Franks. She asked if he was hiring. He asked if she would like to return. She indicated she would like to return as J-1, i.e. head jailer. He stated that he thought that could be done. (Tr. at 57). She then agreed to write the letter because she had made a poor, emotional decision to quit and because she needed the money provided by the job. (Tr. at 57-58). She wrote the letter while in a highly emotional state. (Tr. at 100). Although Franks had asked her to write the letter, he did not tell her to lie or what to state in the letter. (Tr. at 64).

43. None of the circumstances which resulted in the false statements made in the letter were present at the time of the hearing. Ms. Smith's demeanor was such that she did not appear to be under any emotional strain. Her testimony was given in a calm and straightforward manner. Furthermore, Ms. Smith was using her own vacation time to come and testify. (Tr. at 60). Although the state reimbursed her for travel and lodging expenses while testifying, it cannot reasonably be said that Ms. Smith stood to make any monetary gain which was similar to that entailed in an unemployed person receiving employment. (Tr. at 60-61).

44. Glenda Donahue was a credible witness. It, was suggested on cross-examination by Respondents that Ms. Donahue gave testimony adverse to Sheriff Franks in order to ensure that Franks was not elected and Mike Williams would become sheriff. (Tr. at 397). This was based on Ms. Donahue's testimony that she had once been in love with Mike Williams and had quite often engaged in sexual intercourse with him over a nine year period ending in October of 1984. (Tr. at 394, 397). Both Mr. Williams and Ms. Donahue credibly testified, however, that this affair had ended five years before the hearing. (Tr. at 397, 533). Ms. Donahue's testimony was not affected by any such motivation. (Tr. at 397).

45. Carol Haffner was a credible witness. It should be noted that, during the course of her testimony, the Respondent's attorney picked up a volume of the Iowa Code, opened it to a

particular section, and asked her to read it aloud. (Tr. at 569). Ms. Haffner adamantly refused to read this section because she was afraid to read out loud in public. (Tr. at 569). This demonstration was meant to convey the fact that Ms. Haffner can read, but does not like to do so in public. (Tr. at 569). The only reason for this demonstration occurring at all was that it had been brought out in testimony that, during the so-called "therapy" session in May 1985, the other jailers had stated Ms. Haffner could not read. Within minutes of this "spontaneous" demonstration on a non-material issue, Ms. Haffner read aloud, in public, in a calm, clear manner, the full text of Respondent's Exhibit Number 147, a five paragraph, one page letter from her to Sheriff Franks. (Tr. at 579-80). Nonetheless, the discrepancy between this demonstration and Ms. Haffner's performance minutes later does not seriously affect her credibility. It appears that Ms. Haffner was over-prepared, not willfully untruthful.

46. Mike Williams, Debra Kidney, Carol Kirkpatrick, Tara McComb, Harland Mace, and Debra Kendall were all credible witnesses.

Shift Change In March 1985:

47. Complainant Miller alleged that when Carol Kirkpatrick, "a full-time jailer on the 4 to 12 shift went on maternity leave thus freeing up a full-time position on the 4 to 12 shift I was never asked if I wanted the position [T]he position was filed (sic) by a less senior female [Carol Haffner], who allegedly had an affair with the sheriff." (First Complaint) (emphasis added).

48. Although Complainant Miller was aware that Carol Kirkpatrick was pregnant for some time prior to her taking maternity leave, (Tr. at 115, 540, 563, 564; R. EX. # 145), she was not aware either of the date Ms. Kirkpatrick was taking maternity leave or of Ms. Haffner being selected to take the 4 to 12 shift full time until very near the end of March 1985. (Tr. at 115-17; CP. EX. # 10). She learned these facts simultaneously. (Tr. at 116-17). By the time she learned these facts, therefore, it was too late for her to request to be given Carol Kirkpatrick's shift as it had already been assigned to Carol Haffner.

49. It cannot be reasonably inferred from the evidence in the record that Carol Haffner ever had any sexual relationship, consensual or otherwise, with Sheriff Franks. Ms. Haffner and Sheriff Franks both deny the existence of any such relationship or even of sexual advances being made by Franks to Haffner. (Tr. at 559-62, 684, 705; R. EX. # 147, 148). Mike Williams never observed any sexual overtures by Franks to Haffner nor did he observe Haffner act in any way to suggest that she had a sexual relationship with anyone but her husband. (Tr. at 536-37). There is no evidence that anyone had observed such behavior by Franks and Haffner.

50. Mr. Williams had heard rumors of such a relationship, but knew of nothing to substantiate the rumors. (Tr. at 540, 545; R. EX. # 145). Complainant Miller, for example, had told him, on June 4, 1985, that she was not sure if it was true that Ms. Haffner was having an affair with Sheriff Franks, but because Ms. Haffner was a less senior jailer who got the 4 to 12 shift, she assumed it must be true. (Tr. at 540; R. EX. # 145).

51. The only evidence offered to support the existence of such a relationship is based on the "favored female" observations of Kathy Smith and Glenda Donahue. They had noted that, at

various times, one particular female employee would receive favored treatment for a period of time over the other jail employees, all of whom were female. (Tr. at 27, 345). They observed favored treatment consisting of such activities as Sheriff Franks stopping by during his off duty hours to wash or dry dishes, to help prepare lunch, and to perform jail checks or other jailer duties during the shift of the "favored female". (Tr. at 28, 36, 42, 345). Persons receiving such favored treatment at various times included Complainant Miller, Kathy Smith, Kelly Phillips, and Carol Haffner. (Tr. at 27, 37, 364). This treatment toward Carol Haffner, which manifested itself in the form of Sheriff Franks washing the dishes and performing similar tasks for her, continued through the end of Kathy Smith's employment in March of 1986. (Tr. at 42. 45).

52. Although the termination of these "favors" with respect to Kathy Smith was related to the rejection of sexual advances made by Sheriff Franks toward her, it does not follow that the presence or continuation of such favors, without more, toward Carol Haffner demonstrates the existence of a sexual relationship between Sheriff Franks and her. Both Sheriff Franks, and other deputies, also did dishes and vacuumed the floor for Carol Kirkpatrick. No advances were, however, made toward her by Sheriff Franks and no sexual relationship existed between them. (Tr. at 508). No sexual relationship existed between Sheriff Franks and Kathy Smith or Complainant Miller, although such favors had been done for them. In addition, it is not clear in the record whether the Complainant's rejection of Sheriff Frank's sexual advances in March 1985 occurred before or after an offer of the position was made to Carol Haffner. Given these facts, this allegation of discrimination must fail.

Denials of Complainant's Request to Change To a Rotating Shift In May 1985.

53. On May 26, 1985, Complainant Miller made a request to the chief jailer, Kathy Smith, for a shift change whereby she would rotate shifts with Carol Haffner. For example, during the first week, the Complainant might work the midnight to 8:00 a.m. shift while Carol Haffner worked the 4:00 p.m. to midnight shift. The following week, the schedule would be reversed with Complainant working the 4:00 p.m. to midnight shift while Carol Haffner worked the midnight to 8:00 a.m. shift. (Tr. at 54, 121, 446-47; CP. EX. # 1 1). Complainant Miller made this request because she had worked a straight midnight to 8:00 a.m. shift since July of 1984 and was becoming "burned out" from working those hours. (Tr. at 118; CP. EX. # 7, 1 1; R. EX. # 113). She believed this request would be granted because she had greater seniority than Carol Haffner. (CP. EX. # 10; R. EX. # 113; First Complaint at 3).

54. Ms. Smith relayed this request to Mike Williams, the Jail Administrator. Mr. Williams indicated that the schedule change would be appropriate, but since he was going on vacation, and the Sheriff would be taking over the jail administration duties from him, he indicated Ms. Smith should ask Sheriff Franks, which she did. (Tr. at 54, 121; CP. EX. # 11). On May 27th, Sheriff Franks indicated he would check out this proposal with Carol Haffner. (CP. EX. 11). On May 28th, Complainant Miller was told by the Sheriff that he would not know whether the change would be granted until he found out if Ms. Haffner was returning to work. He stated that, if she did come back to work, there would be a problem with her working the midnight to eight shift because of her children. (CP. EX. # 11). [On May 23rd, Ms. Haffner had attended what was labeled a "therapy" session for the jailers. Ms. Haffner had been criticized by several of the

jailers at this session, including Complainant Miller, and had not returned to work by May 28th.] (Tr. at 44-45, 568; CP. EX. # 1, 1 1).

55. On May 29th, Sheriff Franks denied Complainant Miller's request. (Tr. at 55, CP. EX. # 1 1). He had visited with Ms. Haffner and she had indicated that the midnight to eight shift would be a hardship because of her children, i.e. she did not want to be sleeping during the day while two children were home. (Tr. at 125, 450; CP. EX. # 11; R. EX. # 113). Complainant Miller, expressing a belief based upon the sexual advances that the Sheriff had made to her as recently as May 20th, and her rejection of those advances, responded by asking whether it was necessary to "put out" or to sleep with someone in order to get changes made in the Sheriff's office, a comment which visibly angered Sheriff Franks. (Tr. at 125-26, 450, 613; CP. EX. 10, 11).

56. On May 30th, Chief Jailer Kathy Smith, Complainant Miller, and Sheriff Franks had a meeting on the rotating schedule issue. (Tr. at 55, 126). Sheriff Franks made the decision on this occasion to grant the request and told Kathy Smith to work out a rotating shift schedule. (Tr. at 55, 126; CP. EX. # 11; R. EX. # 113). Sheriff Franks made this decision on the basis of Complainant Miller's greater seniority. (R. EX. # 113).

57. On May 31st, Sheriff Franks changed his mind and informed the Complainant and Kathy Smith that he had decided to deny her request for rotating shifts and to go back to the original schedule. (Tr. at 55, 448; CP. EX. # 5, 11). He informed them that this decision was based on the advice of the county attorney. (Tr. at 55,126-27; CP. EX. # 5; R. EX. # 117). He also provided them with a memorandum which stated his reasons for the reversal:

> 1 . Consultation with County Attorney reference this change.
>
> 2. March of 1985 upon the announcment (sic) of Carol Kirkpatrick leave of absence, request to change of shifts was not given by Ruth Clay, Ruth Clay was asked if wanted to change shifts, and wished to stay with midnight 128 A.M.
>
> 3. A change of shifts, would require, according to legal consultation, a complete rotating of 3 shifts, this would effect (sic) too many lives, and would not be of any good to the Page County Jail.

(Tr. at **616;** CP. **EX. # 5;** R. **EX. #** 117).*

(*Complainant's Exhibit # 5 and Respondent's Exhibit # 117 are copies of the same document.)

58. In a memorandum to the Board of Supervisors, dated June 1, 1985, Sheriff Franks stated:

> Friday, May 31, 1985, 1 contacted Steve O'Meara [the county attorney] at his residence and did meet with him there.... Mr. O'Meara advise (sic) that my first elective was correct, seniority does not have the authority to change schedule, only management has that authority, and then only at the benifit (sic) of workable operation. The exception would be in this case, that both parties involved, and not hurting the work operation, would be in favor of the change, which we did not

> have. Further, he advised that Ms. Clay may feel she has a grievance, but Ms. Haffner would have a basis for a lawsuit filed against Page County Jail and Page County. Mr. O'Meara advised me to leave the schedule as it has been.

(R. EX. #.113). Sheriff Franks could not recall what kind of lawsuit O'Meara stated Carol Haffner could file in the event she was required to rotate shifts. (Tr. at 726).

59. Despite the general unreliability of Franks' testimony and the caution with which documents written by him must be viewed, his testimony that he received some advice from the county attorney is credible because it would be so unlikely that the Sheriff would send the Board of Supervisors a memorandum stating that their attorney had given him advice when, in fact, no advice had been given. There is no evidence in the record to indicate this memorandum was not sent or that such advice was not given.

60. In addition, the evidence is clear that Sheriff Franks couldn't make up his mind concerning what to do about Complainant Miller's request. This makes it likely that he did seek and obtain the advice of the county attorney.

61. The general reason that the Complainant's request was denied on advice of counsel isn't specific or clear enough for the Complainant to address nor is it legally sufficient to justify judgment for the Respondents. This is also true of the vague references to the hypothetical lawsuit by Haffner and to the supposed legal requirement to rotate all three shifts and not just the ones of Ms. Haffner and Complainant Miller. Neither of these propositions were supported with any legal authority or reasoning. (Tr. at 615-616; CP. EX. # 5, R. EX. # 113). Without communicating what kind of lawsuit was anticipated or any rationale for requiring the rotation of all three shifts it is impossible for Complainant to address these reasons for denying Complainant's request.

62. The advice to the effect that the authority to change schedules rests in the discretion of management and not more senior employees or that management is not required to abide by seniority in responding to this request, does not provide a specific reason as to why management discretion was exercised so as to deny Complainant Miller's request.

63. The statement in the Sheriff's memorandum to the Board of Supervisors to the effect that management can change the schedule only for reasons of a more effective operation does not provide any specific reason as to why the requested change was not considered to yield a more effective operation. This memorandum does not indicate that such a calculation was even made. (R. EX. # 113).

64. The only indication that effectiveness in operation was a factor in this decision is the Sheriff's testimony and the statement, in the memorandum to Complainant Miller and Kathy Smith, to the effect that the rotation of all three shifts "would effect (sic) too many lives, and would not be of any good to the Page County Jail." (Tr. at 615-16; CP. EX. # 5). This, of course, is not sufficiently clear or specific because it relies on the unknown and unarticulated reasons supporting the requirement for rotation of all three shifts.

65. Even if these "advice of counsel" reasons were sufficiently articulated to permit the Complainant to address them, the only one of these reasons mentioned in the memorandum provided to the Complainant rests on the totally unexplained premise that rotation of all three shifts was legally required. (CP. EX. # 5). It is, therefore, not credible.

66. Sheriff Franks testified that the May 31st memorandum to Complainant Miller stated his reasons for denying Complainant's request for a rotating shift with Carol Haffner. (Tr. at 616). The failure to state in this memorandum the other reasons given in the June lst memorandum to the Board of Supervisors tends to indicate that these other reasons are not credible because they were after the fact justifications for the action and did not play an actual part in the decision at the time it was made. (CP. EX. # 5, R. EX. # 113). In any event, the unexplained failure to mention, in the memorandum to Complainant Miller, the possible lawsuit by Ms. Haffner (or whatever rights she had which might have been violated by granting Complainant's request) or the impact that granting the request would have on the operations of the jail, absent the assumption that all three shifts must be rotated, is an inconsistency which demonstrates these reasons are unworthy of credence.

67. Two other reasons were given for denying Complainant's request. The first is that, at the time Carol Kirkpatrick's leave was announced in March 1985, Complainant Miller made no application for Ms. Kirkpatrick's shift. The second is that, at that time, she was offered Ms. Kirkpatrick's shift and refused it, indicating she preferred to remain on the midnight to eight shift. (CP. EX. # 5). These reasons are also not credible explanations for refusing the Complainant's request for shift rotation.

68. Although Complainant Miller does not dispute that she did not request Ms. Kirkpatrick's four to twelve shift at the time of Ms. Kirkpatrick's maternity leave, she failed to make the request because she had not been informed when the leave was to begin until after Carol Haffner was chosen. Also, Haffner was approached and offered the position without applying for it. (Tr. at 563). Findings of Fact Nos. 47-48.

69. There is conflicting evidence concerning whether or not Complainant Miller was offered the full-time 4 to 12 shift eventually awarded to Carol, Haffner, but the greater weight of the credible evidence shows that Complainant Miller was not offered that shift. First, Complainant Miller has consistently maintained that she was never offered the Kirkpatrick four to twelve shift, although Sheriff Franks had at one time offered her the eight to twelve shift. She stated this in her grievance of June 3, 1985 and her complaint of July 31, 1985. (CP. EX. # 10; First Complaint at 2). She refused to sign the May 31, 1985 memorandum from the Sheriff because of it's statement that she had refused such an offer. (CP. EX. # 1 0).

70. Second, for reasons explained in the findings on credibility, the statements and testimony of Sheriff Franks, including his assertion that Complainant Miller rejected the offer of Ms. Kirkpatrick's shift, are entitled to little weight. See Findings of Facts Nos. 36-37.

71. Third, for reasons explained in the findings on credibility, little weight is given to Kathy Smith's written statement to the Commission to the effect that she had some kind of conversation about the leave with Complainant Miller before Carol Kirkpatrick left during which Complainant

Miller expressed no interest in the shift. See Finding of Fact No. 39. (CP. EX. # 2). There is, in any event, nothing in the statement indicating an offer of the shift was made to Complainant Miller. At hearing, Ms. Smith could not recall whether or not she discussed the shift with Complainant Miller. (Tr. at 76).

72. Fourth, Mike Williams at first testified that an offer was made to Carol Haffner, based on her years of service, after Complainant Miller rejected an offer of the four to twelve shift. (Tr. at 539). On crossexamination, Mr. Williams acknowledged that, in an undated letter addressed to the Commission which discusses the opening of Carol Kirkpatrick's shift, he never mentioned any offer of the shift being made to Complainant Miller. (Tr. at 553; R. EX. # 145). He could not explain why that fact was not included. (Tr. at 553). He also stated that he assumes that an offer was made by him or Kathy Smith, but doesn't remember talking to Complainant Miller about the shift or whether such an offer was, in fact, made either by himself or together with Ms. Smith. (Tr. at 553). In light of these subsequent statements on crossexamination, the testimony on direct concerning the offer is entitled to little weight.

73. Fifth, Carol Kirkpatrick stated, in a memorandum directed to Sheriff Franks that "Kathy, who was chief jailer at this time, offered the position to the next person who had the most seniorty. (sic) This would have been Ruth. Ruth turned down the 4-12 shift because she felt that this wuld (sic) not give her enough time to spend at her business." (R. EX. # 119). Although Ms. Kirkpatrick initially identified this document as being written when she made her request for maternity leave, the content of the document, and the notarization dated August 26, 1985, indicates it could not have been made at that time. (Tr. at 512; R. EX. # 119). Her testimony indicates she does not know when o,- why she wrote this memorandum. (Tr. at 512, 514-15). There is nothing in her testimony or the document which indicates how she obtained the knowledge of the purported offer of the shift to the Complainant or of her rejection of it. (Tr. at 492-500, 512-15). It is unknown whether this statement is based on her personal knowledge or hearsay or a rumor. Under these circumstances, her testimony and statements are entitled to little weight.

74. Finally, Carol Haffner's testimony is essentially that it was "common knowledge" that Complainant Miller would not take the shift because she could not run her business, the Slender Shop, and work that shift full time. (Tr. at 566, 581). Harland Mace's statement is essentially the same, i.e. that he had heard, at some undisclosed time, Complainant Miller state she preferred the twelve to eight shift because of her outside employment. (Tr. at 586-87; R. EX. # 146). Neither of them made any statements concerning whether an offer of the shift **was** made to Complainant Miller.

75. The reasons given for denying Complainant Miller's request also appear to be pretexts for discrimination because, although there is no evidence of a requirement to abide by seniority or length of service in jail operations, the past practice had in fact been to make decisions on the basis of seniority. (Tr. at 433, 548, 712; CP. EX. # 10, 1 1; R. EX. # 113). Even Carol Kirkpatrick and Mike Williams, who thought or assumed that Complainant Miller had been offered the four to midnight shift in March 1985, based their opinion on the Complainant's having greater seniority than Carol Haffner. (Tr. at 539; R. EX. # 119).

Reprimand of June 24, 1985:

76. Complainant received this reprimand on June 24,1985:

> Due to the lack of respect to your immediate superviors, (sic) and inconsideration by you towards other employees of the Page Co. Sheriff's Dept. and Page Co. Jail, this written reprimand will be placed in your personnel file, and will be a factor in considerations of any furture (sic) developments in your employment. This reprimand is based on the desrepectful (sic) attitude and slanderous threats you directed at Ron Franks, Sheriff of Page Co. Iowa, approximatley (sic) 11:30 P.M. May 28, 1985. This also carried on by you to Chief Deputy Mike Williams, Page Co. Sheriff's Dept. in a disrepectful (sic) attitude the following week. The inconsideration you have shown towards other employees of the Page Co. Jail is an ethic which you have violated and will not be tolerated. I must advise you, the disrepectfulness (sic) and inconsideration shall discontinue or a more severe action will be taken

(CP. EX. # 6; R. EX. # 127)(emphasis added).*

(* These exhibits include copies of the same document.)

77. This reprimand was grieved by the Complainant to the Page County Grievance Review Board. The Board recommended that it be permanently removed from Complainant Miller's file and destroyed because it was "ambiguous and constituted subjective opinions, rather than objective facts." (CP. EX. # 17). On July 19, 1985, Sheriff Franks informed the Grievance Review Board that he would "remove the reprimand ... and destroy it." (CP. EX. # 18). Sheriff Franks did not destroy the reprimand, but retained it in a grievance and litigation file. (Tr. at 638, 709).

78. This reprimand was issued thirty-five days after ,May 20th, the last time when Complainant Miller had verbally rejected the Sheriff's sexual advances, and twenty-six days after May 29th, when she had made the comment to Sheriff Franks asking whether it was necessary to sleep with someone in order to get changes made. See Findings of Fact Nos. 34 and 55.

79. The reasons given in the reprimand are so vague that they are impossible for the Complainant to address. Other than the text of the reprimand itself, the only evidence produced by Respondents which directly indicated why Sheriff Franks issued the reprimand, was Sheriff Franks' testimony that it was issued because Complainant Miller showed disrespect on May 29th by demanding a favor "which she almost knew at that time I couldn't produce." (Tr. at 63738). This apparently refers to the request for a schedule change. Sheriff Franks stated that the disrespect shown to Mike Williams involved Complainant Miller coming into Williams office and "scream[ing] at him." (Tr. at 638). Chief Deputy Williams later decided this incident wasn't so bad and this reference was "kind of taken off in a grievance hearing." (Tr. at 638).

80. It is simply not believable that requesting a schedule,change constitutes "disrespect" which justifies a reprimand. The reference in the reprimand to both disrespectful attitude and slanderous

threats purportedly made at 11:30 p.m. on May 28th by Complainant Miller more likely refers to comments which Sheriff Franks, in his memorandum to the Board of Supervisors, alleged were made at 11:30 p.m. on the 29th, i.e. that the Complainant stated that his asking her to attend jail school on May 20th constituted a sexual advance and that she threatened to make it public if he did not change the schedule. (CP. EX. # 6; R. EX. # 113). Complainant Miller's account of the events on May 29th is more credible. (CP. EX. # 1 1). See Findings of Fact Nos. 54 and 55. Given the timing of this reprimand in relation to the last sexual advance of Sheriff Franks toward Complainant Miller, and its reference to "slanderous threats" made by Complainant Miller, which the credible evidence demonstrates were actually remarks made in protestation of past sexual harassment, and the absence of any other credible explanation for the reprimand, it is clear that the underlying motivation for this reprimand was to punish Complainant Miller for resisting and protesting these past sexual advances.

Denied Day Shift In First Week of July 1985:

81. In February or March of 1985, Complainant Miller was promised by Sheriff Franks that she would work the day shift (8:00 a.m. to 4:00 p.m.) during the first week of July 1985. (Tr. at 138; CP. EX. # 16). When the schedule for July was issued on June 28, 1985, Complainant Miller had not been scheduled to work the day shift, but had been scheduled by Sheriff Franks to work the four to midnight shift during that week. (Tr. at 138-39; CP. EX. # 16). Carol Haffner, a less senior jailer, was given the day shift. (CP. EX. # 16). When she requested an explanation from Sheriff Franks concerning why she had been removed from the day shift, Complainant Miller was told only that he didn't think it was a good idea. (CP. EX. # 16).

82. This schedule was issued thirty-nine days after May 20th, the last time when Complainant Miller had verbally rejected the Sheriff's sexual advances. See Finding of Fact No. 34. It was issued four days after the reprimand of June 14, 1985.

83. The Respondents produced no evidence of any reason for the failure to assign the promised schedule to Complainant Miller.

Reprimand On Absence Issued on August 23, 1985:

84. On August 23,1985, Complainant Miller received a document, denominated a "notice," from Sheriff Franks which stated:

> This notice to you should releive (sic) any further misunderstandings reference employees contacting a command officer when the need arises for that employee to become absent their regular tour of duty. This does mean that you shall contact either Sheriff Ron Franks or Chief Deputy Mike Williams if this occasion should arise. This was ordered in a prior regular jail meeting.

(CP. EX. # 26A; R. EX. # 127).*

(*Complainant's Exhibit # 26A and Respondent's Exhibit # 127 include copies of the same document. )

85. The Complainant, who was absent for her shift on August 23,1985, had arranged for Carol Kirkpatrick to work the shift for her. (Tr. at 188). This notice was issued in response to Complainant Miller's failure to inform either Sheriff Franks or Chief Deputy Mike Williams in advance that she would be absent for her shift on August 23,1985 and would have to be replaced by another jailer. (Tr. at 187-88, 640-41; CP. EX. # 26A). It was the Complainant's understanding that, since late 1984, such notice was not required. (Tr. at 187).

86. Complainant Miller had worked a shift for Sandee Kimball from 12:00 midnight on August 10th to 8:00 A.M. on August llth. (Tr. at 188; CP. EX. # 27A, 74). Complainant Miller asserted that Ms. Kimball had not received a similar notice although she had not requested permission to be absent from anyone in advance. (Tr. at 188; CP. EX. # 74; Second Complaint at 2).

87. This notice was issued approximately three months after the last sexual advance made toward Complainant Miller by Sheriff Franks and twenty-three days after she filed her first complaint. See Findings of Fact Nos. 1, 34.

88. Sheriff Frank's testimony and his response to the complaint indicated that Sandee Kimball and other jailers had advised either him or Mike Williams in advance of being absent. (Tr. at 641; R. EX. # 154). He also testified that the jailers had been informed of this requirement at a prior jail meeting. (Tr. at 640). Neither his testimony nor the language of the notice indicate that jailers were required to ask permission to be absent if their shift is covered, but this evidence does indicate they were required to notify either him or Chief Deputy Williams. (Tr. at 640; CP. EX. # 26A).

89. Since at least October of 1984, when Kathy Smith was chief jailer, jailers could make their own arrangements for coverage on days they were to be absent. Once they had made the arrangement, they were to notify Ms. Smith. (Tr. at 17, 22-23; CP. EX. # 25A). This policy of notifying the head jailer or other person in charge of the jail had also been in effect prior to the time Ms. Smith was chief jailer. (Tr. at 340).

90. Sandee Kimball's statement indicates not only that she did not ask anyone's permission, but also that "everyone knew we had arranged my night off." (CP. EX. # 74)(emphasis added). This would indicate that Sheriff Franks knew. In light of this statement, the past practice at the Sheriff's department requiring notification of the head jailer, and evidence that the current policy was to require the jailer to contact or advise the Sheriff of the shift switch, the Complainant has failed to rebut Respondent's legitimate, nondiscriminatory reason for the notice.

Refusal to Place Complainant Miller in the Day Shift Jailer Position:

91. The Complainant made several allegations concerning the failure to place her in the day shift (8:00 a.m. to 12:00 noon) jailer position. She alleged that the denial of this position after her applications on August 8, 1985 and November 6,1985 constituted sex discrimination and retaliation. (Second Complaint, paragraphs 3 and 5). She also alleged that the splitting of the day shift for three days a week between her and Carol Haffner penalized her by requiring her to work her regular midnight to 8:00 a.m. shift starting, on Monday night eight hours after she had

completed a daytime shift on Monday at 4:00 p.m. (Second Complaint at paragraph 4). It is clear, however, that her primary concern is that this split shift and the resultant "penalty" would not be required if the day shift position had been filled. (Tr. at 190-91). The continued refusal to fill the day shift jailer position is the only concern relating to discrimination or retaliation which is reflected in her allegation that Sheriff Franks hired a "part-time office girl" to do some of the day shift jailer's work, i.e. the presence of the office person enables the sheriff to avoid filling the day time jailer position. (Second Complaint at paragraph 10).

92. On or about August 7, 1985, Sheriff Franks posted a notice informing employees that the day shift position would be available due to the resignation of Kathy Smith. It indicated that employees interested in the position should contact him by August 9, 1985. (CP. EX. # 24). On August 8,1985, Complainant Miller left a memorandum at the office for the Sheriff indicating she was interested in the position. (Tr. at 186, 626-27, CP. EX. # 25). On August 9th, Sheriff told the jailers that the day shift jailer position would not be filled and no other jailer would be hired. (CP. EX. # 26; R. EX. # 154).

93. The initial refusal to fill the day shift position occurred within three months of the last sexual advance by Sheriff Franks toward Complainant Miller and her "disrespectful" remarks objecting to such advances; within one and one-half months of a reprimand based on the Complainant's resistance to sexual advances; and within nine days of her filing her first complaint. See Findings of Fact Nos. 1, 34, 55, 76, and 80.

94. Sheriff Franks gave two reasons for failing to fill the day shift position. First, he had not checked the budget prior to posting the position. Kathy Smith's position had been partly funded from the Sheriff's budget and not the jail budget. If he placed a jailer, who was funded exclusively from the jail budget, in the day shift position, there would not be sufficient funds in the jail budget to fund a replacement for the hours the new day shift jailer had formerly worked. (Tr. at 628-29, 713-14; R. EX. #154). Second, he had been advised by the county attorney that, because Complainant Miller had filed her discrimination complaints, the status quo should be maintained, nothing should be changed. (Tr. at 662-63; CP. EX. # 37, R. EX. # 154). These reasons applied not only to the failure to fill the day shift position after Complainant's August 1985 request, but also after her second request in November 1985, and the continued failure to fill the position throughout Complainant's employment. (R. EX. # 154).

95. Sheriff Franks acknowledged that, if Kathy Smith had stayed on, there would have been no budget problem with keeping her in that position. (Tr. at 713). When asked why, after Kathy Smith resigned, her replacement could not be paid out of the sheriff's budget, as she had been, Sheriff Franks stated "Because it was a line item in the sheriff's budget, Kathy Smith." (Tr. at 713). He went on to testify that he couldn't change the name of the person that got paid for the position. (Tr. at 714). No further explanation concerning or evidence on this reason appears in the record. In light of the previous findings concerning Sheriff Franks' credibility, and the inherent implausibility of this reason, this "budget" reason for failing to fill the day shift position is unworthy of credence.

96. The second reason given for failing to fill the day shift position is not a legitimate, nondiscriminatory reason. This reason demonstrates a direct causal link between the failure to fill

the day shift position and Complainant Miller's filing of her complaint. As a practical matter, attempts to maintain the status quo after the filing of a complaint might make some sense if they are implemented in a manner which will forestall disciplinary or other adverse action towards the Complainant which might constitute retaliation. However, in this case, the attempt to maintain the status quo was used to justify adverse action toward the Complainant Miller, in the form of the denial of the day shift position for which she had applied. There is no evidence that this "maintain the status quo" rationale was ever used to prevent any adverse action toward Complainant Miller which was actually considered by Respondents, such as her termination. As far as schedule changes are concerned, Complainant Miller was later required to rotate weekends, when the status quo at the time of the filing of her first complaint had been to allow her to have weekends off. (CP. EX. # 10). Under these facts, it is clear that the effort to maintain the status quo became an instrument of retaliation instead of a means for the prevention of retaliation.

Failure to Assign Complainant to Transportation of Prisoner:

97. Complainant Miller alleges in her second complaint that:

> On August 16, 1985, 1 was the most senior jailer on duty. The Sheriff needed someone to transport a female prisoner to Shenandoah, Iowa. Despite being the most senior jailer on duty, I was not contacted. The Sheriff brought in a J3 jailer less senior than I am, and not on duty to transport the prisoner.

(Second Complaint at 2)(emphasis added).

98. The only testimony introduced by the Complainant or the Commission indicates that transporting prisoners was considered to be desirable duty, the Complainant had performed it in the past, and, at some point in the past, Sheriff Franks had decided to assign it on the basis of seniority. (Tr. at 20-21, 188-89). No other details were offered concerning the mechanics of how the selection of the jailer was made, whether a jailer on duty or one off duty would be selected, or how-the time for transport was determined or other facets of transport. It is not even clear in the record whether Complainant Miller was or was not on duty at the time the transport was made. (CP. EX. # 27A; R. EX. # 154). Given this paucity of evidence, these allegations of discrimination and retaliation must fail.

Failure to Assign the "J-1" Number to Complainant Miller:

99. On August 9,1985, at the same meeting at which they were informed that the day shift jailer position would not be filled, the jailers were told that these numbers were for radio communication codes only. Therefore, the numbers would not be changed. (CP. EX. # 26). In the past, when a jailer had left, the designation for each of the jailers with less seniority than her moved up in number, e.g. if the jailer with the J-1 designation left, then J-2's number changed to J-1, J-3 to J-2 etc.The new jailer would then receive a number reflecting her being the least senior jailer. (CP. EX. # 26, 34, 37, 41).

100. On January 8, 1986, Kathy Smith, who had returned to work as a jailer, but not the chief jailer, was given the designation J-5. (Tr. at 17, 191; CP. EX. # 33, 34). Carol Kirkpatrick, who had previously had the J-5 designation, was moved up to J-4. The previous J-4 was Sandee Kimball, who had left. (Tr. at 191-92; CP. EX. # 34). Both Complainant Miller, designated J-2, and Carol Haffner, J-3, retained their numbers. (Tr. at 192-93). Throughout the remainder of Complainant's employment, no other jailer receiver the J-1 designation. (Tr. at 442-43).

101. On January 9th, Complainant Miller sent a memorandum to Sheriff Franks noting that he had previously stated J numbers would not be changed and asking him to explain why he didn't change everyone's number. (Tr. at 192; CP. EX. # 34). Sheriff Franks' reply to her was that "[t]his was an administrative decision." CP. EX. # 35. His written response to the Commission indicated that he did not advance Complainant Miller to J-1 because of the confusion that would result because the jailer with that number would be erroneously considered to be chief jailer. (R. Ex. # 154).

102. At the time this decision was made, the only persons with the J-1 designation had been chief jailers. See Finding of Fact No. 6. In light of this, the failure to change the designation of one other jailer, and the failure to assign the J-1 designation to anyone else during Complainant's remaining employment, it is concluded that the Respondent's reason for failing to designate Complainant Miller as J-1 has not been rebutted.

Denial of Grievance By Grievance Review Board:

103. On January 14, 1986, Complainant Miller filed a grievance with the Page County Board of Supervisors asserting that she was being subjected to unfair treatment by Sheriff Franks because she had not been assigned the number J-1. (CP. EX. # 36). The Page County Grievance Review Board conducted a hearing on the grievance on January 27, 1986. (CP. EX. # 37). It subsequently issued a decision denying her grievance. (CP. EX. # 38).

104. Complainant's rejection of sexual advances by Sheriff Franks occurred approximately eight months prior to the denial of the grievance. Her first complaint, which is primarily directed toward actions of Sheriff Franks and not of the Grievance Review Board or Board of Supervisors, was filed approximately six months before the denial. See Findings of Fact Nos. 1, 34, 55. This evidence is not sufficient to support an inference that denial of the grievance Was due to either Complainant Miller's rejection of sexual advances by Sheriff Franks or the filing of her first discrimination complaint.

Not Called In To Work Overtime On January 16,1986:

105. Complainant Miller alleged in her complaint that she was subjected to sex discrimination and retaliation by not being called in to work on January 16, 1986 when Carol Kirkpatrick worked eight hours overtime. (Second Complaint at 3). There is no evidence in the record to support these allegations.

Required to Rotate Weekends With Other Jailers:

106. In January of 1986, the jailers were informed at a monthly meeting that the Sheriff was trying to create a schedule which would allow each jailer to have one weekend off each month. (R. EX. # 154). At or about that time, Complainant Miller was informed that she would be expected to rotate weekends with the other jailers, which she was eventually required to do. (Tr. at 196; Second Complaint at 3).

107. Until late 1984, Complainant Miller routinely worked weekends. (Tr. at 195). From that time, Complainant Miller was not regularly scheduled for weekends due to her seniority. (Tr. at 195). She did, however, work weekends through agreement with other jailers and when requested to fill in for absent jailers. (CP. EX. # 27A, 37). See Finding of Fact No. 86.

108. The Sheriff's response to the second complaint indicates that his reason for requiring Complainant Miller and the other jailers to rotate weekends was to allow each jailer to have at least one weekend off per month. (R. EX. # 154).

109. The available credible evidence tends to confirm that, as of the time rotation of weekend shifts began, the other jailers were not getting at least one weekend per month off unless Complainant Miller volunteered to work. An examination of the schedules for August, October, and November 1985 indicates this would have been a problem at that time. (CP. EX. # 27A, 72, 73). Although Kathy Smith was reemployed in January 1986, Sandee Kimball had left, so there is no reason to believe that Smith's rehire relieved the problem. See Finding of Fact No. 100. Although it is a close question, given the dubious credibility of Sheriff Franks' statements and the presence of other prior acts of retaliation and discrimination, it is concluded that Complainant Miller has failed to rebut the Respondent's legitimate, nondiscriminatory reason for requiring that weekends be rotated.

The Termination of Complainant Miller:

*Establishment of the Prima Facie Case of Termination Due to Sex Discrimination and Retaliation:*

110. On April 10, 1986, Complainant Miller was terminated from her position as jailer. (CP. EX. # 46). At the time of her discharge, she was capable of performing the job of jailer. At that time, she had been performing the job for over four years. See Finding of Fact No. 4. She had successfully completed training courses related to her job including courses in jail operations in 1984 and 1985. (R. EX. # 128). In the opinion of Kathy Smith,who was chief jailer from April of 1983 until July 31, 1985, Complainant Miller was an excellent jailer whose performance was better than that of Carol Haffner, who was retained. (Tr. at 49). See Finding of Fact No. 7. Mike Williams, who was jail administrator until February 1, 1986, had "no problems" with Complainant Miller's performance. (Tr. at 548). See Finding of Fact No. 10.

111. Her termination occurred thirty-eight days after the filing of her second complaint; eight months after the filing of her first complaint; and eleven months after she resisted Sheriff Franks' sexual advances. See Findings of Fact Nos. 1, 2,34,55. In 1985, Complainant Miller went from "favored female" status to "the one most hated by the Sheriff." (Tr. at 52). During tha time, Sheriff Franks repeatedly told Kathy Smith not to mention Miller's name to him. (Tr. at 52-53).

On several occasions, including one in May of 1985, when Complainant Miller asked for a rotating shift with Carol Haffner, Sheriff Franks told Ms. Smith that no changes would be made at the jail until he got rid of the Complainant. (Tr. at 53-54). This occurred shortly after Complainant Miller's rejection and protestation of Sheriff Franks' sexual advances. See Finding of Fact No. 55.

*Respondents' Reasons for Termination:*

112. Sheriff Franks testified that the reasons for the Complainant's termination are those given in her termination notice:

> 1 . Failure to provide proper training to new employees.
>
> 2. Attempting to impose in the minds of new employees, by insulting other staff and supervisors, your personal feeling, creating a very stressful situation for new employees.
>
> 3. Communicating with inmates of the Page County Jail during their incarceration and while you were on duty, reference your personal problems with other staff and supervisors of the Page County Jail.
>
> 4. Promoting inmates to bring legal action against Sheriff Ron Franks, Page County Jail, and the County of Page. Action that would be a monatary (sic) loss to Page County.
>
> 5. Creating a stressful atmosphere among other staff, past and present, while attempting personal gain:
>
> > A. Telling other staff members untrue statements, which you said the sheriff had told you about other staff.
> >
> > B. Intimidating and embarrassing staff without authority to do so.
> >
> > C. Attempting and sometime (sic) suceeding (sic) to play inmate against staff, staff against staff, staff against supervisors.
>
> 6. Starting and promoting a rumor(s) to new employees reference a staff member of the Page County Jail and Sheriff Ron Franks going to school at the same time. The rumor used by you to show a relationship between staff and the sheriff, while knowing it to be untrue, or to place doubt in new employees (sic) minds.

(Tr. at 658-62; CP. EX. # 46).

*Reasons Lacking in Clarity and Specificity.*

113. With the exception of the reason stated in paragraph 6, none of the reasons in the termination notice are expressed with sufficient clarity and specificity to permit the Complainant to address them. (CP. EX. # 46). All the language is conclusory and presents no or very little detail on the reasons for termination. This lack of specificity and clarity in the termination notice disposes of the reasons stated in paragraphs 3 and 5A, since no other evidence in the record, other than Sheriff Franks' adoption of the notice, addresses them. (Tr. at 658-62). This also disposes of the reference in paragraph 5C to playing inmate against staff as the only other evidence which may relate to this vague allegation merely repeats it while offering no specific facts concerning it. (Tr. at 499; R. EX. # 118).

114. Several exhibits, consisting of written statements by other jailers complaining about Complainant Miller, which might relate to the reasons given in paragraph numbers 1, 2, 5B, 5C, and 6, were introduced by respondents. (R. EX. # 114, 115, 116, 118, 147, 147A, 147B). With the exception of four exhibits, (R. EX. # 118, 147, 147A, 147B), these complaints are in writing because Sheriff Franks asked employees who come to him with complaints about other employees to put them in writing so he would have something to investigate and act on. (Tr. at 495, 570-71, 579, 582, 617-18; CP. EX. J).Testimony from Carol Kirkpatrick and Carol Haffner was also introduced concerning these exhibits and incidents described therein.

115. Neither the letter of termination nor Sheriff Franks' testimony nor any other evidence identifies the incidents related in these exhibits, or in testimony about the exhibits, as being the ones referred to in paragraphs 1, 2, 5B, and 5C in the letter of termination or as being part of the reasons for termination. Although Sheriff Franks did testify that he was concerned about reports that Complainant Miller was sleeping on the job, gossiping, and berating the job she was doing, at no time did he testify that these reports were part of his reasons for terminating Complainant or indicate that they were referred to in the notice of termination. (Tr. at 624). Therefore, none of the evidence produced by Respondent sufficiently further defines the reasons set out in paragraphs 1, 2, 5B, and 5C so as to permit the Commission to conclude that these reasons now have sufficient clarity and specificity so as to permit the Complainant to address them.

*Promoting a Rumor Concerning A Relationship Between Sheriff Franks and a Staff Member:*

116. In April 1986, Carol Haffner complained to Sheriff Franks about Complainant Miller's repeated insinuations to two new employees, Erlinda Foster and Judy Bahn, and others that Ms. Haffner and Sheriff Franks were engaged in an affair. Complainant Miller was said to have pointed out to Foster and Bahn that, by comparing Sheriff Franks' and Carol Haffner's schedules, both were to be absent on days when Carol Haffner was in jail school. (Tr. at 570-71; R. EX. # 147, 147A). Although, in light of Complainant Miller's denial of making such insinuations to Erlinda Foster, and of Foster's attempt to withdraw her statements to Sheriff Franks, it may be doubted that Complainant Miller made such statements to Ms. Foster, it is more likely than not that she did make such statements to Judy Bahn. (Tr. at 203, 208, 482; CP. EX. J). See Finding of Fact No. 49.

*Promoting Legal Action By Inmates:*

117. Paragraph number 4 of the termination notice refers to an incident where an inmate complained to Sheriff Franks that a razor was dirty. (Tr. at 204, 659-60). Sheriff Franks asserted that Complainant Miller told this inmate that she would support and back any lawsuit the inmate filed against either him or Page County. (Tr. at 660). He claimed to have obtained statements from two inmates verifying his assertion, but these were not introduced in evidence. (Tr. at 660).
118. Complainant Miller testified that Sheriff Franks unlocked the razor, wiped the blade off on his pants, reinserted the blade, and told the inmate it was clean. (Tr. at 204). The inmate wrote Citizen's Aid to complain and asked Complainant Miller if she would be a witness who would verify that he did not obtain a clean razor. (Tr. at 204). Complainant Miller stated she would. (Tr. at 205). In light of the Complainant's greater credibility, her version of the facts is considered to be more accurate than the Sheriff's. This reason is pretextual as agreeing to be a witness in a complaint to Citizen's Aid does not amount to promotion of legal action by inmates. Also, this is not a legitimate reason for discharging the Complainant. See Conclusion of Law No. 23.

*Reasons Shown to Be Pretextual or Otherwise Deficient.*

119. In summary, the evidence produced concerning the reasons for discharge stated in paragraphs 1, 2, 3, 5A, 5B, and 5C of the termination notice fails to clearly set forth the reasons for discharge in such a manner as would permit the complainant to address them. The "promotion of legal action by inmates" was found to not be a legitimate reason for discharge of the Complainant. See Finding of Fact No. 118. What is left is one reason for the discharge: that Complainant Miller made insinuations to Judy Bahn, a new employee, implying that Sheriff Franks' and Carol Haffner were having an affair. This reason is found to be a pretext for discrimination and retaliation for several reasons.

120. First, Sheriff Franks did not follow his own disciplinary policies. Although there were no written personnel policies in effect at the Sheriff's department, Sheriff Franks testified that he followed a guideline in regard to complaints with work done by an employee. He would first give one or two verbal reprimands, then a written reprimand, then a suspension of one or two days, followed by termination. He had the option of immediately terminating an employee if an infraction was serious enough. (Tr. at 701- 02). There is no evidence in the record of any prior reprimand or suspension against Complainant Miller concerning this incident or prior instances of promoting rumors about this alleged affair.

121. Second, a prior jailer, Kent Stickleman, a male, received only a written reprimand for a more serious infraction, i.e. making a mistake which allowed an inmate to escape. (Tr. at 718, 732-34).

122. Third, past employment practices at the jail included (a) adverse treatment of the Complainant and other female employees because they rejected the sexual advances of Sheriff Franks; and (b) adverse treatment of the Complainant because she filed discrimination complaints. See Findings of Fact Nos. 16-18, 20, 65-69, 80, 82-83, 95-96. It is more likely than not that the termination of Complainant Miller was undertaken in accordance with these past practices.

123. Fourth, in light of the proximity in time of the termination to the filing of the second complaint, and of Sheriff Franks' statements, made shortly after Complainant Miller rejected his advances, indicating he wished to "get rid" of the Complainant, it is more likely than not that this discharge is motivated by sex discrimination and retaliation.

Ruling In the Alternative:

124. As an alternative to the finding that the reasons expressed in paragraphs 1, 2, 5B and 5C of the termination letter are not expressed with sufficient clarity and specificity so as to permit the Complainant to address them, the reasons for termination shall be reviewed as if there were evidence in the record identifying the incidents mentioned in the statements and testimony introduced by Respondents as being those generally referred to in the notice of termination.

*Reasons Given in Paragraphs Numbers 1, 2, 5B, and 5C - Improper Communications With and Training of Employees:*

125. The Respondents introduced Carol Kirkpatrick's notice of resignation, dated March 19, 1986. (CP. EX. # 118). In this notice she made a series of vague allegations which have neither sufficient detail nor clarity to permit the Complainant to address them. Carol Kirkpatrick started her employment with Page County in July of 1984. (Tr. at 489). She indicates that, at that time, Complainant Miller accused Kent Stickleman, a former jailer, "of doing lots of things, like, getting the inmates to turn against her, and doing lots of favors for the inmates, which Kent did not do." (R. EX. # 118). There are absolutely no details, such as dates, names of inmates, the nature of the favors Complainant Miller was said to have alleged were performed, or how Stickleman was alleged to have turned inmates against her, in the record. In September of 1984, Complainant Miller was said to have "constantly complained [at jail school] about things the Sheriff was doing that she did not approve of." Not one specific example of a complaint is provided in the record. Finally, Complainant Miller is said to have embarrassed Carol Kirkpatrick "in front of a whole restaurant full of people, by saying 'That if I didn't like working at the Sheriff's office, I could quite (sic).'" No specifics concerning time, place, persons present, or other circumstances are provided. (R. EX. # 118).

126. Even if it were assumed that the two events for which a general time frame is indicated were described in a sufficiently clear manner which would permit the Complainant to address them, they are so remote in time that it is unlikely that they would have been a major cause for Complainant's termination.

127. On or before April 6, 1986, two new jailers, Erlinda Foster and Judy Bahn, had complained to Carol Haffner about the stress placed on them during training by Complainant Miller. (Tr. at 571; R. EX. # 147). Ms. Haffner informed Sheriff Franks about these concerns. (Tr. at 571; R. EX. # 147). Judy Bahn submitted a letter, dated April 5, 1986, to Franks indicating that Complainant Miller subjected her to gossip and complaints about Franks and the department while she was being trained. Although the letter states the incident occurred on April 27th, it is reasonable to conclude, given the date of the letter, that it refers to March 27,1986. According to the letter, Ms. Bahn received the impression that, if she disagreed with Complainant Miller's opinion, Miller would engage in a "vendetta" against her. Complainant Miller's gossip initially

upset her to the point of tears and made her feel that she would lose her job if she made any mistakes. (R. EX. # 116,147). By April 2nd, Ms. Bahn was able to "space off" Complainant's gossiping and not be bothered by it. (R. EX. # 116). She also complained that Complainant Miller's falling asleep on duty when they were working together on April 2nd, 3rd and 4th set a poor example. (R. EX. # 116).

128. Erlinda Foster submitted a letter, dated April 1, 1986, to Sheriff Franks asking if the schedule could be changed so she would not have to work with Complainant Miller. Her letter indicates that she felt she was not learning job procedures because Complainant Miller slept, gossiped, and attempted to "brainwash" Ms. Foster in regard to "work and coworkers." (R. EX. # 114). This letter was one of the statements which Ms. Foster subsequently asked Sheriff Franks, who had requested this statement, to return as she thought it "was not right" to provide such a statement because Complainant Miller "was a very good worker." (CP. EX. J; R. EX. # 114, 147B). Since Ms. Foster subsequently attempted to withdraw this statement, no credence is given to the allegations in it.

129. Complainant Miller did not know what incidents the statements in paragraphs 1 and 5C of the termination letter referred to as Sheriff Franks did not discuss them with her when he terminated her. (Tr. at 201-02, 207). She believed that paragraph 2 might relate to a reference she made to Sheriff Franks in regard to the affair she believed Ms. Haffner had with Sheriff Franks. (Tr. at 203).

*Reasons Given In Paragraphs Numbers 1, 2, 5B, and* 5C - *Shown to Be Pretexual or Otherwise Deficient.*-

130. In summary, the allegations in Carol Kirkpatrick's resignation notice, even when considered in combination with the other evidence, are too vague to be addressed by Complainant. Furthermore, at least two of these allegations are too remote in time to constitute a major cause for Complainant's discharge. No credence is given to Erlinda Foster's statements in light of her attempts to withdraw them. What remains is the reason that Complainant Miller was terminated because she failed to properly train Judy Bahn because (a) her gossip and complaints upset Ms. Bahn enough to cry on one occasion, and (b) she set a poor example by failing asleep on the job when the two worked together.

131. This reason is considered to be a pretext for discrimination for the reasons previously expressed in Findings of Fact Nos. 120-23. In addition, it should be noted that, although Judy Bahn's statement to Franks was admitted into evidence, she did not testify. (R. EX. # 116). Her statement was reduced to writing at the request of Sheriff Franks. See Finding of Fact No. 114. Such statements should be viewed with caution as not being of doubtful credibility. See Findings of Fact No. 37. Furthermore, although Sheriff Franks requested such statements so he could have something to investigate and act on, it appears this investigation did not include obtaining the Complainant's side of the story. See Findings of Fact Nos. 114, 129. Finally, any incident where Complainant Miller fell asleep on her shift may well be due to sleep loss resulting from stress due to discrimination and retaliation, including the continued discriminatory denial of a shift change after long periods on the midnight to eight o'clock shift. See Findings of Fact Nos. 134-

35. Under these circumstances, it is more likely than not that discrimination and retaliation are the true motives for Complainant Miller's termination.

Compensation:

132. Complainant was unemployed for approximately three months after her discharge, at which time she obtained a higher paying job. (Tr. at 211). She had been earning $4.50 per hour for a 40 hour week. (Tr. at 209). Complainant Miller is, however, due no backpay because of a discovery sanction denying her 89 days of back pay which was imposed on her for failure to answer interrogatories. The Complainant ultimately missed the deadline set by rule by over three months. After Respondents filed a Motion to Compel the Complainant to provide answers to interrogatories, an Order was issued on July 14, 1989 requiring Complainant to submit answers by August 4, 1989. This deadline was also missed and it became necessary to continue the hearing for one and one half months. Complainant was also ordered to pay $348.00 to reimburse Respondents for their attorneys fees incurred while litigating the motion to compel and motion for sanctions. This amount is to be deducted from the award of damages for emotional distress. Ruling of August 22, 1989 on Respondent's Motion for Sanctions; Ruling of September 7, 1989 on Commission's Motion for Amendment of Findings of Fact; Ruling on Attorneys Fees of October 9, 1989; Post-Hearing Brief of Commission at 42.

Emotional Distress:

133. It is clear from the record that the sexual harassment and retaliation suffered by Complainant Miller,and its aftermath, caused her serious emotional distress and mental anguish. Although, on the first occasion when Franks offered to take her to Des Moines, Complainant Miller thought he was joking, she became very upset as the advances continued. (Tr. at 217). She was, in her words, "scared to death" when Sheriff Franks grabbed her, pulled her off her chair and into a hallway while trying to kiss her. (Tr. at 218). She was insulted and humiliated by these advances and repeatedly questioned herself about whether she had done anything to encourage them. (Tr. at 217-18, 222).

134. Complainant Miller was distressed because of discriminatory employment actions such as the reprimand of June 24, 1985. (Tr. at 218-19). It may be reasonably inferred that other undeserved, discriminatory, and retaliatory employment actions such as denials of Complainant Miller's request to change to a rotating shift in May 1985, the failure to place Complainant Miller on day shift during the first week of July 1985, and the refusal and continued failure to place Complainant Miller in the day shift jailer position on and after August 1985 also extracted their price from Complainant Miller in terms of emotional distress. This would be particularly true with regard to the denial of schedule changes as she was "burned out" from working the midnight to eight o'clock shift. See Finding of Fact No. 53.

135. These actions made her feel "picked on" and harassed. (Tr. at 218). She understandably suspected that virtually any adverse employment action by Respondents was discrimination due to her resistance to Sheriff Franks sexual advances or retaliation for her filing discrimination complaints. (CP. EX. # 43; First and Second Complaints). See Findings of Facts Nos. 52, 90, 97-98,102,104-05,109. She was not able to eat properly or sleep well because of the constant strain

of not knowing whether she would be reprimanded or otherwise get into trouble because of this harassment. (Tr. at 219). Although, as will be seen, she had other problems which caused her distress, the harassment aggravated this distress to the point she was not able to sleep nights. (Tr. at 251).

136. The termination of Complainant Miller's employment not only caused her substantial economic loss, it exacerbated her emotional distress. (Tr. at 209-211; 219-222). She was shocked by her discharge and felt it was extremely unfair. (Tr. at 219). She felt she was forced to change everything in her life as she had responsibilities and obligations which could not be met without a job. (Tr. at 222). It was, for example, necessary for her to move to California to obtain employment. (Tr. at 210-11; CP. EX. # 49, 50). As a result of her experiences at the Page County Sheriff's Department, Complainant Miller found herself feeling sad all the time. (Tr. at 220). She felt humiliated and her self-respect decreased. (Tr.at 221). She sought and received therapy for this and other reasons. (Tr. at 220-21; CP. EX. # 51, 52; Joint Exhibit # 200). She still discusses the termination and harassment with her therapist and was still affected by the distress as of the date of the hearing. (Tr. at 221-22). She believes she may never stop feeling distressed over her termination. (Tr. at 221-22).

137. There have been other events in Complainant's life which caused her substantial emotional distress. In making an award of damages for emotional distress, care has been taken to ensure that no award is made for damage caused solely by these other sources of distress.

138. There were three other events which were distressing to Complainant Miller. First, during or before March of 1985, Complainant Miller began to suspect that her husband was engaged in an extramarital affair. (Tr. at 109-110, 249; Joint Exhibit 200). This was very distressing to her. (Tr. at 85-86, 216, 249, 251). By 1986, this suspicion was confirmed when she found a woman at home with her husband. She filed for divorce later that year. The divorce became final in 1988. (Tr. at 237). She discussed this with her therapist. (Joint Exhibit # 200).

139. Second, when Complainant Miller's daughter, Debra Kendall, was sixteen, she accused her stepfather (and Complainant's husband) Jerry Clay of repeatedly sexually molesting her. Complainant then took her daughter to a counselor. The Department of Social Services became involved and, after proceedings before them, Ms. Kendall was removed from her parents' home and never returned to the custody of her parents. (Tr. at 256-57, 520-22; Joint Exhibit 201). This has been a continuing source of strain between Complainant Miller and her daughter, and has caused her emotional distress. (Tr. at 258, 522).

140. Third, there has been continuing conflict between Complainant Miller and her daughter concerning her grandchildren. In Easter of 1988, Complainant Miller took her grandson to California and did not return him when her daughter requested his return. (Tr. at 474). It was necessary for Ms. Kendall to come to California and retrieve her son. (Tr. at 474, 522-23; Joint EX. 200). In May of 1989, Ms. Kendall had to take the police in California with her to obtain her grandson from Ms. Miller. (Tr. at 474-76, 523). On Labor Day of 1989, Complainant visited her grandchildren in the other grandmother's home without the knowledge of Ms. Kendall. (Tr. at 47980, 524). This conflict has caused Complainant Miller emotional distress. (Tr. at 259, 478).

141. In light of the severity and duration of the distress suffered by Complainant Miller due to the discriminatory retaliatory actions of the Respondents, an award of fifteen thousand dollars ($15,000.00) would be full, reasonable, and appropriate compensation. After the $348.00 for Respondent's attorneys fees is deducted, the amount to be awarded is fourteen thousand six hundred fifty-two dollars ($14,652.00).

CONCLUSIONS OF LAW

Jurisdiction:

1. Ruth Miller's complaints were timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code § 601A.15(12) (1983). See Findings of Fact Nos. 1-2. All the statutory prequisit, 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. 3.

2. Ms. Miller's complaint is also within the subject matter jurisdiction of the Commission as the allegations that the Respondents subjected her to sex discrimination and retaliation in her employment fall within the statutory prohibitions against such practices. Iowa Code §§ 601 A.6, 601 A.11 (1983).

Order and Allocation of Proof:

3. It is well recognized that more than one theory of discrimination may apply in a case. Henson v. City of Dundee, 682 F.2d 897, 908 at n.5 (llth Cir. 1982). This case involves three separate theories of sex discrimination, two of which, the "consensual sexual relationship theory" and "quid pro quo sexual harassment" are resolved through the burden-shifting analysis utilized when a Complainant attempts to establish discrimination through circumstantial evidence. The third theory of sex discrimination, "hostile working environment sexual harassment" relies on the two step analysis set forth in Katz v. Dole, 709 F.2d 251, 255-56 (4th Cir. 1983).

4. This case also involves various allegations of retaliation which have been resolved either under the burden- shifting analysis used to prove retaliation through circumstantial evidence or through the order and allocation of proof which is used when there is 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. lG79).The burden of persuasion in this proceeding is on the complainant to persuade the finder of fact that she was subjected to sex discrimination and retaliation in the terms and conditions of her employment; and terminated because of her sex and retaliation. Linn Co-operative Oil Company v. Mary Quigley, 305 N.W.2d 728,733 (Iowa 1981).

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

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

Order and Allocation of Proof Where Complainant Relies on Circumstantial Evidence of Discrimination:

7. 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).

8. 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).

9. 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). The burden of establishing a prima facie case of discrimination is not onerous. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The plaintiff is merely required to produce enough evidence to permit the trier of fact to infer that the employer's action was taken for a discriminatory or retaliatory reason. Id. at 254 n.7. This showing is not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154,156 (Iowa 1986).

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

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.10 (1981)(emphasis added)).

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. 2j-at 217. 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. 711,717-18 (1983)(Blackmun, J. concurring).

Consensual Sexual Relationship Theory:

13. This theory applies only to the Complainant's allegation that she was not offered the 4:00 to 12:00 shift in March of 1985 because Sheriff Franks gave it to Carol Haffner who allegedly was providing sexual favors to him. See Findings of Fact Nos. 47-52. The essence of this theory is that an employer is engaged in discrimination on the basis of sex when the employer awards job benefits to or otherwise favors an employee because the employee is engaged in a consensual sexual relationship with the employer. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 147 (2nd ed. 1989). There is a divided authority concerning whether or not this actually does constitute sex discrimination. Id.

14. It is not necessary to resolve this question because, even if this theory were accepted, it would be necessary for Complainant to have established her prima facie case through the production of evidence from which it may be reasonably be inferred that the favored employee is actually engaged in a sexual relationship with the employer. King v. Palmer, 598 F. Supp. 65, 67 (D. D.C. 1984), *rev'd & remd on other grounds*, 778 F.2d 878 (D.C. Cir. 1985). Such evidence would include, for example, testimony showing the favored individual and the employer spent a substantial amount of time together or communicating by phone after work; behavior on the job, including physical contact, which suggested intimacy; kissing outside of the workplace; loans of substantial amounts of money; various acts of on-the-job favoritism toward the favored employee; King v. Palmer, 778 F.2d 878, 879-80 (D.C. Cir. 1985); and testimony to the effect that the favored employee indicated she was intimate with the employer. King v. Palmer, 598 F. Supp. 65, 67 (D. D.C. 1984). There is not sufficient evidence to infer a sexual relationship between the employer and the alleged favored employee in this case. See Findings of Fact Nos. 49-52.

Quid Pro Quo Sexual Harassment Theory,

15. The essence of the quid pro quo sexual harassment theory of sex discrimination is that "[a]n employer may not require sexual consideration from an employee as a quid pro quo for job benefits." Henson v. City of Dundee, 682 F.2d 897, 908 (llth Cir. 1982). A Complainant may

completely establish a violation of the Iowa Civil Rights Act under this theory by proving all of the following elements:

> (1) *The [Complainant] belongs to a protected group.*
>
> *(2) The [Complainant] was subject[ed] to unwelcome sexual harassment.*
>
> *(3) The harassment complained of was based upon sex.*
>
> *(4) The employee's reaction to harassment complained of affected tangible aspects of employee's compensation, terms, conditions or privileges of employment.* The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of the job benefit or the cause of a tangible job detriment in order to create liability under this theory of sexual harassment. 29 C.F.R. t 1604.11(a)(1) & (2) (1981). As in the typical disparate treatment case, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision.

Henson v. City of Dundee, 682 F.2d 897, 909 (llth Cir. 1982)(emphasis in original). In the quid pro quo case, the employer is held strictly liable for sexual harassment by supervisors which causes tangible job detriment. Id.

16. The requirements to establish a prima facie case of quid pro quo sexual harassment may vary depending upon the specific facts. Id. at 911 n.22. Under the facts of this case, a prima facie case of discrimination may be established by showing that:

> (1) The Complainant is a female.
>
> (2) The Complainant was subjected to sexual harassment in the form of unwelcome sexual advances by her supervisor.
>
> (3) Male employees were not similarly harassed.
>
> (4) She subsequently either suffered a job detriment or was denied a job benefit of which she had a reasonable expectation

See Henson v. City of Dundee, 682 F-2d 897, 909, 911 it- n-2@ (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 953 (D.C. Cir. 1981); Schlei & Grossman, Employment Discrimination Law 426 (2nd ed. 1983).

17. Through application of the above formula to the facts, Complainant established a prima facie case of discrimination with regard to her allegations concerning denial of a rotating shift in May 1985; the reprimand of June 24, 1985; denial of the day shift in the first week of July 1985; the reprimand on absence issued on August 23, 1985; refusal of the day shift jailer position; failure to assign the J-1 number; being required to work weekends with other jailers; and her

termination. See Findings of Fact Nos. 4, 12, 20, 23, 32-34, 53-54, 56, 75, 76, 78, 81-82, 84, 91-93, 99-100, 106, 110-111.

18. Complainant failed to establish a prima facie case of quid pro quo discrimination in regard to her allegations concerning the failure to offer her the shift change in March 1985; the denial of the grievance by the grievance review board; and the failure to be called in to work overtime on January 16, 1986. See Findings of Fact Nos. 52,104, 105.

19. Complainant also demonstrated a prima facie case of sex discrimination in regard to her termination by showing that:

> (1) [s]he was a member of a protected class,
>
> (2) [s]he was capable of performing the job, and
>
> (3) [s] he was discharged from the job.

Smith, v. Monsanto Chemical Co., 770 F.2d 719, 38 Fair Empl. Prac. Cases 1141, 1142 n.2 (8th Cir. 1985); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253, 25 Fair Empl. Prac. Cases 1326 (8th Cir. 1981). See Findings of Fact Nos. 4, 1 1 0.

*Legitimate Non-Discriminatory Reasons:*

20. Respondent failed to produce any evidence of a legitimate non-discriminatory reason in regard to the allegation that the Complainant was discriminatorily denied assignment to the day shift for the first week of July 1985. As the Respondent has failed to rebut the prima facie case on this issue, the Complainant has met her burden of persuasion and this denial is found to be sex discrimination in violation of the Act. See Conclusion of Law No. 10.

21. Once a prima facie case is established, the Respondent is required to produce evidence articulating a legitimate, non-discriminatory reason for the challenged employment action. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). A legitimate reason is a lawful reason. BLACK'S LAW DICTIONARY 811 (5th ed. 1979). It was ultimately shown that the "promoting legal action by inmates" reason for Complainant's termination amounted to the termination of Complainant Miller because she told an inmate she would be a witness for him in his complaint to Citizen's Aide. See Finding of Fact No. 118.

22. Iowa Code section 601 G.22 states:

> A person who willfully obstructs or hinders the lawful actions of the citizen's aide or the citizen's aide's staff, or who willfully misleads or attempts to mislead the citizen's aide in the citizen's aide's inquiries, shall be guilty of a simple misdemeanor.

Iowa Code § 601 G.22 (1985).

23. It would be difficult to imagine a more effective way for a public agency to obstruct or hinder the Citizen's Aide's lawful investigations or to mislead the Citizen's Aide in such investigations than to terminate employees who agree to be witnesses for its investigations. Such action is unlawful under Iowa Code section 601G.22. Termination for this reason is not a legitimate reason for termination.

24. The Respondent also articulated an illegal reason for the refusal to place Complainant Miller in the day shift jailer position, i.e. that this was denied because of an effort to maintain the status quo because Complainant had filed her complaint. The manner in which this practice was implemented made it clear that it was utilized as an instrument of retaliation. See Findings of Fact Nos. 94, 96. This is not a legitimate, nondiscriminatory reason which will rebut a charge of sex discrimination. Cf. Thomkins v. Morris Brown College, 752 F.2d 558, 37 Fair Empl. Prac. Cas. 25, 30 n.20 (llth Cir. 1985)(sex discrimination is not a legitimate, nondiscriminatory reason in a retaliation case).

25. In order to rebut the Complainant's prima facie case, the Respondent must introduce admissible evidence which would allow the finder of fact to rationally conclude that the challenged decision was not motivated by discriminatory animus. Linn Cooperative 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, this burdencannot be met "merely through an answer to the complaint or through argument of counsel." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed. 2d. 207, 216 n.9 (1981)).

26. The evidence produced must be sufficient to raise "a genuine issue of material fact as to whether Respondent discriminated against the Complainant." Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989)(citing Texas Department of Community Aff airs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1094, 67 L.Ed. 2d. 207, 215-16 (1981)). Statements describing conclusions and beliefs are not sufficient to establish the existence of a genuine issue of material fact See Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971). The nondiscriminatory reasons 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). If a Respondent fails to state a sufficient reason to meet this burden, the Complainant "need only prove the elements of the prima facie case to win." Loeb v. Textron, 600 F.2d 1003, 1018, 20 Fair Empl. Prac. Cases 29, 40 n.20 (lst Cir. 1979).

27. It has been found that Respondents failed to offer evidence which stated some of the reasons for the denial of a rotating shift in May of 1985, the June 24, 1985 reprimand, and for the discharge of the Complainant with sufficient clarity and specificity for Complainant to address. See Findings of Fact Nos. 61-65, 79, 113-115, 119, 125, 130. Therefore, these unclear, non-specific and vague reasons were not sufficient to meet Respondent's burden of producing evidence of legitimate non-discriminatory reasons for the denial of a rotating shift, Complainant's reprimand, and discharge.

28. The Respondents did produce evidence of legitimate non-discriminatory reasons for all of the allegations for which a prima facie case was established with the exception of the denial to the Complainant of assignment to the day shift during the first week of July 1985. See Findings of Fact Nos. 67, 79, 85, 94, 101, 108, 113. A ruling in the alternative was also made which assumed that other legitimate, non-discriminatory reasons for the discharge had been expressed with sufficient clarity and specificity for Complainant to address. See Findings of Fact Nos. 124-131.

Pretexts for Discrimination:

29. The Complainant may meet its burden of producing evidence sufficient to show that Respondent's articulated reasons for employment actions are pretexts for discrimination in a variety of ways, and these comments are not intended to enumerate all the ways in which pretext may be shown. See La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Cas. 913, 922 n.6 (7th Cir. 1984).

30. Reasons articulated for a challenged employment action may be shown to be pretexts for discrimination by evidence showing:

> (1) that the proffered reasons had no basis in fact,
>
> (2) that the proffered reasons did not actually motivate the [challenged employment action], or
>
> (3) that the proffered reasons were insufficient to motivate the [challenged employment action].

Bechold v. IGW Systems, Inc., 817 F.2d 1282, 43 Fair Empl. Prac. Cas. 1512, 1515 (7th Cir. 1987). The third method of showing pretext may be accomplished with regard to discipline and discharge through:

> evidence that the proffered reason for the [challenged employment action] was something so far removed in time from the [action] itself that it is unlikely to have been the whole cause, even if a part of it, or evidence that the proffered reason applied with equal or greater force to another employee who was not discharged [or disciplined].

La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Gas. 913, 922 (7th Cir. 1984).

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

32. Pretext maybe shown by the employer providing inconsistent reasons, for the same adverse employment action, to the Complainant and other sources. See Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 266 & n.35 (2nd ed. 1989). The failure to conduct a thorough investigation prior to discipline, including an investigation of Complainant's version of the events leading to the discipline, may demonstrate pretext. See Id. at 266 & nn.34-35.

33. After application of these principles and those set forth in Conclusions of Law Numbers 11 and 12 above, it was determined the Complainant was not able to show that Respondents' reasons for their actions were pretexts for discrimination in regard to the reprimand on absence issued on August 23, 1985; failure to assign the J-1 number; and being required to rotate weekends with other jailers. See Findings of Fact Nos. 90, 102, and 109.

34. Through application of the same principles, Respondents' reasons were found to be shown to be pretextual in regard to denial of a rotating shift in May 1985; the reprimand of June 24, 1985; refusal of the day shift jailer position; and the Complainant's termination. See Findings of Fact Nos. 65-75, 80, 95, 118-23, 126, 128, 130-31. The Complainant has met her burden of persuasion with regard to these employment actions which are found to be sex discrimination in violation of the Act

Hostile Working Environment Sexual Harassment Theory:

35. "Maintenance of a sexually hostile work environment through sexual harassment is a form of illegal sex discrimination under section 601A.6(l)(a) of the Iowa Civil Rights Act." Lynch v. City of Des Moines, 454 N.W.2d 827, 833 (Iowa 1990). "Where sexual harassment in the workplace is so pervasive and severe that it creates a hostile or abusive work environment, so that the plaintiff must endure an unreasonably offensive environment or quit working, the sexual harassment affects a condition of employment." Id. at 834.

36. While not deciding this issue, the Iowa Supreme Court has questioned whether it is appropriate or necessary to utilize the burden shifting analysis applicable to quid pro quo sexual harassment cases in hostile work environment cases. Id. at 834 n.6. When the Court made this comment, it cited the Fourth Circuit's decision in Katz v. Dole, a decision which offers an alternative analysis. Id. (citing Katz v. Dole, 709 F.2d 251, 255-56 (4th Cir. T9-83).

37. A two step analysis was set forth in Katz v. Doyle:

> First, the plaintiff must make a prima facie showing that sexually harassing actions took place, and if this is done, the employer may rebut the showing directly, by proving the events did not take place, or indirectly, by showing that the, were genuinely isolated or trivial. Second, the plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment. . .. When ... the employer's supervisory personnel manifested

> unmistakable acquiescence in or approval of the harassment, the burden on the employer seeking to avoid liability is especially heavy.

Id.

*Showing A Hostile Working Environment:*

38. It has been established that sexually harassing actions took place. See Findings of Fact Nos. 32-35. The Respondents have suggested on brief that the alleged incidents of sexual harassment were not pervasive and therefore do not demonstrate a sexually harassing environment. Respondents Brief at 14.

39. It is well established that there must be proof that the sexual harassment was:

> "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Vinson, 106 S. Ct. at 2406 (quoting Henson, 682 F.2d at 904). *This test may be satisfied by a showing that the sexual harassment was sufficiently severe or persistent "to* affect seriously *[the victim's] psychological well being."* Henson, 682 F.2d at 904.

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (llth Cir. 1987) (emphasis added).

40.

> The existence of hostile or abusive working environment must be established by the totality of the circumstances.
>
> ...
>
> [T]he determination of whether defendant's conduct is sufficiently severe and pervasive to constitute ... harassment does not turn solely on the number of incidents alleged by plaintiff. . . . The totality of the circumstances requires the factfinder to examine the severity, as well as the number, of the incidents of harassment. ... In some situations the severity of the offensive conduct may lessen the need for sustained exposure The prima facie showing in a hostile environment case is likely to consist of evidence of many or very few acts or statements by the defendant which, taken together, constitute harassment."

Vaughn v. Ag Processing, Inc., No. 89-183, slip op. at 11-12 (Iowa July 18, 1990)(citations omitted).

41. The Equal Employment Opportunity Commission has also recognized that, while a hostile working environment claim usually requires a pattern of offensive conduct, "the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical." Fair Employment Practices (BNA) 405:6681, 405:6690-91 "EEOC:

Policy Guidance on Sexual Harassment" (March 19, 1990)(emphasis added). In unusually severe cases, a single incident of harassment may be enough. Id.

42.

> More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.... When the victim is the target of both verbal and non-intimate physical con. duct, the hostility of the environment is exacerbated and a violation is more likely to be found.

Id.

43. In its policy guide on sexual harassment, the EEOC cited one of its decisions where "[a] violation was found where the harasser forcibly grabbed and kissed charging party while they were alone in a storeroom." Id. at n. 24. A more accurate description of this case would be that it concludes that a coworker forcibly grabbing and kissing an employee does constitute sexual harassment, but the employer was excused from liability because it took prompt remedial action. Commission Decision No. 83-1, CCH EEOC Decisions § 6834 (1983). Nonetheless, the conclusion is clear that the EEOC considers such activity as being sufficient to generate a hostile working environment.

44. In light of the above principles, it is concluded that the unwelcome advances sustained by Complainant Miller were sufficiently severe to create, and did create, a hostile working environment for her. See Findings of Facts Nos. 32- 35 and 133. This conclusion of law is also adopted as a Finding of Fact.

*Employer Liability:*

45. The second part of the Katz test involves determining whether the employer is liable for hostile work environment harassment. Katz v. Dole, 709 F.2d 251, 255-56 (4th Cir. 1983). Liability will be automatic when the harasser is "a proprietor, partner or corporate officer" of a business. Id. at 255. It is not necessary to decide whether Sheriff-f Franks, as head of the Page County Sheriff's Department, falls within an equivalent category. For it has been established that Respondents had "actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action." Id. See Finding of Fact No. 35. This establishes employer liability. Id. The Complainant has met her burden of persuasion with regard to the establishment of a sexually hostile working environment which is found to be sex discrimination in violation of the Act.

Order and Allocation of Proof Where Complainant, Relies on Direct Evidence of Retaliation:

46. Direct evidence of retaliation was found in regard to the failure of Respondents to place Complainant Miller in the day shift position. See Finding of Fact No. 96. The proper analytical approach in a case with direct evidence of discrimination or retaliation 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); cf. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 230-31 (2nd ed. 1989)(suggested that if complainant shows by direct evidence that lawful opposition of discrimination is a factor in employment decision, then employer must show by preponderance of evidence that decision would have been made even in absence of this factor). **With the presence of such direct evidence, the analytical framework, involving shifting burdens of production, which was originally set forth in** McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), **and subsequently adopted by the Iowa Supreme Court,** e.g. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293,296 (Iowa 1982); Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522,530 (Iowa 1985), **is inapplicable.** Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S., 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor,J.concurring);TransWorldAirlines 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).

47. 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). See, also Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990).

48. All of the above steps were followed with regard to this allegation albeit not in the. precise order stated above. See Findings of Fact Nos. 91-96. The Complainant has met her burden of persuasion with regard to proving that she was denied the day shift jailer position because she filed a discrimination complaint. This denial is found to be retaliation in violation of the Act. The same outcome would have resulted from application of the burden shifting analysis.

Retaliation - Burden Shifting Analysis:

49. The principles previously outlined concerning the analysis used when proof of discrimination is made through circumstantial evidence also apply to proof of retaliation. Lynch v. City of Des

Moines, 454 N.W.2d 827, 834 n.6 (Iowa 1990). See Conclusions of Law Nos. 7-12, 25-26, 29-32.

50. A prima facie case of retaliation may be established by the Complainant by producing evidence which shows:

> (1) she was engaged in statutorily protected activity, (2) she suffered adverse employment action, and (3) a causal connection between the two.

Hulme v. Barrett, 449 N.W.2d 629, 633 (Iowa 1989).

51. Some ways in which a causal connection between the filing of the complaint and the adverse decision can be shown are (a) proximity in time of the filing and the adverse decision; (b) treating the complainant differently than employees who have not filed; (c) failing to follow established procedures and policies with regard to the action taken against the complainant; and (d) different treatment of complainant after the filing of the complaint than before the filing. Schlei & Grossman, Employment Discrimination Law 558-59 (2nd ed. 1983)

52. Applying these principles, prima facie cases of retaliation were established with regard to the reprimand on absence issued on August 23, 1985; refusal of the day shift jailer position; failure to assign the J-1 number; being required to rotate weekends with other jailers; and termination. See Findings of Fact Nos. 1-2, 84, 91-93, 99-100, 106, 110-111, 120. Of these, the reasons articulated by Respondents for the refusal of the day shift jailer position and for termination of Complainant were found to be pretexts for retaliation. See Findings of Fact Nos. 95, 118-23, 126,128,130-31. The Complainant has met her burden of persuasion with regard to showing her discharge was retaliation in violation of the Act. The denial of the day shift jailer position has already been found to be a violation.

Credibility and Testimony:

53. In addition to the factors mentioned in the section entitled "Course of Proceedings" and in the findings on credibility in the Findings of Fact, the Administrative Law Judge has been guided by the following two principles: First,'[w]hen the trier of fact ... finds that any witness has willfully testified falsely to any material matter, it should take that fact into consideration in determining what credit, if any, is to be given to the rest of his testimony." Arthur Elevator Company v. Grove, 236 N.W.2d 383,388 (Iowa 1975). Second, "[t]he trier of facts may not totally disregard evidence but it has the duty to weigh the evidence and determine the credibility of witnesses. Stated otherwise, the trier of facts . . . is not bound to accept testimony as true because it is not contradicted. In Re Boyd, 200 N.W.2d 845, 851-52 (Iowa 1972).

Remedies:

54. Violation of Iowa Code sections 601A.6 and 601A.11 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 § 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. In addition to the illustrative examples of remedial action enumerated under Iowa Code section 601A.15(8)(a), the Commission has the authority to require Respondents to develop and implement an educational program to prevent future instances of sexual harassment. Lynch v. City of Des Moines, 454 N.W.2d 827, 835-36 (Iowa 1990).

Damages for Emotional Distress:

55. In accordance with the statutory authority to award actual damages, the Iowa Civil Rights Commission has the power to award damages for emotional distress. Chauffeurs Local Union 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986)(interpreting Iowa Code § 601A.15(8)).

The following principles were applied in determining whether an award of damages for emotional distress should be made and the amount of such award.

56. "[A] civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct."Hy Vee Food Stores, Inc. v. lowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990). "Humiliation can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d at 636 (quoted with approval in Blessum v. Howard County Board, 245 N.W.2d 836,845 (Iowa 1980)).

57. Even slight testimony of emotional distress, when combined with evidence of circumstances which would be expected to result in emotional distress, can be sufficient to show the existence of distress. See Dickerson v. Young, 332 N.W.2d 93,98-99 (Iowa 1983). Testimony of the complainant alone may be sufficient to prove emotional distress damages in discrimination cases. See Crumble v. Blumthal, 549 F.2d 462, 467 ,(7th Cir. 1977; Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. 111. 1981).

58. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). Nonetheless, such evidence in the record may be considered when assessing the existence or extent of emotional distress. See Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988).

59. When the evidence demonstrates that the complainant has suffered emotional distress proximately caused by discrimination, an award of damages to compensate for this distress is appropriate. Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984)(citing Nichols, Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview, 32 Drake L. Rev. 273, 301 (1982-83)). The Complainant did suffer substantial and serious emotional distress resulting from discrimination and retaliation.

60.

> Because compensatory damage awards for mental distress are designed to compensate a victim of discrimination for an intangible injury, determining the amount to be awarded for that injury is a difficult task. As one court has suggested, "compensation for damages on account of injuries of this nature is, of course, incapable of yardstick measurement. It is impossible to lay down any definite rule for measuring such damages."
>
> ...
>
> Computing the dollar amount to be awarded is a function of the finder of fact. Juries and judges have been making such decisions for years without minimums or maximums, based on the facts of the case [and] the evidence presented on the issue of mental distress.

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

61. The amount of damages for emotional distress will depend on the facts and circumstances of each individual case. Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984). Past Commission decisions have referred to the consideration of various factors in awarding damages for emotional distress. Id. Upon examination of the Commission's cases, and the authorities cited therein, it is concluded that the two primary determinants of the amount awarded for damages of emotional distress are the severity of the distress and the duration of the distress. See Cheri Dacy, 7 Iowa Civil Rights Commission Case Reports 17, 24-25 **(**1985); Marian Hale, 6 Iowa Civil Rights Commission C Reports 27, 29 (1984).

63. A wrongdoer takes the person he injures as finds him..McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975). A previously disabled person injured by acts of a wrongdoer "is entitled to such increased damages as are the natural and proximate result the wrongful act." Id. at 46; Keeton, Prosser Keeton on the Law of Torts 292 (1984). This principle applies to psychological and emotional injuries McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975).

64. On the other hand, the wrongdoer is not required to pay damages for emotional distress resulting from sources completely independent of its conduct.*See* Keeton, Prosser and Keeton on the Law of Torts 292, 345, 348-50 (1984). Cf. Lynch v. City of Des Moines, 454 N.W.2d 827, 836 (Iowa 1990) (upholding award of emotional distress damages in sexual harassment case against appeal of damages as inadequate - noting some distress due to other turmoil in complainant's life unrelated to discriminatory actions of employer). With items such as pain and suffering where the extent of the harm is almost incapable of definite proof, the factfinder is granted wide latitude in determining what amount of damage is attributable to the wrongdoer despite the absence of specific proof. Keeton, Prosser and Keeton on the Law of Torts 348- 350 & nn.47, 49 (1984).

Interest:

65. Post-judgment interest is usually awarded upon almost all money judgments, including judgments for emotional distress damages. Dobbs, Hornbook on Remedies 164 (1973). Only post-judgment interest on awarded because emotional distress damages are not ascertainable before a final judgment. Id. at 165.

Procedural Due Process:

66. On brief and in their answer Respondents alleged that this action should be dismissed because the Respondents' rights to procedural due process guaranteed by the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 9 of the Constitution of Iowa were violated because "[u]nder the administrative rules, the Respondents rights to discovery and prepare for hearing cannot commence until receipt of this notice. Iowa Administrative Code 161-4.1." Respondent's Brief at 42. Respondents concluded that "Due process of law precludes the Iowa Civil Rights Commission from allowing a three to four year period from passing between the filing of the Complaint or Charge of Discrimination and the Respondent's first opportunity to discovery and confrontation of witnesses." Respondent's Brief at 44.

67. The rule which actually makes reference to the relationship between discovery and the notice of hearing states, in relevant part: "Subsequent to issuance of the notice of hearing, the office of the attorney general and counsel for the parties and the parties may employ preheating discovery measures set forth in Iowa Code Chapter 17A." 161 Iowa Admin.

Code § 161-4.2(2).

68. The Commission rules, however, only track the statutory authorities which, when read together, provide that discovery procedures are available as a matter of right only after the issuance of the notice of hearing. This authority is found at Iowa Code section 17A.13(l), which provides that "[d]iscovery procedures ... are available to all parties in contested cases before an agency," and Iowa Code section 17A.12 which provides that, "[de]livery of the notice [of hearing] . . . shall constitute commencement of the contested case proceeding."

69. These statutes are the true source of the limitation on discovery rights which are the subject of the Respondents' constitutional due process attack. No administrative agency, including this Commission, has the legal authority to rule on the constitutional validity of a statute and the Commission must decline the invitation to do so. Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830, 836 (Iowa 1979).

70. Respondents brief and answer also imply that delay in the holding of the hearing violates their due process rights to be heard "at a meaningful time" and "in a meaningful manner." Respondent's Brief at 4445 (citing e.g. Hedges v. Iowa Dept. of Job Service, 368 N.W.2d 862 (Iowa Ct. App. 1985)).

71. The focus of Respondents discussion on brief seems to be on the meaningful time requirement. Respondents do not specify how they were deprived of the opportunity to be heard in a "meaningful manner." In this regard, it is helpful to remember that nonconstitutional procedural rights and due process rights must be distinguished. Schwartz, B., Administrative Law §5.2 (1984). The federal courts, for example, have held that there is no due process guarantee of any rights to discovery in proceedings before administrative agencies. Id. at § 6.6 (citing Silverman v. CFTC, 549 F.2d 28 (7t-h Cir. 1977)). The full panoply of due process rights required before administrative agencies, including the rights to notice, to present evidence, to rebut adverse evidence, to be represented by counsel, to have a decision based on evidence in the record, and to have a complete record, were all provided here. Id. at § 6.6

72. When applied to property rights, the due process right to be heard at a meaningful time refers to the time between the hearing and either the temporary or permanent deprivation of a property interest. When the hearing is held, as this one was, prior to any temporary or final deprivation of the property, the highest requirements of due process in regard to time have been met. *See e.g.* Mathews v. Eldridge, 424 U.S. 319, 333, 340-42; Goldberg v. Kelly, 397 U.S. 254, 26671 (1970); 16A **AM. JUR.2D** *Constitutional Law §* 844 (1979); Schwartz, B., Administrative Law §§ 5.24-5.25 (1984). To the extent that there is a concern with the time between the issuance of the notice and the date of the hearing, due process requires that there be sufficient time between the notice of hearing and the hearing date to allow preparation. Schwartz, B., Administrative Law § 6.4 (1984). Sufficient time was given here. See Finding of Fact No. 3.

**DECISION AND ORDER**

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Ruth Miller, is entitled to judgment because she has established that the denial of a rotating shift in May 1985; the reprimand of June 24, 1985; the denial of assignment to the day shift for the first week of July 1985; the refusal of the day shift jailer position; the creation of a hostile working environment and the failure to remedy same; and her discharge constituted sex discrimination and retaliation, as set forth in the findings of fact and conclusions of law, by Respondents Ron Franks, Sheriff; the Page County Sheriff's Department; the Page County Board of Supervisors; and the Grievance Review Board, in violation of Iowa Code Sections 601 A.6 and 601 A. 11.

B. Complainant Miller is entitled to a judgment of fourteen thousand six hundred fifty-two dollars ($14,652.00) in compensatory damages against the Respondents for the emotional distress she sustained as a result of the discrimination practiced against her by the Respondents.
C. Interest shall be paid by the Respondents to Complainant Miller on the above award of compensatory damages at the rate of ten percent per annum commencing on the date this decision becomes final, whether by Commission decision or by operation of law, and continuing until date of payment.

D. Respondents are hereby ordered to cease and desist from any further practices of sex discrimination and retaliation in employment as set forth in the findings of fact and conclusions of law.

E. Respondents shall post, within 60 days of the date of this order, in conspicuous places at their locations in Clarinda, Iowa, in areas readily accessible to and frequented by employees, the notice, entitled "Equal Employment Opportunity is the Law" which is available from the Commission.

F. Respondents shall develop a written policy on sexual harassment which shall include an effective grievance procedure. An example of such a policy is attached to this decision as Exhibit "A." This policy shall be completed within 120 days of the date of this order. This policy shall be subject to the approval of the Commission. In the event, in the sole judgment of the Commission's representative, agreement cannot be reached on the language of such policy, the version drafted by the Commission shall be adopted by Respondents. A copy of this policy shall be issued to each employee of Respondents within 150 days of the date of this order. At that time, a copy of the policy shall also be posted in conspicuous places readily accessible to employees and the public at the Page County Courthouse.

G. The Respondents shall develop a proposed plan of education and training for all management personnel of Respondents, which will include education and training in the prevention, detection, and correction of sexual harassment, within 120 days of the date of this order. This plan shall be subject to the review and approval of the Commission. The plan shall be implemented within 150 days of the date of this order.

H. Respondents shall develop a set of written personnel policies for the Page County Sheriff's Department which shall include detailed objective procedures on scheduling, promotion, discipline and discharge. These policies shall be completed within 150 days of the date of this order. These policies shall be subject to the review and approval of the Commission. In the event, in the sole judgment of the Commission's representative, agreement cannot be reached on the language of such policies, the version drafted by the Commission shall be adopted by Respondents. A copy of these policies shall be issued to each employee of the Page County Sheriff's Department within 180 days of the date of this order. At that time, a copy of the policy shall also be posted in conspicuous places readily accessible to employees and the public at the Page County Sheriff's Department.

I. A copy of this decision shall be provided to the Iowa Department of Management.

J. Respondents shall file a report with the Commission within 210 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs E through H inclusive of this order. This report shall include copies of all policies, postings, and plans required by this order.

Signed this the 22nd day of September.

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

Des Moines, Iowa 50319
515-281-4480

**ADOPTION OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER.**

1. On October 26, 1990, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed findings of fact, conclusions of law, decision and order, which are incorporated in this order as if fully set forth herein.

2. The exceptions filed by the Respondents to the Administrative Law Judge's proposed findings of fact, conclusions of law, decision and order are hereby overruled as such exceptions are without merit.

IT IS SO ORDERED.
Signed this the 29th day of October, 1990.
Abigail Pumroy
Chairperson
Iowa Civil Rights Commission