BEFORE THE IOWA CIVIL RIGHTS COMMISSION

DARRELL HARVEY, Complainant, and IOWA CIVIL RIGHTS COMMISSION,
vs.
SANDY CALDWELL, Respondent.

CP # 04-90-19797

Course of Proceedings

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Darrell Harvey against the Respondent Sandy Caldwell alleging discrimination on the basis of sex in housing.

The text of the complaint states in full:

> I moved into this apartment on June 1, 1989 and the owner, Sandy Caldwell, told me that she preferred renting to girls but since she had none inquiring about the apt. she would rent to me and my two male roommates. She also stated at that time that the rent would be increasing $25 each for each additional roommate. My one yr. lease is coming up for renewal and she stated to me on March 28, 1990 that we should be looking for someplace else to stay. I told her that I would like to stay where I am, but she refused stating that she has some girls that want to rent. She is also allowing 4 women to pay the same rate that we are and they should pay more. This is discriminating to me because I am a male.

From this text, it is evident that Complainant Harvey is alleging four violations of the Iowa Civil Rights Act. First, that Respondent Sandy Caldwell (hereinafter referred to as Sandra Caldwell) failed to renew his lease for rental of an apartment because of his sex. Second, that Respondent Caldwell made a statement to him on June 1, 1989, when he first rented the apartment, "that she preferred renting to girls, but since she had none inquiring about the apt. she would rent to me and my two male roommates." Third, that on March 28, 1990 she stated to him, when refusing to renew the lease, "that she has some girls that want to rent." Fourth, that she "is also allowing the 4 women to pay the same rate that we [the three males] did and they should pay more." Any one or combination of these acts would constitute a violation of the Iowa Civil Rights Act. See Conclusion of Law No. 3.

The public hearing on this complaint was held on December 11-12, 1991 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Black Hawk County Courthouse in Waterloo, Iowa. The Complainant, Darrell Harvey was not represented by counsel. The Respondent was represented by Douglas Coonrad, Attorney at Law. The Iowa Civil Rights Commission was represented by Teresa Baustian, Assistant Attorney General. The last brief in this case was filed on March 5, 1992.

A proposed decision was issued in this case on September 2, 1993 recommending that the case be dismissed. On October 22, 1993, the proposed decision was reversed and remanded back to

the Administrative Law Judge with directions to reconsider the decision and to issue a new decision (a) finding that the witnesses supporting Complainant's version of events were credible; (b) retaining the finding that a prima facie case of discrimination, with respect to the failure to renew his lease, was established; and (c) finding that Respondent either did not show a legitimate non- discriminatory reason for its failure to renew the lease, or, alternatively, that she did, but the complainant established that the reason was pretextual and was done to cover up the real reason for the failure to renew the lease.

The changes in findings of fact which are made in this decision necessarily follow from the mandated change in findings of fact on credibility and pretext. Findings of fact and conclusions of law on remedies are now made as discrimination is being found with respect to the alleged failure to renew the lease and with respect to the discriminatory statements. No change is being made with respect to the ultimate finding on the allegation of lower rent being provided to females than to males because (a) no change in this finding was required by the motion approved by the Commission and (b) this finding, unlike the findings on the discriminatory statements and the discriminatory failure to renew the lease, was primarily based on documentary evidence and not on the evaluation of witness credibility. In other words, a change in this finding was neither expressed nor implied by the Commission's remand.

In order to be consistent with the law, the instruction addressing Respondent's reason for failure to renew Complainant Harvey's lease is being interpreted, with respect to the McDonnell-Douglas analysis, to require a finding that the Complainant proved that Respondent's reason for failure to lease the apartment is a pretext for discrimination. The finding of fact to the effect that Respondent produced evidence of a legitimate non-discriminatory reason remains unchanged because, at the second stage of the McDonnell- Douglas analysis, it is not appropriate to weigh whether or not the Respondent's reason is believed. The basic question at that stage is whether evidence of a legitimate non- discriminatory reason for the alleged discriminatory action has been produced, not whether that evidence is believed. Such evidence, in the form of testimony of Sandra Caldwell, was produced. Therefore Respondent's burden of production of evidence of a legitimate nondiscriminatory reason was met. See Conclusion of Law No. 23.

Respondent's reason for failure to renew the lease was, however, ultimately not believed by the Commission. At the third stage of the McDonnell-Douglas analysis, this disbelief, in combination with the inference of discrimination remaining from establishment of the prima facie case, is sufficient to show that the reason is a pretext for discrimination. Pretext was also shown by evidence which persuaded the Commission that discrimination was the more likely motivation for Respondent's actions. See Conclusion of Law No. 16.

The finding that Complainant's witnesses are credible also has an impact with respect to a second method of proof, the direct evidence method. The testimony of these witnesses, which includes evidence of statements by Respondent Caldwell indicating a sex discriminatory policy was placed into effect, must be considered anew in light of the direct evidence method of proof. See Conclusions of Law Nos. 6-10.

The findings of fact and conclusions of law are set forth below because there must be separately stated findings of fact and conclusions of law in every decision in contested

casesincluding reversals or modifications of proposed decisions. Iowa Code *S* 17A.16(1) (1993); Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 295 (Iowa 1982). **Failure to do so may result in a remand back to the agency for a new opinion when the decision reviewed by the court reveals no sound factual or legal basis.** Wiese v. Iowa Department of Job Service, 389 N.W.2d 676, 681 (Iowa 1986). 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(1).

RULING ON RESPONDENT'S MOTION FOR A DIRECTED VERDICT:

1. At the close of the Commission's and Complainant's evidence, the Respondent made a motion for directed verdict based on the proposition that the Complainant and the Commission had not presented sufficient evidence to establish a prima facie case of discrimination. (Tr. at 164). The Commission resisted the motion. (Tr. at 165). As indicated during the hearing, the practice of the Administrative Law Judge is to rule on such motions in the proposed decision. (Tr. at 164-65). The motion is overruled for both procedural and substantive reasons.

Procedural Reasons:

2. First, motions for directed verdict challenge the sufficiency of the evidence to generate a jury question. In re Will of Pritchard, 443 N.W.2d 95, 97 (Iowa App. 1989). The motion contemplates a proceeding, such as a jury trial, where the functions of lawgiver and factfinder are separated. *See* Id. This is not the case in contested case proceedings where the administrative law judge serves as both factfinder and lawgiver.

3. Second, the motion contemplates a final resolution of the case through the entry of judgment in accordance with the directed verdict. *See* id. (quoting Iowa R. Civ. P. 243(b)). If granted at the close of the plaintiff's case, it would avoid the necessity for the defense put on its case. Although any district court judgment is final upon entry, Vennerberg Farms, Inc. v. IGF Insurance, 405 N.W.2d 810, 814 (Iowa 1987), this principle has no application to a decision by an administrative law judge. *See* id. at 813-14. In a contested case proceeding before the Iowa Civil Rights Commission, or any other administrative agency, the administrative law judge has the authority, after a full hearing, to issue only a proposed decision. Iowa Code *S* 17A.15(2) (1993); 161 Iowa Admin. Code *S* 4.6(1). *See* Vennerberg Farms, Inc. v. IGF Insurance, 405 N.W.2d 810, 813 (Iowa 1987).

4. The most a moveant for directed verdict in an administrative contested case could expect, therefore, is a proposed directed verdict, which would not yield the final resolution and avoidance of the necessity for the defense to present its case which is contemplated by the motion. Therefore, it is reasonable to conclude that a motion for directed verdict is inappropriate in a contested case hearing and should be overruled.

Substantive Reasons:

5. Assuming for the sake of argument that such motions are appropriate in the administrative context, the question which must be addressed is whether the Complainant and the Commission presented evidence which, when viewed in the light most favorable to them, generates a genuine issue of material fact on the question of discrimination. *See* In re Will of Pritchard, 443 N.W.2d 95, 97 (Iowa App. 1989). In determining this question, the adjudicator:

> views the evidence in the light most favorable to the party against whom the motion was made regardless of whether such evidence is contradicted and every legitimate inference which may be reasonably deduced therefrom must be carried to the aid of the evidence and if reasonable minds can differ on the issue, it is for the [factfinder, i.e. the motion should be denied].

Id.

6. Under these standards, there is no doubt that the Complainant and the Commission presented sufficient evidence, which, if viewed in a light most favorable to them, regardless of contradiction, while allowing every legitimate inference which could be drawn in their favor, would permit reasonable minds to differ on the issue of discrimination. Therefore the motion for directed verdict is overruled.

FINDINGS OF FACT:

A. Jurisdictional and Procedural Facts:

1. The Respondent and the Commission stipulated that the components necessary to arrive at a contested case hearing have been met in this case. (Tr. at 5).

B. Background:

2. Complainant Darrell Harvey, a male, lived at Apartment # 3 on the third floor of the building located at 2508 Olive Street in Cedar Falls, Iowa from June 1, 1989 to approximately June 1, 1990 on a one year lease. (Answer; CP. EX. A; Tr. at 8, 10). He and a second male, Mark Warren, his cotenant, were roommates during the school year. (C. EX. A; Tr. at 10, 49). A third male, Brian Barnes, sublet the apartment, in place of Mark Warren, during the summer of 1989. (Tr. at 12).

3. Respondent Sandra Caldwell and her husband, Dr. Kenneth Caldwell, own this building and another on College Street. Both buildings are former single family homes converted into apartments. (Tr. at 12, 166, 381-82). There are three floors in the Olive Street building, with each floor constituting a separate apartment. There is a common entrance way, facing Olive Street. (Tr. at 12, 168). The College Street site had three apartment units and a business front from 1988 through June of 1990. Then the business expanded into unit # 2, reducing this to a two apartment building. (R. EX. # 63; Tr. at 168, 188-89).

4. Sandra Caldwell is the primary person to show the apartments, have contact with the tenants, collect rents, and take care of the apartments. (Tr. at 167, 382). Dr. Caldwell does the computer and bookwork for the apartments. (Tr. at 167).

C. The Preponderance of the Evidence Supports the Allegation That Sandra Caldwell Indicated She Preferred to Rent to Women, to Darrell Harvey and Mark Warren Prior to Renting the Apartment to Them:

5. Darrell Harvey's complaint states, in part, "I moved in to this apt. on June 1, 1989 and the owner, Sandy Caldwell, told me that she preferred renting to girls but since she had none inquiring about the apt., she would rent to me. . ." (Complaint). Complainant Harvey did not testify with respect to this allegation at hearing.

6. Mark Warren credibly testified that, when Sandra Caldwell showed them the apartment, she stated something "to the effect that its nicer maybe--its nicer maybe with girls living there. That's--it wasn't you know--that's what she said, something to that effect. It wasn't--." (Tr. at 357). He thought this comment indicated "something to the effect that she would possibly prefer girls." (Tr. at 370). According to Warren, this was a passing remark. Sandra Caldwell did not discourage either Warren or Harvey from renting the apartment. This was the only statement by Mrs. Caldwell during Warren's entire tenancy which indicated she preferred female tenants. (Tr. at 357-58).

7. Sandra Caldwell denied making any comment at that time to the effect that she was interested in renting only or primarily to females. (Tr at 182). Her testimony is not credible. The Complainant and the Commission have shown by sufficiently probative direct evidence that Mrs. Caldwell made a statement indicating that she preferred female tenants either at the time she showed or leased apartment # 3 to Complainant Harvey and Mark Warren. In the absence of any affirmative defense, the Commission and the Complainant have established that Respondent Caldwell discriminated against Complainant Harvey on the basis of sex by indicating, on or about June 1, 1989, that she preferred to rent to females.

D. The Preponderance of the Evidence Supports the Allegation That on March 27, 1990, Respondent Caldwell Told Complainant Harvey That She Would Not Renew the Lease Because She "Would Like to Get Girls in the Building":

Events Leading Up to March 27th Conversation Between Sandra Caldwell and Darrell Harvey:

8. On or about February 16, 1990, Respondent Caldwell mailed notices to tenants stating "would you please call me and let me know your rental plans for summer and fall, [b]ecause I am beginning to get inquiries from people wanting apartments for summer and fall. Thank you. Sandra A. Caldwell." (R. EX. # 28, 29, 30; Tr. at 193-94, 199). Although such a notice was mailed to the unit occupied by Darrell Harvey and Mark Warren, it was never delivered. (Tr. at 15, 128, 194, 360-61). Mark Warren had, however, told Sandra Caldwell, in December of 1989, that he did not intend to stay beyond the end of the lease as he intended to and did live elsewhere for the following summer and fall. (Tr. at 95, 359-60, 361-62).

9. Respondent Caldwell would usually receive a response to these notices on or about March 1st, when rent was paid. If she did not receive a reply within 30 days, she assumed the tenants did not intend to remain and the apartment was available for showing. (Tr. at 196).

10. Before March 1990, Darrell Harvey and Brian Barnes, who had sublet together during the prior summer, had decided to get an apartment together for the next school year. (Tr. at 12, 14, 53, 54). They looked around for a better apartment than the one on Olive Street, and would have moved if they had been able to find a better apartment in the same price range. (Tr. at 14, 53-54). Complainant Harvey planned to inform Sandra Caldwell that he and Barnes would like to rent the apartment on April 1, 1990, when he paid the rent. (Tr. at 53).

Telephone Conversation of March 27, 1990 Between Darrell Harvey and Sandra Caldwell:

11. On March 26th and 27th, Respondent Caldwell telephoned Harvey and Warren's apartment to inform them that she would be showing the apartment on the 28th. The call on the 27th was made to change the time of the showing from 6:00 p.m. to 6:30 p.m. On both occasions, she had received permission to show the apartment. (Tr. at 202-03, 206, 291). Her calendar for March 1990 shows "6:00" crossed out, followed by "6:30." (R. EX. # 28). Caldwell could not recall who, Harvey or Warren, she spoke with on either occasion. (Tr. at 203). Mark Warren could not recall if he answered either of the phone calls, but he knew in advance that the showing of the apartments was going to happen. (Tr. at 358- 59).

12. Complainant Harvey answered Caldwell's call on March 27th. He was informed by her that she would be showing the apartment the next day to prospective tenants. (Tr. at 15-16).

13. During their telephone conversation on March 27th, Harvey told Respondent Caldwell that he would like to continue to rent the apartment, with Brian Barnes as his roommate and cotenant. She replied she still wished to show the apartment. Respondent Caldwell told Harvey she "would like to get girls in the building, but if--and she wasn't going to advertise the apartment, and if she wasn't able to rent it, I could stay the next year." When Complainant Harvey asked Respondent Caldwell why she wanted females in the building, she said that girls cause less wear and tear on the apartments. There was no further conversation at that time. (Tr. at 15-16).

14. There were no witnesses to this telephone conversation other than Caldwell and Harvey. (Tr. at 17). There were, however, signed written statements made by J.D. Tonn and Stacy L. Borchers, which were given to Complainant Harvey by those individuals. These documents are credible and verify that Mrs. Caldwell made statements in the presence of these individuals to the effect that she preferred female tenants. (C. EX. B, C; Tr. at 30-31). Respondent Caldwell's denial that she made such statements is not credible. (Tr. at 257-58).

15. Complainant Harvey's credibility is enhanced by the conformity of his testimony with these documents, i.e. both his testimony and the documents indicate that Respondent Caldwell made such statements. In addition, Complainant Harvey's testimony is credible because it is plausible, i.e. it would have made sense for Complainant Harvey to tell Sandra Caldwell that he wished to renew his lease when she informed him that she was going to show the apartment. It is certainly undisputed that he did inform her of his wish to renew his lease the next day. Complainant

Harvey and the Commission have proven by sufficiently probative direct evidence that Respondent Caldwell did indicate to Harvey on March 27, 1990 that she was going to continue to show the apartment because she would prefer to have women in the apartments. In the absence of any affirmative defense, the Commission and the Complainant have established that Respondent Caldwell discriminated against Complainant Harvey on the basis of sex by indicating, on March 27, 1990,that she preferred to rent to females and would rent to him only if no females were available.

E. The Greater Weight of the Evidence Indicates Jeff Ruge Was Present In Harvey's Apartment On March 28, 1990:

Showing of Apartment # 3 on March 28, 1990:

16. On March 28th, Sandra Caldwell met with three young women at 2508 Olive Street for the purpose of showing them apartment # 3, the third floor apartment leased by Darrell Harvey and Mark Warren. (R. EX. # 28; Tr. at 182, 204, 278- 79, 329-30, 346-47). These women included Chris White, Sara Moody and Cindy Hesse. (Tr. at 207, 331-32). The group entered the building through the front door. They went into the apartment after Mrs. Caldwell unlocked the door. Neither Harvey nor Warren were there. (Tr. at 206, 334, 348). Darrell Harvey arrived at the apartment while Mrs. Caldwell and the three young women were still there. (Tr. at 19, 212, 215, 335, 348).

The Question of Whether Jeff Ruge Was Present In Harvey's Apartment On March 28, 1990:

17. At this point, there arises a major conflict between the testimony of Respondent Caldwell, her daughter Amy Caldwell, and Chris White on the one hand, and that of Complainant Harvey and Jeff Ruge on the other. The Caldwells and Ms. White's testimony indicates Jeff Ruge was never at the apartment while either Mrs. Caldwell or the women viewing the apartment were there. (Tr. at 219-20, 296, 336-37, 348- 49). Harvey's and Ruge's testimony indicates he was there. (Tr. at 20, 22, 58, 69-71, 138-141, 147-49, 153-55). This issue is important because Ruge's testimony corroborates Harvey's assertions that, on March 28th, (a) Harvey, not Caldwell, initiated a discussion with Caldwell concerning window damage while the three women viewing the apartment were still there, and (b) Caldwell reiterated her position that she was not renewing his lease because she preferred female tenants. (Tr. at 139-40, 154).

18. Complainant Harvey and Jeff Ruge credibly testified that, after Harvey arrived at the apartment, Ruge was phoned by Harvey, was asked to come over to the apartment immediately, and did so. (Tr. at 20, 147-49). Harvey had made a prior arrangement with Ruge to come over at his call so Ruge would witness his conversation with Respondent Caldwell. (Tr. at 57, 119, 138, 144-45, 146-47).

19. Harvey credibly testified that, after his telephone conversation with Caldwell on the 27th, he contacted the Department of Housing and Urban Development (HUD) and related his account of that conversation. He asserted that the HUD representative asked him if he had a witness to the telephone conversation with Caldwell. This made him aware of the importance of having such a witness. (Tr. at 16-19).

20. Therefore, Harvey contacted Ruge as he intended to ask Caldwell again about her reasons for not renewing his lease, while Ruge witnessed the conversation. (Tr. at 57-58, 119, 138, 392-93), According to both Ruge and Harvey, Mrs. Caldwell and the three women were still present when Ruge arrived. (Tr. at 58, 69-70, 138-39, 141, 149-50, 152-155). Ruge indicated that they would have seen him. (Tr. at 152- 53). According to Ruge, he had entered the building through the front door. (Tr. at 147-48).

21. Respondent Caldwell, however, testified that, during the entire time she was at apartment # 3 on March 28th, there was nobody there other than her, the three women, and Darrell Harvey. She specifically denied that Jeff Ruge was there and denied ever meeting him. (Tr. at 219-20, 236).

22. Mrs. Caldwell's testimony was supported by her then 14 year old daughter, Amy Caldwell, who was waiting outside in the car parked on Olive Street. (Tr. at 345-46, 350) She was in a position to see the front door, was looking at the house most of the time, and saw no one, other than Darrell Harvey, enter the building from the time Sandra Caldwell and the three young women entered it until the time they had all left. (Tr. at 348-49).

23. Chris White was one of the three women who were shown the apartment. (Tr. at 207, 331-32). Unlike every other nonparty witness at hearing, including Jeff Ruge, Mark Warren, Amy Caldwell and Ken Caldwell, there is no evidence in the record which would indicate Ms. White is a friend, roommate, or relative of either of the parties. (Tr. at 10, 52, 117, 141, 166, 345, 381). She was an independent witness who was present only for the purpose of being shown the apartment. (Tr. at 204-07, 329-330).

24. Ms. White's testimony clearly indicates that no one other than her, Mrs. Caldwell, the other two women being shown the apartment, and Darrell Harvey were present during the time she and the other two women were there. (Tr. at 336). According to her, although Harvey did make a phone call telling an unidentified person "She's here. She's showing the apartment," no one ever did come. Jeff Ruge, in other words, was never there. (Tr. at 335-337). In addition, she testified that she had talked to one of the other women who had been present at the apartment, Cindy Hesse, who also did not recall anyone else being there other than Harvey, Caldwell, and the women viewing the apartment. (Tr. at 336-37).

25. Since Ms. White had no motive for lying, the probable explanation for her testimony concerning the absence of Mr. Ruge, other than truthfulness and accuracy, is that she simply did not notice him or forgot he was there. This is implicitly suggested by Darrell Harvey's testimony indicating that Mr. Ruge, once he arrived, remained in Harvey's bedroom most of the time. This was done in order to maintain a low profile and to thereby provide an atmosphere where Mrs. Caldwell would feel she could speak freely. (Tr. at 68-69, 392-93). It is more likely than not that Ms. White and Cindy Hesse either forgot that Mr. Ruge was present or did not notice him as they were busy conducting their own business, i.e. viewing the apartment. Mrs. Caldwell's testimony, on the other hand, to the effect that Ruge was not there is either willfully false or she too did not notice Ruge's presence. Amy Caldwell's testimony is not credible. She was either not paying attention when Ruge entered the apartment or has forgotten that he entered the apartment. The greater weight of the credible evidence indicates that Jeff Ruge was present in Darrell' Harvey's

apartment, on March 28, 1990, while either Mrs. Caldwell or the three women viewing the apartment were present.

F. Respondent Caldwell Was Aware of Window Damage Prior to Complainant Harvey's Coming to the Apartment:

Awareness of Window Damage:

26. On March 28th, prior to Darrell Harvey's entrance into apartment # 3, Sandra Caldwell became aware for the first time that windows in Harvey's bedroom had been broken by BB gun fire. (Tr. at 204-05, 208). When she entered the bedroom while showing the apartment to the women, she pointed out the damage to them and indicated to the women that the windows would be replaced. (Tr. at 206, 208, 209, 333, 342- 423). She noticed that the exterior storm windows had holes and were cracked, while the interior windows were unharmed. There were BBs and pellets in the sills. (Tr. at 115, 208). There were several BB or pellet holes where projectiles had penetrated two storm windows in Harvey's room. (R. EX. # 40; Tr. at 21, 113-15).

27. After Complainant Harvey entered the apartment, he and Respondent Caldwell became engaged in a conversation wherein she asked him to explain the damage to his bedroom window. (Tr. at 213, 335, 343-44). Harvey indicated to her that he believed that some men living across the street had shot it out. (Tr. at 213, 224, 297-98, 336). She asked Harvey if he had reported it to the police. (Tr. at 22, 66, 213, 335).

28. Chris White observed and overheard this conversation as set forth above, but could not recall how Harvey had responded when asked if he had reported the damage to the police. Her testimony confirms (a) that Caldwell was aware of the window damage prior to Harvey's entrance, and (b) that Caldwell initiated the conversation concerning the windows. (Tr. at 335-36, 343-44). Although this would appear to contradict Harvey's and Ruge's testimony to the effect (a) that Harvey pointed out the window damage to Caldwell and the women in order to discourage the women from renting in the hope that Caldwell would still renew his lease despite her alleged preference for women, (b) that Caldwell was not aware of the damage prior to being informed of it by Harvey, and (c) that Harvey initiated the discussion of window damage, it is more likely than not White is mistaken with respect to whether Caldwell initiated the conversation with Harvey. (Tr. at 21-22, 61-62, 65, 139-40, 152). Of course, Harvey could have initiated the conversation with Caldwell regardless of whether or not Caldwell had prior knowledge of the BB gun damage. Since Harvey would not know of Caldwell's prior knowledge, it may have appeared to him that she did not have such prior knowledge.

29. Darrell Harvey responded that he did not report the damage to the police. (Tr. at 66). He had also not reported the damage to the Caldwells, although he had been aware of it since approximately November of 1989. (Tr. at 25-26, 63-64).

What Harvey Knew About the Window Damage:

30. At that time, Harvey had seen a man, whom he knew lived in a house across the street, fire a BB gun which hit the side of the house Harvey lived in. He checked the windows later and found

no damage. A few days later, however, he found the windows were damaged. He did not see the shooting which resulted in the window damage. (Tr. at 25-26, 62-63, 374-76).

31. Three months later, in February, 1990, Harvey also saw two of the men from across the street carrying a gun and looking up at telephone poles in someone's yard. He then saw them in the alley. Shortly after that, he found that one of his car headlights was out due to a small hole, but he did not know if it was caused by a BB. Harvey did not see these men shoot anything on that occasion. (Tr. at 27-38).

G. The Preponderance of the Evidence Supports the Allegation That on March 28, 1990, Sandra Caldwell Stated That She Would Not Renew the Lease Because She "Has Some Girls That Want to Rent":

32. After the young women who were looking at the apartment left, Complainant Harvey asked Sandra Caldwell if he could renew his lease. (Tr. at 70, 204, 215-16, 233, 253, 305-06). At that time, Respondent Caldwell indicated that she would not renew the lease either because she preferred women tenants, because women did not impose the wear and tear on property that were caused by men, or because women were better housekeepers. (Tr. at 22-23, 70, 141-42, 154). The denial of these allegations by Respondent Caldwell is not credible. (Tr. at 217-18, 319). Complainant Harvey and the Commission have proven by sufficiently probative direct evidence that Respondent Caldwell did indicate to Harvey on March 28, 1990 that she would not renew the lease because she would prefer to have women in the apartments. In the absence of any affirmative defense, the Commission and the Complainant have established that Respondent Caldwell discriminated against Complainant Harvey on the basis of sex by this statement.

H. The Evidence Ultimately Establishes That Sex Discrimination Was the Reason For the Respondent's Refusal to Renew Complainant Harvey's Lease Under a McDonnell-Douglas Analysis:

Prima Facie Case of Sex Discrimination:

33. A prima facie case of sex discrimination was established through evidence that:

a. Complainant Harvey asked to have his lease renewed. See Finding of Fact No. 13.

b. There were no established objective minimum qualifications for tenancy. See Finding of Fact No. 34.

c. Complainant Harvey was rejected although no other prospective tenant expressing an interest in renting or renewing has been rejected. See Finding of Fact No. 36.

d. After the rejection of Harvey, Respondent Caldwell continued to seek other prospective tenants to lease the apartment. See Finding of Fact No. 37.

34. There is no evidence in the record of any specific minimum objective requirements for prospective tenants for Respondent Caldwell's apartments. She has no application process or

reference requirements for either prospective tenants or sublessors. (Tr. at 271). The Respondent does not rely on any postings or paid advertising to obtain tenants. (R. EX. # 37; Tr. at 220, 273-74). Respondent Caldwell relies on the general knowledge of the Cedar Falls and student communities that she has rental properties in order to obtain prospective tenants. (Tr. at 276-77).

35. When Respondent Caldwell shows someone a unit, she puts their name on a list. If she shows a subsequent person a unit, she puts his or her name on a list, but tells them it has been previously shown. If the second party is interested, she will try and contact the first person to see whether they want to rent, but she would not reject the overtures of a second party who wished to make a deposit on the apartment. (Tr. at 283-84). The first person to look is given a reasonable period to determine whether they want the apartment. They get it if they want it. (Tr. at 320).

36. Under this "first shown, first leased" system no prospective tenant, with the exception of Complainant Harvey, has ever been denied an apartment. (Tr. at 233, 253, 320, 387-88). Renewal of leases is usually a fairly automatic procedure. (Tr. at 388). Approval of sublessors is also automatic once the name of the sublessor is given. (Tr. at 272-73).

37. After the rejection of Complainant Harvey's request for renewal, Respondent Caldwell continued to seek other prospective tenants for apartment # 3. It was shown to Ann Adams on March 30, 1990. The lease with her and Ms. Haverkamp was signed on April 3, 1990. (R. EX. # 70; Tr. at 253, 275, 313).

Prima Facie Case Rebutted Through Respondent Caldwell's Articulation of a Legitimate Nondiscriminatory Reason for the Rejection of Harvey's Request to Renew His Lease:

38. Respondent Caldwell produced evidence of a legitimate, non-discriminatory reason for the refusal to renew Complainant Harvey's lease. That reason was Complainant Harvey's failure, prior to that date, to notify either the Caldwells or the police of the BB gun damage to the storm windows in his bedroom. (Tr. at 216-17, 233, 253, 272, 300, 306, 319, 387).

39. Respondent Caldwell never suggested that Harvey actually inflicted the damage. She did testify that she thought he had "allowed" the damage to her property, an act which she understood to be prohibited, according to a summary of Iowa Code section 562A.17 (1989) which was in her possession. (R. EX. # 55; Tr. at 232, 307). While it was not her understanding that Harvey had given the individual permission to shoot at the building, it was her understanding that, by choosing to not report the individual who he saw shooting the building, Harvey "willingly allow[ed]" the damage to be done. (Tr. at 232, 307-09). While her understanding may not be an accurate construction of Iowa Code section 562A.17 (1989), which refers to "knowingly permit[ing]" a person to damage property, her reason is, nonetheless, a lawful, nondiscriminatory reason.

40. In the same manner, her testimony concerning Title 42 United States Code section 3604 of the Fair Housing Act reflects a lack of legal understanding concerning this section, which is an exception to the prohibition against discrimination in the sale or rental of a dwelling because of a handicap of a buyer or renter. (R. EX. # 55; Tr. at 232). Nonetheless, her concern is with the

failure to report the shooting of a BB gun at a house, an act which jeopardizes the safety of tenants. (Tr. at 232). The reason is still legitimate and nondiscriminatory.

Respondent Caldwell's Legitimate Nondiscriminatory Reason for the Rejection of Harvey's Request to Renew His Lease Has Been Shown to Be a Pretext for Discrimination:

41. The Respondent's reason for refusing Complainant Harvey's request to renew his lease has some basis in fact. It is important to note that Respondent Caldwell held Harvey responsible for his failure to report the damage. Harvey admitted that he had failed to notify either Respondent Caldwell or the police of the BB gun damage to the windows for a four month period, from November of 1989 to March of 1990. (Tr. at 63-64). His failure to notify was motivated by his fear that, if there were an investigation, the men across the street would retaliate against him by damaging his car. (Tr. at 28, 303).

42. However, Complainant Harvey and the Commission proved, through Harvey's and Jeff Ruge credible testimony concerning statements made by Respondent Caldwell both before and after she became aware of the BB gun damage, that the real motivation for Respondent Caldwell's action was sex discrimination. See Findings of Fact Nos. 15, 32. Furthermore, Respondent Caldwell never informed Complainant Harvey that his failure to report window damages to the police or to her was a reason for the refusal to renew his lease. The only reason he was given by Respondent Caldwell was that she preferred to rent to women. (Tr. at 393).

43. In summary, Respondent Caldwell's articulated legitimate, nondiscriminatory reason for refusing to renew Complainant Harvey's lease has been shown to be false or otherwise unworthy of credence because the BB gun damage to windows was unknown at the time she first informed Complainant Harvey that she was not renewing his lease and because she never told Harvey that was the reason. The combination of disbelief of the articulated reason and the inference of discrimination remaining from the prima facie case demonstrates that reason is a pretext for discrimination. See Findings of Fact Nos. 15, 33, 42.

44. Pretext was also shown by evidence of statements by Respondent Caldwell, before and after Caldwell's becoming informed of the window damage, indicating that sex discrimination was the true reason for the failure to renew Harvey's lease. By showing pretext through both of the methods set forth herein, sex discrimination has been established. See Findings of Fact Nos. 7, 15, 32.

I. The Evidence Ultimately Establishes That the Respondent Made Sex Discriminatory Statements and That Sex Discrimination Was the Reason For the Respondent's Refusal to Renew Complainant Harvey's Lease Under a Direct Evidence Analysis:

45. There is sufficiently probative direct evidence in the record to establish (a) that Caldwell made statements to Harvey in 1989 and on March 27 and 28, 1990 and to others indicating that she preferred to rent to female tenants and (b) that the actual motivation for her failure to renew the lease was sex discrimination. No affirmative defenses were offered to rebut the showing that the discriminatory statements were made. See Findings of Facts Nos. 7, 14, 15, 32. The window damage reason, if viewed as an affirmative defense to the refusal to renew the lease under the

direct evidence method of proof, was not established by a preponderance of the evidence as the evidence showed that (a) Respondent Caldwell had decided to not renew the lease of Complainant Harvey due to his sex prior to the time she became aware of the window damage; (b) Caldwell continued to give this as a reason for not renewing his lease even after discovery of the window damage; and, (c) Caldwell never told Harvey that his failure to report window damage was part of the reason for the failure to renew his lease. See Findings of Fact Nos. 15, 32, 42.

J. The Greater Weight of the Evidence Does Not Support the Allegation that Respondent Caldwell Leased Harvey's Former Apartment to the Subsequent Female Tenants at a Rate Lower Than She Had Informed Harvey He Would Have Had With an Equal Number of Male Tenants:

The Allegation:

46. In his complaint, Harvey alleged, with respect to the women that were shown the apartment on March 28th, that Respondent Caldwell "is also allowing the 4 women to pay the same rate that we did and they should pay more." (Notice of Hearing).

Rates at Which the Apartment Was Rented to Harvey:

47. Complainant Harvey and Mark Warren rented their apartment at the rates of $270.00 per month for the months of June and July of 1989; and of $320.00 per month for the period of August 1, 1989 to June 1, 1990. (R. EX. # 12, 61; CP. EX. A; Tr. at 11, 60-61, 181). The $320.00 per month base rate for two people would have been increased an additional $25.00, to $345.00 per month, if he and Warren had a roommate, making a total of three tenants. (Tr. at 11, 181, 383). An increase of $25.00 per month for each additional tenant over two, and a reduction of $25.00 per month from $345.00 when the number of tenants is two instead of three, was Respondent Caldwell's policy. (Tr. at 181, 383).

Harvey's Testimony As to the Better Terms Offered the Female Prospective Tenants:

48. Harvey initially testified that Respondent Caldwell was stating that the rent would be $330.00 per month for the four women. (Tr. at 20). He later testified that Caldwell said either $320.00 or $330.00 for the four of them. He thought it was $320.00, but had since seen the lease for those who actually rented the apartment for $330.00, and could now not remember what it was. (Tr. at 59). He testified that **the amount stated seemed odd to him as it was less than the base rent which Caldwell had informed him that he and his roommates would have paid if a total ofthree men had rented the apartment, i.e. $345.00.** (Tr. at 20-21, 60- 61).

49. Chris White could not recall what amount was mentioned when rent was discussed. (Tr. at 334-35).

50. The rental amount for Ann Adams and Christine Haverkamp, who leased the apartment on April 3, 1990, was $330.00 per month for the entire term of the lease, from June 1, 1990 to May 31, 1991. (R. EX. 13, 61; Tr. at 183, 243,). This amount was $60.00 per month more than Complainant Harvey and Mark Warren paid for the months of June and July of 1989. This was

$10.00 per month more than Complainant Harvey and Mark Warren paid for the months of August 1989 through May 1990. See Finding of Fact No. 57.

Comparison of Treatment of Past Male and Female Tenants With Respect to Rental Amounts:

51. A further demonstration of equal treatment of males and females in rent is shown by comparison of tenants of Apartment # 3 prior to the rental by Harvey and Warren. During the period from August 1, 1986 to June 1, 1987, the apartment was rented to three females for the sum of $345.00 per month. (R. EX. # 9; Tr. at 178-79). During the period from August 1, 1987 to June 1, 1988, the apartment was rented to three males for the sum of $345.00 per month. (R. EX. # 10; Tr. at 179). During the period of June 1, 1988 to June 1, 1989, the apartment was rented to three males at the rate of $300.00 per month until August 1, 1988 and at the rate of $345.00 per month until June 1, 1989. (R. EX. # 11; Tr. at 180).

52. The allegation that Respondent Caldwell offered more favorable rental terms to prospective female tenants than to the complainant on the basis of his sex is not supported by the greater weight of the evidence.

K. Credibility Findings:

53. Because of the importance of credibility to the resolution of the issues in this case, a number of references to credibility of the witnesses have already been made. These findings need not be reiterated in full here. It is sufficient to find that Complainant Harvey's, Jeff Ruge's, and Mark Warren's testimony is more plausible, internally consistent, and more consistent with the greater weight of the evidence, including that of the written statements of J.D. Tonn and Stacy L. Borchers, than the testimony of Sandra Caldwell, Dr. Caldwell, and Amy Caldwell.

54. Chris White's credibility was enhanced not only by her status as a disinterested witness, but also by her demeanor. Although she admitted being nervous, she gave the impression that this was the usual nervousness of a witness who does not routinely testify in judicial or quasi-judicial proceedings. (Tr. at 333). Overall, the impression she gave was of a witness who was trying to tell the truth. However, it is reasonable to believe and it is found that she forgot or was mistaken with respect to Jeff Ruge's presence and whether the conversation on window damage was initiated by Mrs. Caldwell or the Complainant.

L. Compensatory Damages:

55. The Complainant seeks a total of two thousand dollars ($2000.00) in compensation for the following items:

> (a) the difference between what he paid for the combination of rent and utilities (gas and electricity) at Gold Falls Villa for the period of his lease there from May 21, 1990 to May 31, 1991 and what he would have paid for those items at 2508 Olive Street during that time if he had remained there.
>
> (b) telephone hookup charges at Gold Falls Villa.

(c) ten dollars for one tank of gasoline expended in moving his property from his old apartment to his new apartment at Gold Falls Villa.

(d) his time spent packing and preparing for the move, making the move, unpacking, and setting up in the new apartment.

(e) some amount less than $154.00 for hours of work missed at Hy-Vee due to delay in starting his part-time employment there because of moving.

(f) emotional distress.

(Tr. at 83, 94-95).

Rent and Utilities:

56. The rent at 2508 Olive Street was increased to $330 per month for two people for the period from June 1, 1990 to June 1, 1991. This was $165.00 per person. (R. EX. 12, 13, 61; Tr. at 183, 243). The rent at Gold Falls Villa for the period of May 2, 1990 to May 31, 1991 was $300.00 per month for two people. This was $150.00 per person. (CP. EX. E).

57. The tenants at 2508 Olive Street were liable for utilities (gas and electricity) only if they exceeded $50.00 per month, which they never did. (Tr. at 40). Harvey and his roomate were liable, however, for the full amount of these utilities at the Gold Falls apartments, which amounted to a total of $462.30 or $231.15 per person for the lease period from May 21, 1990 to May 31, 1991. (CP. EX. G; R. EX. 61).

58. For the eleven days of overlapping leases at their old and new apartments from May 21 to May 31, 1990 inclusive, Complainant and his roommate paid an extra $106.48 rent to Gold Falls Villa which would not have been paid if they had been able to renew their lease at 2508 Olive Street. [($300 month rent at Gold Falls Villa / 31 days per month) X 11 days = $9.68 per day X 11 days = $106.48]. (CP. EX. E). This would be $53.24 per person.

59. For the period from June 1, 1990 to May 31, 1991, the total difference between the combined rent and utilities paid by Complainant alone at Gold Falls Villa and the amount he would have paid at 2508 Olive was $51.15. The calculation is: [($150.00 rent per month at Gold Falls X 12 months) + ($231.15 complainant's total share of utilities at Gold Falls)] -[($165.00 rent per month at 2508 Olive X 12 months) + (no charge for utilities at 2508 Olive)] = [($1800) + ($231.15)] - [($1980.00) + ($0)] = [$2031.15] -[$1980.00] = $51.15.

60. The total compensation for additional rent and utility costs due Complainant for the period of May 21, 1990 to May 31, 1991 is $53.24 + $51.15 = **$104.39.**

Telephone Hookup Charges at Gold Falls Villa:

61. The total telephone one-time hookup charges ("order processing" and "line connection") at Gold Falls Villa for Complainant Harvey and his roomate were $36.00 effective June 2, 1990. (CP. EX. F; Tr. at 47-48). Complainant Harvey's share, for which he should be compensated, is **$18.00.** (Tr. at 97). For reasons stated in the conclusions of law, Harvey cannot be awarded his roommate's share for this or any other damage remedy, despite an agreement between him and his roommate to split the damages awarded. (Tr. at 97-98). See Conclusion of Law No. 32.

Gasoline Moving Costs:

62. Complainant Harvey asks compensation for $10.00 for a full tank of gas which he asserts was expended when he moved his belongings in his Chevette from 2508 Olive to Gold Falls Villa. (Tr. at 43, 94).

63. Complainant's testimony that it was an approximately 2 mile round trip from 2508 Olive to Gold Falls can be verified by comparison to the distances on the map of Cedar Falls, Respondent's Exhibit 65, wherein the locations of 2508 Olive and Gold Falls Villa are marked, respectively, by yellow circles on the map. (R. EX. 65; Tr. at 89, 105). He testified that he could drive 200 miles on a tank of gas in city driving in his Chevette. (Tr. at 89).

64. At two miles per round trip, Complainant would have to make 100 round trips to expend between 2508 Olive Street and Gold Falls Villa to expend a full tank of gas. Complainant also testified, however, that he made only 15 to 25 trips in his Chevette while moving. (Tr. at 121). Even with the higher figure, he would have driven no more than 50 miles, which would have expended one quarter of a tank of gas. Given his cost of $10.00 per full tank of gas, therefore, he should be compensated **$2.50** for the one quarter tank of gas actually expended.

Compensation For Loss of Time Due to Packing and Preparing For the Move, Making the Move, Unpacking and Setting Up in the New Apartment:

65. Complainant Harvey is asking for compensation for his time spent packing and preparing for the move, making the move, unpacking, and setting up in the new apartment at Gold Falls Villa. (Tr. at 94). It took Complainant Harvey several days to pack. (Tr. at 42). It may be reasonably inferred that "several days" would mean at least two eight- hour days. He then made the actual move over a two day period. (Tr. at 42). It may be reasonably inferred that this would mean at least two more eight-hour days. Given that it took at least two eight-hour days to pack, it may be reasonably inferred that it would take an equal amount of time to unpack and "set up" Harvey's new apartment. Thus the total lost time for which compensation is sought by Harvey is six eight-hour days or a total of 48 hours.

66. How should this time be compensated? The evidence demonstrates that, in May of 1990, Complainant Harvey began working at Hy-Vee at $4.00 per hour. This seems to be a reasonable rate for the Complainant's time. Therefore, Complainant should be compensated in the amount of **$192.00** for his forty-eight hours of lost time.

Compensation of Less Than $154.00 for Delay in Starting Work at Hy-Vee:

67. Complainant Harvey secured work at Hy-Vee on May 16, 1990. (Tr. at 41). After working a total of 2.4 hours on either the 16th or 17th, he asked for and received a delay in the start of his work until May 31st. (R. EX. 72-payroll records; Tr. at 41.) He asked for at least a one week delay so he would have time to pack, spend time with friends and family, and to have time between his study and work. (Tr. at 41, 120, 127).

68. Complainant Harvey originally asked for compensation of $154.00 based on a 40 hour week at Hy-Vee at $3.85 an hour (which was less than the $4.00 per hour rate he actually received). (R. EX. 72-payroll records; Tr. at 95- 96). He retracted this request after he examined his payroll records which indicated that he had never worked forty hours per week at Hy-Vee, although he had asked for forty hours at the time of his application. (R. EX. 72-payroll records; Tr. at 96-97). In fact, Harvey never worked more than 26.4 hours in a week at Hy-Vee. (R. EX. 72-payroll records). Complainant Harvey still seeks compensation for an unspecified amount less than $154.00, which would reflect the work he missed due to the delay he requested. (Tr. at 95- 97).

69. This compensation should not be granted for two reasons. First, Complainant Harvey indicated that he asked for a delay for three reasons: (1) time to pack, (2) time to spend time with friends and family, and (3) time for a break between his college studies and work. (Tr. at 41, 120, 127). The greater weight of the evidence suggests that Complainant Harvey would have taken a break, and delayed his part-time employment at Hy-Vee regardless of whether he had to pack or not. The loss, in other words, would have been incurred regardless of the discrimination. Second, to compensate Harvey for this delay would duplicate part of the compensation already made for loss of time. Complainant Harvey should not be awarded double damages for what in essence is part of a previously compensated injury.

Emotional Distress:

70. Complainant Harvey suffered at least mild to moderate emotional distress due to discrimination from the time on March 27, 1990, when he was informed by Respondent Caldwell that she preferred to have women in the apartment until at least the time when he was settled in his new apartment sometime after May 21st.

71. Harvey indicated that he was "in shock" after his telephone conversation with Caldwell on March 27th. (Tr. at 16). When the apartment was shown on the 28th, he recalled Respondent Caldwell informing the women that the first person to put a deposit down would have the apartment held for them. He remembered thinking "I already have my deposit money down, and I can't stay." He felt quite helpless. (Tr. at 20).

72. The necessity of having to look for other apartments increased the strain already imposed by his class paper assignments, preparation for final examinations, and time spent working at the dining hall. (Tr. at 34-36).

73. His emotional state was described as "very hard because I was living in a place I wanted to stay." He was content where he was at. Because of the other demands on his time, the need to coordinate his schedule with his roommate, Brian, and a tight housing market, he spent a lot of

time, energy and frustration in the effort to find apartments in their price range. He felt very frustrated and powerless. (Tr. at 36).

74. Complainant Harvey ended up living in Gold Falls Villa, a location which he did not consider to be as nice as the Respondent's apartments. (Tr. at 38). From the outset, he felt the Respondents actions were wrong. (Tr. at 44). Harvey was quite upset as he had taken good care of his apartment. He felt he was being grouped with other guys, other male tenants in the building, who may not have been as careful as he. (Tr. at 46).

75. As set forth previously, Complainant suffered out- of-pocket losses due to Respondent's discriminatory conduct. It may be inferred that such loss causes some emotional distress. See Findings of Fact Nos. 60, 61, 64, 66.

76. In light of the intensity of the distress and its limited duration, the sum of one thousand five hundred dollars ($1,500.00) is full, reasonable and adequate compensation for Complainant Harvey.

CONCLUSIONS OF LAW

Jurisdiction:

Procedural and Jurisdictional Objections Waived By Stipulation:

1. A "stipulation" is a "voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate [the] need for proof." BLACK'S LAW DICTIONARY 1269 (5th ed. 1979). **Stipulations as to fact are binding on a court, commission or other adjudicative body** when, as in this case, there is an the absence of proof that the stipulation was the result of fraud, wrongdoing, misrepresentation or was not in accord with the intent of the parties. In Re Clark's Estate, 131 N.W.2d 138, 142 (Iowa 1970); Burnett v. Poage, 239 Iowa 31, 38, 29 N.W.2d 431 (1948). In this case, the parties stipulated that the components necessary to arrive at a contested case hearing have been met in this case. See Finding of Fact No. 1. This stipulation, in effect, disposes of all jurisdictional and procedural objections, such as timeliness, with the exception of any objection to subject matter jurisdiction, which cannot be waived by stipulation. Pruess Elevator v. Iowa Dept. of Natural Resources, 477 N.W.2d 675, 677 (Iowa 1991).

Subject Matter Jurisdiction:

2. Subject matter jurisdiction ordinarily means the authority of a tribunal to hear and determine cases of the general class to which the proceedings in question belong. Tombergs v. City of Eldridge, 433 N.W.2d 731, 733 (Iowa 1988). Darrell Harvey's complaint is within the subject matter jurisdiction of the Commission as the allegations that the Respondent made statements indicating that females were preferred as tenants; refused to renew his lease due to his sex; and allowed female tenants to pay a lower rent due to their sex, fall within the statutory prohibitions against unfair housing practices which the Commission has the power to hear and determine. Iowa Code *SS* 601A.8, .15 (now *SS* 216.8, .15) (1989). **There can be no doubt that just as**

"[a]llraces majority or minority are protected from unfair . . . practices under [the Iowa Civil Rights Act]" Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 771 (Iowa 1971), **so are bothsexes, male and female, protected from housing discrimination on the basis of sex by the Act.** Iowa Code *S* 601A.8 (now 216.8); *Cf.* Ladd v. Iowa West Racing Association, 438 N.W.2d 600-02 (Iowa 1989)(Iowa Civil Rights Act prohibits sex discrimination against men in public accommodations).

3.

> **It shall be an unfair or discriminatory practice for any owner . . . of rights to housing** . . . :
>
> 1. **To refuse to . . . rent, lease, . . . any . . . housing accommodation . . . to any person because of the . . . sex of such person.**
>
> 2. **To discriminate against any person because of such person's . . . sex . . . in the terms, conditions or privileges of the . . . rental . . . of any . . . housing accommodation. . .**
>
> 3. **To directly . . . advertise, or in any other manner indicate or publicize that the . . . rental, lease, . . . of any . . . housing accommodation . . . by persons of any particular . .. sex . . . is unwelcome, objectionable, not acceptable or solicited.**

Iowa Code *S* 601A.8 (1989)(now Iowa Code *S* 216.8).

Order and Allocation of Proof in Housing Discrimination Cases Under the Disparate Treatment Theory:

4. The same orders and allocations of proof utilized in disparate treatment employment discrimination cases are also utilized in housing discrimination cases under the disparate treatment theory. R. Schwemm, Housing Discrimination Law and Litigation *S* 10.1 (1993); Pinchback v. Armistead Homes Corp., 907 F.2d 1447, Fair Hous. Fair Lend. (Looseleaf) *S* 15638 at p. 16273-74 (4th Cir. 1990). Disparate treatment theory focuses on whether the Complainant has been "intentionally singled out for adverse treatment on the basis of a prohibited criterion." Henson v. City of Dundee, 682 F.2d at 903.

> 5. Disparate treatment is shown when:
>
> The employer [or landlord in housing cases] . . . treats some people less favorably than others because of their race [or sex]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

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

6. "Direct evidence" is that "evidence, which if believed, proves existence of [the] fact in issue without inference or presumption." It is "that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect". BLACK'S LAW DICTIONARY 413-14 (1979).

7. Direct evidence that a protected class status, such as sex, is a motivating factor in housing policies and practices concerning tenants would include comments by decisionmakers expressing either a preference for or an aversion to tenants who are members of a particular protected class. *See* Dorene Polton, XI Iowa Civil Rights Commission Case Reports 152, 161 (1992)(apartment manager expressed hostility toward blacks as tenants and a preference for white tenants). *C.f.* Buckley v. Hospital Corporation of America, 758 F.2d 1525, 1530 (11th Cir. 1985)(supervisor's statements of surprise at longevity of staff members, of need for "new blood," of intent to recruit younger employees, and comment on plaintiff's "advanced age" causing stress was direct evidence of age discriminatory intent in discharge); Miles v. M.N.C. Corp., 750 F.2d 867, 36 Fair Empl. Prac. Cas. 1289, 1294-96 (11th Cir. 1985)(hiring official's statement that he had no black employees because they "weren't worth a sh--" was direct evidence of discrimination in failure to recall from layoff); Jackson v. Wakula Springs & Lodge, 33 Fair Empl. Prac. Cas. 1301, 1307 (N.D. Fla. 1983)(use of racial slurs by individual responsible for discharge is direct evidence of racial animus in termination); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 477-78 2nd ed. 1989)(Either policies which on their face call for consideration of a prohibited factor or statements by relevant managers reflecting bias constitute direct evidence of discrimination).

8. The proper analytical approach in a case with direct evidence of discrimination is, first, to note the presence of such evidence; second, to make the finding, if the evidence is sufficiently probative, that the challenged practice discriminates against the Complainant because of the prohibited basis; third, to consider any affirmative defenses of the Respondent; and, fourth, to then conclude whether or not illegal discrimination has occurred. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 121-22, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533, 535 (1985)(Age Discrimination in Employment Act). **With the presence of such direct evidence, the analytical framework, involving shifting burdens of production, which was originally set forth in** McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), **and subsequently adopted by the Iowa Supreme Court**, *e.g.* Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982); Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 530 (Iowa 1985), **is inapplicable. Landals v. Rolfes Co**., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985); Pinchback v. Armistead Homes Corp., 907 F.2d 1447, Fair Hous. Fair Lend. (Looseleaf) *S* 15638 at p. 16274-75 (4th Cir. 1990)(housing discrimination case); R. Schwemm, Housing Discrimination Law and Litigation *S* 10.2 n.15 (1993).

9. The reason why the McDonnell Douglas order and allocation of proof is not applicable where there is direct evidence of discrimination, and why the Respondent's defenses are then treated as affirmative defenses, i.e. the Respondent 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 [Respondent's] burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination.

Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring). *See also* Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990); R. Schwemm, Housing Discrimination Law and Litigation *S* 10.2 n.16 (1993)(direct evidence rarely available).

10. In this case the direct evidence, of statements by Respondent Caldwell to the effect that she preferred female tenants, that female tenants caused less wear and tear on the apartments than male tenants, that females were better housekeepers than male tenants, and that she would not renew her lease with Harvey due to his sex was sufficiently probative to prove violations of the Act, i.e. "To refuse to . . . rent, lease, . . . any . . . housing accommodation . . . to any person because of the sex of such person," Iowa Code *S* 601A.8(1) (1989), and "indicating . . . that the . . . rental, lease . . . of any . . . housing accommodation . . . by persons of any particular . . . sex . . . is unwelcome, objectionable, not acceptable or solicited." Iowa Code *S* 601A.8(3) (1989). See Findings of Fact Nos. 7, 15, 32, 45.

Ruling In the Alternative: Showing of Violation With Respect to Alleged Discriminatory Failure to Renew Lease Under Order and Allocation of Proof Where Complainant Relies on Circumstantial Evidence of Discrimination:

11. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding was on the Complainant and the Commission to persuade the finder of fact that the elements of each allegation of discrimination have been proven. Iowa Code *S* 601A.15(7)(now *S* 216.15(7); Linn Co-operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981). Of course, in discrimination cases, as in all civil cases, the burden of persuasion is "measured by the test of preponderance of the evidence," Iowa R. App. Pro. 14(f)(6).

12. 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).

13. In the typical discrimination case, in which the Complainant uses circumstantial evidence to prove disparate treatment on a prohibited basis, the burdens of production, but not of persuasion, 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 toassure 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).

14. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). This showing is not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986); Pinchback v. Armistead Homes Corp., 907 F.2d 1447, Fair Hous. Fair Lend. (Looseleaf) § 15638 at p. 16274 (4th Cir. 1990).

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

16. 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). The finder of fact may, as has been done here, determine that its "disbelief of the reasons put forward by the defendant may . . . together with the elements of the prima facie case, suffice to show intentional discrimination." St. Mary's Honor Center v. Hicks, ___ U.S. ____, 62 Fair Empl. Prac. Cas. 96, 100 (1993). See Finding of Fact No. 43.

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

burden of persuading the finder of fact that intentional discrimination occurred. Id. 450 U.S. at 256, 101 S. Ct. at , 67 L. Ed. 2d at 217.

Prima Facie Case of Discrimination:

18. The burden of establishing a prima facie case of discrimination under the disparate treatment theory is not onerous. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). **The Complainant is merely required to produce enough evidence to permit the trier of fact to infer that the Respondent's action was taken for a discriminatory or retaliatory reason.**Id. at 254 n.7. A prima facie case may be shown in a variety of ways as there will be different factual circumstances present in each case. Teamsters v. United States, 431 U.S. 324, 358 (1977)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).

19. While a prima facie case of sex discrimination may be established through evidence of "differences in treatment," Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 516 (Iowa 1990)(quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977), it may also be established through a "showing of treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation." City of Minneapolis v. Richardson, 239 N.W.2d 197, 202 (Minn. 1976).

20. An example of the latter, a prima facie case of disparate treatment in hiring, is established by proof that: (1) Complainant is member of a protected class, e.g. a male, (2) Complainant applied and was qualified for position for which employer was seeking applicants, (3) Despite qualifications, Complainant is rejected, and (4) Employer continues to seek applicants of Complainant's qualifications. *See* Schlei & Grossman, Employment Discrimination Law 1298 (1983)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Of course, "the [f]acts necessarily will vary in [discrimination] cases and the specification above of the prima facie proof required . . . is not necessarily applicable to every factual situation." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

21. The presumption of illegal discrimination under this formula arises not because of any showing of different treatment of male and female applicants, but "because it eliminates the most likely legitimate causes for the employer's adverse action--a lack of minimum qualifications and the absence of a job opening. If these are not the causes, it is presumed that the employer's actions, unless otherwise explained, are more likely than not based on discrimination." Schlei & Grossman, Employment Discrimination Law at 1299.

22. A prima facie case of discrimination with respect to the allegation that Complainant Harvey's lease was not renewed due to his sex was established through a variation of the McDonnell Douglas method, which is set forth in Finding of Fact No. 33. *See also* R. Schwemm, Housing Discrimination Law and Litigation *S* 10.2 (1993)(looseleaf)(prima facie case established by showing: 1. member of a protected class, 2. applied for and was qualified to rent unit, 3. rejected by defendant, 4. housing opportunity remained available after rejection).

Respondent's Evidence of a Legitimate Non-Discriminatory Reason:

23. 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 Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981). No assessment of whether the evidence produced is credible or persuasive is made at this stage of the circumstantial evidence (McDonnell-Douglas) analysis. *See* St. Mary's Honor Center v. Hicks, ___ U.S. ____, 62 Fair Empl. Prac. Cas. 96, 100 (1993). Respondent Caldwell met this burden of production by introducing evidence articulating a legitimate non-discriminatory reason for the failure to renew Complainant Harvey's lease, i.e. Harvey's failure to report the window damage. See Findings of Fact Nos. 38-40.

Complainant Demonstrated That Respondent Caldwell's Reason Was a Pretext for Discrimination:

24. The Complainant may meet his burden of producing evidence sufficient to show that Respondent's articulated reason for its failure to renew his lease is a pretext 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).

25. Reasons articulated for a challenged action may be shown to be a pretext 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 action], or (3) that the proffered reasons were insufficient to motivate the [challenged action].

Bechold v. IGW Systems, Inc., 817 F.2d 1282, 43 Fair Empl. Prac. Cas. 1512, 1515 (7th Cir. 1987). Here it was determined that the proffered reason did not actually motivate the failure to renew Harvey's lease. See Findings of Fact Nos. 42-44.

26. After application of these principles and those set forth in Conclusions of Law Numbers 16, 17, and 24 above, it was determined the Complainant was able to show that Respondent's reason for its failure to renew his lease was a pretext for sex discrimination. See Findings of Fact Nos. 41-44.

Credibility and Testimony:

27. In addition to the factors in the findings on credibility in the Findings of Fact, the Commission has been guided by the following 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). "[I]n the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." NLRB. v. Pittsburgh Steamship Company, 337

U.S. 656, 659 (1949) (rejecting proposition that consistently crediting witnesses of one party and discrediting those of the other indicates bias). 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).

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

29.

> Evidence on an issue of fact is not necessarily in equilibrium because the witnesses who testify to the existence of the fact are directly contradicted by the same number of witnesses, even though there is but a single witness on each side and their testimony is in direct conflict
>
> . . .
>
> Numerical preponderance of the witnesses does not necessarily constitute a preponderance of the evidence so as to require a contested question of fact to be decided in accordance therewith. . . . [T]he intelligence, fairness, and means of observation of the witnesses, and various other recognized factors in determining the weight of the evidence . . . should be taken into consideration. . . . It is, of course, well recognized that the preponderance of the evidence does not depend upon the number of witnesses.

Id., 249 Iowa at 425, 86 N.W.2d 861.

30. Finally, it has been recognized that, when all other witnesses have a relationship with one or the other of the parties which might color their testimony, the testimony of the sole disinterested witness will often be entitled to the greatest weight. *See generally*, Lareau & Sacks, Assessing Credibility in Labor Arbitration, 5 The Labor Lawyer 151, 178-79 (1989). However, this is not an absolute rule. Such disinterested witnesses are, of course, as subject to lapses of memory or a failure to observe events happening in their immediate vicinity as any other witness. Such factors must be taken into account in evaluating their testimony.

Remedies:

31. Violation of Iowa Code sections 601A.8(1) and 601A.8(3) having been established the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code *S* 216.15(8) (1993). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "An appropriate remedial order should close off 'untraveled roads' to the illicit end and not 'only the worn one.'" Id. at 771.

Compensatory Damages:

32. The Iowa Civil Rights Act was amended effective January 1, 1979 to allow the award of "actual damages." 1978 Iowa Acts, ch. 1179, *S* 16. **It is beyond question that, since that time, theCommission has had the power to award "actual damages," which are synonymous with "compensatory damages," for the purpose of "making whole" complainants for any losses suffered as a result of discrimination.** Iowa Code *S* 216.15(8)(a)(8) (1993); Chauffers, Teamsters and Helpers v. Iowa Civil Rights Commission, 394 N.W.2d 375, 382 (1986). There is no legal authority, however, for damages to be awarded to make whole others, such as roommates, who have not filed discrimination complaints.

33. Damages which may be awarded include compensation for increased rental costs, lost wages, and other economic and noneconomic losses. *See* Dorene Polton, XI Iowa Civil Rights Commission Case Reports 152, 165 (1992); Diane Humburd, X Iowa Civil Rights Commission Case Reports 1, 9 (1989); Belton, Remedies in Employment Discrimination Law 406-08 (1992). In this case, which is a housing and not an employment discrimination case, lost wages or back pay may be considered to be special damages because such damages, unlike emotional distress, do not ordinarily or generally result from the discriminatory denial of housing. *See* Diane Humburd, X Iowa Civil Rights Commission Case Reports 1, 9 (1989)(citing Kirchner v. Incorporated Town of Larchwood, 120 Iowa 578, 582, 95 N.W. 184, 186 (1903)); Belton, Remedies in Employment Discrimination Law 406 (1992); Dobbs, Remedies 138-39, 528-32 & n.13 (1973). Loss of time is also recoverable as an item of special damages. Dobbs, Remedies at 531.

34. Special damages must be proved to a reasonable certainty. Dobbs, Remedies at 139. What is necessary to prove reasonable certainty varies, however, from one kind of case to another. Id. at 152. "[T]he degree of acceptable uncertainty may vary with the strength of the substantive law policy." Id. at 153. When there is a strong public policy underlying the claim, as there is in civil rights cases, "the more willing a court may be to accept pretty incomplete evidence on the damages issue." Id. at 152.

35. This is consistent with the two basic principles to be followed in computing awards in discrimination cases set forth by the Iowa Supreme Court: "First, an unrealistic exactitude is not required. Second, uncertainties . . . should be resolved against the [discriminator]." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 530-31 (Iowa 1990). "It suffices for the [agency] to determine the amount . . . as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. at 531.

Damages for Emotional Distress Are Awardable As Actual or Compensatory Damages:

36. **In accordance with the statutory authority to award actual damages, the Iowa Civil Rights Commission has the power to award damages as compensation for emotional distress sustained as a result of discrimination.** Chauffeurs Local Union 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986)(interpreting Iowa Code *S* 601A.15(8), now *S* 216.15(8)).

37.

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

Belton, Remedies in Employment Discrimination Law 408 (1992)(quoting Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985)(quoting Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979)). The following principles were applied in determining whether an award of damages for emotional distress should be made and the amount of such award.

Proof Requirements for Emotional Distress Must Be Consistent With Requirement That The Statute Is To Be Liberally Construed to Effectuate Its Purpose:

38.

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

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

Even Mild Emotional Distress Should Be Compensated:

39. **Even mild emotional distress resulting from discrimination is to be compensated.** Rachel Helkenn, X Iowa Civil Rights Commission Case Reports 62, 73 (1990); Robert E. Swanson, X Iowa Civil Rights Commission Case Reports 36, 45 (1989); Ann M. Redies, X Iowa Civil Rights Commission Case Reports 17, 28 (1989). *See* Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525-26 (Iowa 1990)(citing Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 355 (Iowa 1989)(adopting reasoning that because public policy requires that employee who

is victim of discrimination is to be given a remedy for his complete injury, employee need not show distress is severe in order to be compensated for it)).

Emotional Distress May Be Inferred From the Circumstances of the Case:

40. "Humiliation can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d at 636 (housing case quoted with approval in Blessum v. Howard County Board, 245 N.W.2d 836, 845 (Iowa 1980)).

Emotional Distress May Be Proven By A Combination of Slight Testimony of Distress and Circumstantial Evidence Or By Testimony of the Complainant Alone:

41. 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. Belton, Remedies in Employment Discrimination Law 415 (1992)(citing Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1273 (8th Cir. 1981). *See also* Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977); Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. Ill. 1981).

42. 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).

Determining the Amount of Damages for Emotional Distress:

43.

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

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

44. Although awards in other cases have little value in determining the amount an award should be in another specific case, Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990), a sampling of emotional distress damage awards in a recent treatise on discrimination remedies provides some idea of the range of awards available:

> Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225, 1238 (D.C. Cir. **1984)**(**$10,000**; racist joke by supervisor); Rowlett v. Anheuser-Busch, Inc., 812 F.2d 194, 204 (1st Cir. 1987); (**$123,000**; emotional distress; continuously under stress in race discrimination claim; after discharge suffered financial and emotional problems because of unemployment; expert testimony of psychologist that discriminatee suffered from symptoms of anxiety, stress, and some depression); Cowan v. Prudential Ins. Co., 852 F.2d 688, 691 (2nd Cir. 1988 (**$15,000**; severe emotional distress, humiliation, loss of self-esteem that resulted in serious disagreement with wife and heavy drinking); Wade v. Orange County Sheriff's Office, 844 F.2d 951, 953, 955 (2nd Cir. 1988)(**$50,000**; emotional distress, embarrassment, and humiliation caused by racial discrimination); Foster v. Tandy Corp., 848 F.2d 184 (4th Cir. 1987)(**$34,000**; elements of compensatory damages not specified); Hernandez v. Hill Country Tel. Co-Op., Inc., 849 F.2d 139, 143- 44 (5th Cir. 1988)(**$50,000**; mental anguish and emotional problems for which discriminatee received medical treatment); Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1293 (7th Cir. 1987)(**$10,000** for psychological disability and emotional pain; berated and denied opportunity to use a bathroom because of race); Wilmington v. J.I. Case Co., 793 F.2d 909, 922 (8th Cir. 1986)(**$400,000**; elements not delineated; deterioration of health, mental anxiety, humiliation and emotional distress); Hall v. Gus Constr. Co., 842 F.2d 1010, 1017 (8th Cir. 1988)(**$15,000** for 1 plaintiff and **$20,000** for another plaintiff; humiliation and emotional distress); Easley v. Anheuser Busch, Inc., 758 F.2d 251 (8th Cir. 1985)(**$500** for mental and emotional distress); Muldrew v. Anheuser-Busch, Inc., 758 F.2d 989, 992 (8th Cir.1984)(**$125,000**; emotional distress and humiliation led to marital problems, lessened respect by children, and loss of car and home); Block v. R.H. Macy & Co., 712 F.2d 1241, 1245 (8th Cir. 1983)(**$12,402**); Johnson v. Armored Transp., Inc., 813 F.2d 1041, 1042 (9th Cir. 1987)(**$45,000**; elements not delineated; racially derogatory remarks); EEOC v. Inland Marine Indus., 729 F.2d 1229 (9th Cir. 1984)(**$500**); Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120-21 (10th Cir. 1985)(**$50,000**; rejecting argument that only nominal damages can be awarded for embarrassment, humiliation, severe anxiety, and great emotional suffering); Zaklama v. Mt. Sinai Medical Ctr., 842 F.2d 291 (11th Cir. 1985)(**$85,000**; elements not delineated); Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985)(**$100,000**; emotional stress, loss of sleep, marital strain, and humiliation); Walters v. City of Atlanta, 803 F.2d 1135, 1146 (11th Cir. 1986)(**$150,000**; mental anguish; discriminatee repeatedly passed over for promotion because of race).

Belton, Remedies in Employment Discrimination Law 416 n.78 (1992)(emphasis added).

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

injured person.'" Id. (quoting Restatement of Torts *S* 905). *See also* Restatement (Second) of Torts *S* 905 (comment i).

46. In this case, given the mild to moderate emotional distress suffered by Complainant Harvey, and the limited duration of the distress, an award of $1,500 was found to constitute appropriate compensation.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant Darrell Harvey and the Iowa Civil Rights Commission have proven by the greater weight of the evidence Complainant Harvey's allegations that Respondent Caldwell made statements indicating that she preferred to rent to females and that Respondent Caldwell failed to renew his lease for rental of an apartment because of his sex. They failed to prove that Respondent Caldwell allowed females to pay a lower rental rate for an apartment due to their sex.

B. Complainant Harvey is entitled to judgment for compensatory damages for the following amounts and purposes:

(a) rent and utilities: $104.39.

(b) telephone connection charges: $18.00.

(c) gasoline expended in moving: $2.50.

(d) loss of time: $192.00.

(e) emotional distress: $1,500.00.

C. Interest at the rate of ten percent per annum shall be paid to Complainant by Respondent on the award for rent and utilities commencing on May 31, 1991 and continuing until date of payment; and on the award for emotional distress and loss of time commencing on the date this decision becomes final, whether by operation of law or Commission decision, and continuing until date of payment.

D. Respondent Caldwell shall post, within 60 days of the date this order becomes final, in conspicuous places at each of her apartment buildings in Iowa, in areas readily accessible to and frequented by tenants and visible to prospective tenants, at least two copies per building of the poster, entitled "Fair Housing Opportunity" which is available from the Commission.

E. Respondent Caldwell shall review the publications "Fair Housing Advertising in Iowa" and "Iowa Fair Housing Guide" which are available from the Commission.

F. Respondent Caldwell shall maintain, until November 1, 1996, a log of all prospective tenants indicating the name, address, and sex of the prospective tenants and date the tenants expressed interest in, and/or were shown the apartment, whether or not they were interested in the apartment after it was shown, and whether or not they rented the apartment. A copy of this log and any leases for housing properties shall be sent to the Commission on request.

Signed this the 2nd day of November, 1993.

_____

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

FINAL DECISION AND ORDER:

1. On December 3, 1993, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order, with the exception of the award of damages for emotional distress. Item "(e)" of paragraph "B." of the Decision and Order section of the proposed decision and order is stricken. Also stricken are Findings of Fact, Conclusions of Law, and portions of the proposed decision and order which are inconsistent with the Commission's decision to strike the award of damages for emotional distress. The proposed decision as so modified is hereby incorporated in its entirety as if fully set forth herein.

IT IS SO ORDERED.

Signed this the 28th day of January, 1994.

Sally O'Donnell
Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319

Copies to:

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