BEFORE THE IOWA CIVIL RIGHTS COMMISSION

CONNIE ZESCH- LUENSE, Complainant, and IOWA CIVIL RIGHTS COMMISSION,

vs.

ROBERT PLILEY and the CHICKEN HOUSE, Respondents.

CP # 05-88-17707

SUMMARY

This matter came before the Iowa Civil Rights Commission on the complaint of Complainant Connie Zesch-Luense alleging the following violations by Respondents The Chicken House and Robert Pliley: (a) race discrimination in public accommodations and aiding or abetting by directing complainant to discriminate in public accommodations on the basis of race; and (b) retaliation through termination of her employment because she refused to so discriminate.

Complainant Zesch-Luense alleges that Respondent Robert Pliley asked her to tell a Native American customer that she would no longer serve him drinks. She further alleges that, when she inquired as to why, she was informed by Pliley that he did not want Blacks and Indians in his bar. He also said he had not had Blacks and Indians in his bar before she came to work there. She responded that wasn't true. Pliley then again directed her to tell the Native American that she would no longer serve him. When she refused, Pliley informed her that she was discharged.

A public hearing on this complaint was held on March 9, 1993, before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Marshall County Courthouse in Marshalltown, Iowa. The Respondents were not represented by legal counsel. The Iowa Civil Rights Commission was represented by assistant attorney general Rick Autry. The Complainant was represented by attorney Barry S. Kaplan.

The Respondent's Brief was received on April 26, 1993. The Complainant's Brief was received on June 24, 1993. The Commission's Brief was received on June 25, 1993.

Complainant Zesch-Luense proved her allegations of aiding or abetting, retaliation, and race discrimination in public accommodation through credible direct evidence of such violations, i.e. evidence of statements by Respondent Pliley to the effect that he wanted her to deny service to a Native American due to his race and that she was fired for refusing to implement this policy by informing the Native American that she would no longer serve him drinks.

Remedies awarded include $1137.50 in back pay, $2000.00 in emotional distress damages, a cease and desist order, a requirement that notices be posted assuring the public of nondiscrimination in public accommodations, and hearing costs. Jurisdiction is retained for a future award of attorney's fees.

RULINGS ON OBJECTIONS:

1. The complainant objected to Respondent's Exhibit # 1 on the grounds that it is irrelevant and immaterial. This purports to be a list of "People Barred From Chicken House" because of drinking problems. (R. EX. # 1; Tr. at 146-48). This list does not state the race or any other information about the persons listed.

2. This exhibit is relevant as it tends to "make the existence of [a] fact of consequence to the determination of the [contested case] more or less probable than it would be without such evidence. Iowa R. Evid. 401 (definition of relevant evidence). This fact is whether it was Respondent's practice to deny service to those who had problems with their drinking at the bar. The exhibit is also material as it is pertinent to the that issue. BLACK'S LAW DICTIONARY 881 (5th ed. 1979)(citing Vine Street Corp. v. City of Council Bluffs, Iowa, 220 N.W.2d 860, 863 (definition of "material evidence."). The objection is overruled. The list's failure to indicate the race of these individuals reflects its weight, not its admissibility.

FINDINGS OF FACT:

I. JURISDICTIONAL AND PROCEDURAL FACTS:

A. SUBJECT MATTER JURISDICTION:

1. Complainant Zesch-Luense alleges that she was told by Respondent Pliley to refuse service to a Native American because of his race and that she was discharged due to her failure to do so. (Notice of Hearing-Complaint). By alleging that she was directed to deny service for this reason and being terminated for her refusal to do so, Ms. Zesch-Luense has alleged she has suffered loss or damage due to race discrimination in public accommodations, aiding or abetting and retaliation. She has, therefore, alleged she is aggrieved by such discrimination, aiding or abetting, and retaliation. This is sufficient to bring the complaint within the subject matter jurisdiction of the Commission. See Conclusions of Law Nos. 1-5.

B. TIMELINESS:

2. On May 20, 1988, Complainant Zesch-Luense filed her complaint, CP # 05-88-17707, alleging aiding and abetting by requiring her to discriminate, retaliation through termination of her employment, and discrimination in public accommodations on the basis of race. The date of the termination and other acts is given as April 2, 1988. Official notice is taken that May 20, 1988 is forty-eight (48) days after April 2, 1988. Fairness to the parties does not require that they be given the opportunity to contest this fact.

C. JURISDICTIONAL PREREQUISITES:

3. The complaint was investigated. After probable cause of race discrimination and aiding and abetting, including retaliation, was found, conciliation was attempted and failed. Notice of hearing was issued on January 14, 1993. (Notice of Hearing as amended; Tr. at 14-17).

D. AMENDMENT OF NOTICE OF HEARING:

4. It should be noted that the language on the first page of the notice of hearing citing section 601A.6 was amended at hearing to add sections 601A.7 and 601A.11 dealing, respectively, with public accommodations and aiding and abetting, including retaliation. (Tr. at 15-17).

5. This amendment was not technically necessary. The complaint, which specifically referred on its first page to public accommodation discrimination, to retaliation, and to section 601A.11 governing aiding and abetting, including retaliation, is part of the Notice of Hearing as it is attached to the Notice and incorporated by reference. (Notice of Hearing). Nonetheless, the amendment was made for purposes of clarity without objection by any of the parties. (Tr. at 17). The Respondents understood at the outset of the hearing that all matters alleged in the complaint were to be considered at the hearing. (Tr. at 14).

D. RESPONDENTS ALLOWED TO PRESENT WITNESSES DESPITE LACK OF NOTICE TO THE COMMISSION AND THE COMPLAINANT:

6. The Respondents listed no witnesses on their prehearing conference form filed on February 1, 1993. (Respondents' Prehearing Conference Form). During the course of the prehearing conference, on February 4, 1993, Respondent Pliley stated that he had talked to three people who were in the bar on April 2, 1988 and asked them if they wanted to be witnesses. They had indicated that they could not remember what was said, so he would not be calling them as witnesses. (Prehearing Conference Tape; Prehearing Conference Order; Tr. at 6-7). The Complainant and Commission did identify their witnesses at the time of the conference. (Complainant's Prehearing Conference Form; Prehearing Conference Order).

7. Despite these prior indications that Respondents would not be calling any witnesses, on the day of hearing the Respondents presented a list of 14 witnesses they wished to call. (Tr. at 4-6). The Complainant and the Commission objected to these surprise witnesses, as they had given advance notice of their witnesses. (Tr. at 5-6, 11). Because Respondent Pliley was representing himself without an attorney, and apparently did not understand the procedures, he was allowed to present the witnesses. (Tr. at 12-14). The Complainant and Commission were given the opportunity to have the record held open so they could ascertain whether they wished to present additional evidence. (Tr. at 13-14). At the end of the hearing, they waived the opportunity to have the record held open for this purpose. (Tr. at 163- 64).

II. BACKGROUND:

8. Complainant Zesch-Luense was employed by Respondents Robert Pliley and The Chicken House as a bartender and waitress from approximately March 6, 1988 to April 2, 1988. (R.EX. #2; Respondent's Position Statement Submitted With Prehearing Conference Form (hereinafter "Position Statement"); Tr. at 24-25). She was married at that time to Stan Zesch and remained married to him until approximately mid-1990. (Tr. at 22-23, 50).

9. Robert Pliley is owner of The Chicken House, a restaurant with a bar in Albion, Iowa. (Tr. at 24). Marlys Pliley is his wife. She was present at the business on April 2, 1988. She helps out in the business and interviews and hires personnel for it. (Tr. at 100-02, 104-05). Shirley Miller is

the manager of the bar part of the business while Robert Pliley manages the restaurant. (Tr. at 86, 92). She has worked for Pliley for approximately 12 years. (Tr. at 82-83, 85). On April 2, 1988, Complainant Zesch-Luense was in charge of the bar until the end of her employment later on that date. Shirley Miller did not arrive at the bar on that day until after the end of Complainant's employment. (Tr. at 92, 97).

10. Dale Miller is Shirley Miller's husband. (Tr. at 81-82). He has worked at The Chicken House in exchange for bartered work with Robert Pliley. (Tr. at 82-83).

III. DIRECT EVIDENCE OF DISCRIMINATION AND RETALIATION:

11. There is credible, direct evidence in the record of discrimination and retaliation which proves that Respondents engaged in (a) directing Complainant Zesch-Luense to refuse service to a Native American on the basis of his race, and (b) terminating her upon her refusal to deny service. This evidence consists primarily of the testimony of Complainant Zesch-Luense and Stan Zesch. (Tr. at 27-28, 53).

12. On April 2, 1988, Stan Zesch and Guy Suda Tiger, a Native American, entered the bar and sat down together. Subsequently, when Complainant Zesch-Luense was walking toward Mr. Tiger to serve him his second draw of beer, she noticed that Respondent Robert Pliley and his wife, Marlys, had walked from the restaurant to the bar area. Mr. Pliley whispered something to his wife while watching the complainant with his arms crossed and shaking his head "no." Mrs. Pliley then told Complainant Zesch-Luense that Mr. Pliley wanted to speak to her. Zesch-Luense went back to the kitchen and restaurant area to speak to Respondent Pliley. He directed her to inform Mr. Tiger that she would serve no more drinks to him. Complainant Zesch-Luense asked why he wanted her to stop serving Mr. Tiger. In response, Respondent Pliley stated that he had not had any "niggers and Indians" coming into his establishment prior to the time she began working for him. (Tr. at 26-28).

13. Pliley also stated that Zesch-Luense was a "nigger and an Indian lover." (Tr. at 28). Stan Zesch, who was in the restroom at this time, was able to overhear Robert Pliley make a statement indicating that he did not want "any Indians or niggers" in his establishment. (Tr. at 52-53).

14. Complainant Zesch-Luense headed to the bar area to inform Guy Suda Tiger that she could not serve him anymore drinks. She stopped and returned to Respondent Pliley, who was in the kitchen, to tell him that she should tell Mr. Tiger himself that he was not going to be served. She stated she would not do it. Pliley responded that she was through "as of right now", i.e. her employment was terminated. She turned around and walked back out to the bar. Her check was written out and waiting for her at the end of the bar when she returned there and sat down. (Tr. at 28-29).

15. In addition to the direct evidence discussed above, there is also circumstantial evidence of race discrimination in public accommodations. Robert Pliley testified that there was one white person in the bar, a Red Gunderson, who, like Guy Suda Tiger, had had enough to drink. (Tr. at 140-41, 143). Pliley testified that "I **would** have shut him off at that point." (Tr. at 140-41). There is no evidence, however, that Pliley **did** take action that night to shut him or anyone other

than Native Americans off from drinks. Respondent Pliley admitted that the directions to discontinue service given to Complainant Zesch-Luense concerned only "the Indians." (Tr. at 132). There is no non-discriminatory explanation in the record for this difference in treatment.

16. Marlys Pliley admitted that she believed Indian people can't drink as well as white people. (Tr. at 117). Although she later attempted to retract this statement, (Tr. at 118), her initial testimony reflects her belief in the accuracy of a well-known racial stereotype concerning Native Americans, i.e. that they cannot handle alcohol as well as white people. It is common knowledge, and certainly within the specialized knowledge of the Commission, that this stereotype exists. Official notice, therefore, is taken of the existence of this racial stereotype. Fairness to the parties does not require that they be given the opportunity to contest this fact.

IV. CREDIBILITY:

A. DEMEANOR OF WITNESSES TO PLILEY-LUENSE CONVERSATION:

17. Demeanor of the three witnesses who either overheard or participated in the conversation between Respondent Pliley and Complainant Zesch-Luense plays an important part in the determination of which of these witnesses was telling the truth. The witness with the most appropriate demeanor was Complainant Zesch-Luense. Her testimony was given in a calm and straightforward manner. During much of her testimony, she established direct eye contact with the Administrative Law Judge. Otherwise, she faced the attorney or party examining her on the witness stand. There was little hesitation in her testimony and her memory seemed to be clear.

18. The demeanor of Stan Zesch was not as consistently confident as the Complainant's. Most of the time, he was looking at the attorney or party examining him. The rest of the time, his attention was on the administrative law judge. Most of his testimony was clear, straightforward, and made without hesitation. One discordant note in his testimony is the statement that after he heard "Bob telling Connie that he didn't want any Indians or niggers in his establishment," Mr. Zesch "tried not to hear from then on." (Tr. at 53). Taken alone, this statement seems contrary to human nature, as many persons would try to listen to an argument their spouses were involved in. When asked to explain this statement, however, Mr. Zesch indicated that "I just didn't like what I heard, so I hurried up and got out of the bathroom." (Tr. at 53). It seems Mr. Zesch's impulse was to quit concentrating on listening, finish his business in the restroom, and leave it in order to see what was happening.

19. The witness with the poorest demeanor was Mr. Pliley. During his testimony, Respondent Pliley was constantly shifting around in the witness chair looking at the ceiling, the floor, or other areas of the room. He occasionally looked at the administrative law judge, or his examiner, but often failed to make eye contact with either. This behavior gave the undersigned the impression that he wasn't too comfortable with his testimony. This behavior was surprising in light of how well he handled representing himself during the hearing, which was average to above average for a layperson.

B. INCONSISTENT STATEMENTS:

20. There are a number of statements, concerning material facts, made at hearing by Respondent Pliley and his wife which are inconsistent either with their previous statements made during the investigation or during the hearing.

21. Respondent Robert Pliley, for example, was confused at hearing about the number of Native Americans in the bar that night. He initially testified at hearing that there were two Native Americans in the bar, a "Tony" and a "Tiger." (Tr. at 137). When it was pointed out that, during the investigation, he had indicated there were three, he stated he would guess that the lady with one of the two Native Americans was "part Indian." This made a total of three. (Tr. at 137-38, 157).

22. During the hearing, Robert Pliley also testified that both Tony and Mr. Tiger were too intoxicated to drive. Of the three Native Americans, only the lady was capable of driving that night. (Tr. at 138-40, 142-43). During the investigation, however, Respondent Pliley stated that Tiger was the only one of the three Native Americans capable of driving. (Tr. at 157-58).

23. In his position statement, and his testimony at hearing, Respondent Pliley asserted that the reason for directing Complainant Zesch-Luense, on April 2, 1988, to discontinue selling drinks to Tony and Mr Tiger is because they were "drunks" who had had too much to drink. (Position statement; Tr. at 130, 132, 137-39, 142-43). According to Robert Pliley, Mr. Tiger had a headband on his head half cocked off to the side. Tony was walking and spilling some beer. (Tr. at 130). Despite his professed opinion that neither of these men was fit to drive, and his awareness of his own dramshop liability in the event their drunk driving resulted in an accident, Pliley took no action to prevent these men from leaving the bar, from driving while intoxicated, or to alert local law enforcement agencies as to the danger posed by these supposedly intoxicated individuals. (Tr. at 144-45). This failure to act is inconsistent with his position that service was to be refused because these individuals were drunk.

24. Marlys Pliley's testimony about the number of Native Americans at the bar on April 2, 1988, their identity, and whether they were intoxicated was also inconsistent and confused. During the hearing, she stated at one point there were 2 or 3 Native Americans at the bar. She confessed she could not recall exactly. She finally settled on there having been two. (Tr. at 107). She could not recall their names, indicating that "[o]ne, I think, was Tony or Tiger or something." (Tr. at 107-08). During the hearing, Mrs. Pliley testified that these 2 or 3 Native Americans were intoxicated and getting out of hand. (Tr. at 108).

25. This testimony stands in contrast to Mrs. Pliley's statements during the course of the investigation. At that time, she indicated there were no Native Americans present other than Guy Suda Tiger. She also indicated that no one else in the bar was intoxicated other than him. (Tr. at 154- 55).

26. During the investigation, when she was asked to give her version of events, Marlys Pliley stated that, while she was working in the dining room, Robert Pliley "evidently went out to the bar and said he wanted to talk to Connie. So he wanted to know if I would take care of the bar while he took her back to the back room. And they went to the back room to talk." She made no

mention of having spotted any drunks. She stated that Robert Pliley *did not tell her* what he and Ms. Zesch-Luense were going to talk about. (Tr. at 155-56).

27. In her testimony at hearing, however, Mrs. Pliley stated that *she* came back and told Respondent Pliley that there were going to be problems in the bar. (Tr. at 102, 110-11). She testified that she was the one who spotted the drunks and reported them to Robert Pliley. (Tr. at 102, 110-12, 115-16). She also testified that Robert Pliley *did* tell her what he and the complainant would be talking about. (Tr. at 112-13).

28. Mrs. Pliley's testimony that the Native Americans were intoxicated is also not consistent with what she saw of their behavior. (Tr. at 108). When asked how she knew they were intoxicated, she indicated they were "loud and rowdy." (Tr. at 111, 116). The only specific behavior she could identify to support this conclusion was that they were laughing loudly. According to her, they were not bothering anybody. They were threatening no one. They were not fighting. She did not know if they were using profanity. She was not close enough to hear what they were saying. (Tr. at 116-17). In light of these admissions, and the other inconsistencies in Mrs. Pliley's testimony, Complainant's testimony that Mr. Tiger was well behaved and quiet seems more plausible. (Tr. at 33-34).

29. If it were assumed to be true that Mrs. Pliley alerted Robert Pliley that there were Native American "drunks," based only on this "loud laughing", it would seem likely that her belief in the racial stereotype that Native Americans cannot handle alcoholic drinks as well as white people played a role in her determination that the Native American(s) present were intoxicated. See Finding of Fact No. 16.

30. There is no such evidence of confusion with respect to Complainant Zesch-Luense or Stan Zesch. Both consistently and credibly testified, for example, that there was only one Native American in the bar that night, Guy Suda Tiger. Both credibly testified that he was not drunk. (Tr. at 25, 27- 28, 51-52, 53-54). Their testimony that there was only one Native American in the bar that night is supported by the testimony of Shirley Miller. (Tr. at 97). It is also consistent with Marlys Pliley's original statement during the investigation. (Tr. at 155). Their position that Mr. Tiger was sober is also consistent with Respondent Pliley's original statement during the investigation that Tiger was sober enough to drive. (Tr. at 157).

31. On brief, Respondent noted that "when [complainant] took the stand she denied the fact that she had gone to see William Hill, Counselor at Law." (Respondent Brief at 1; Tr. at 37). Complainant Zesch-Luense initially recalled seeing an attorney, but did not recall Hill's name until shown a letter from Hill to Pliley regarding this incident. (R. Ex. # 3; Tr. at 36-38).

32. Her initial failure to recall Hill's name does not reflect adversely on her credibility as Hill's name is not material to this case, i.e. his name does not inform the factfinder concerning the events of April 2, 1988, whether discrimination occurred, or what remedies would be appropriate. Further this letter, dated April 11, 1988, does indicate that Complainant Zesch-Luense gave the same story to Mr. Hill, within three days of the incident, as is given in her complaint of May 20, 1988: "[Robert Pliley] ordered her not to serve 'niggers and indians'

because it was bad for business, and ordered her to tell an indian who was in the bar that he wouldn't be served". (R. EX. # 3). This bolsters her credibility.

33. On brief, Respondents also suggest that Stan Zesch could not have heard the conversation between Complainant Zesch-Luense and Robert Pliley because of the thickness and construction of the wall in the men's restroom. (Respondents' Brief at 1). There is, however, no testimony or other evidence in the record to support Respondents' position. Statements on brief, unless they militate against that party's case, are not evidence. See Conclusion of Law No. 19.

C. COMPLAINANT ZESCH-LUENSE WAS NOT INTOXICATED OR "HALF-DRUNK" DURING THE TIME SHE WAS WORKING ON APRIL 2, 1988:

34. Marlys Pliley and Respondent Robert Pliley both testified that Complainant Zesch-Luense was intoxicated to the point of being "half-drunk" when she arrived for work on April 2, 1988. They allowed her to work despite this alleged drunkenness. (Position statement; Tr. at 119-20,135). This statement is not credible in the light of: (a) their allowing her to work in spite of her alleged intoxication; (b) the other inconsistencies with respect to material statements of fact which have been previously noted; (c) the credible testimony of Complainant Zesch-Luense and Stan Zesch to the effect that she had no alcoholic drinks prior to coming to work that day and was "definitely not" intoxicated when she showed up for work or while working. (Tr. at 34, 54, 57-58).

35. The assertion that Complainant Zesch-Luense was drunk or intoxicated during her working hours is also contrary to the statements made by Respondent Pliley and Marlys Pliley during the investigation. When they were asked who they had observed being intoxicated that night, neither of them mentioned Complainant Zesch-Luense being intoxicated during her working hours. (Tr. at 108, 154-55, 157-58).

36. Complainant Zesch-Luense also credibly denied she had alcoholic drinks while working. (Tr. at 34). (She did, however, have some drinks after her discharge.) (Tr. at 36). Respondent Pliley admitted that he could not know whether Complainant Zesch-Luense had anything to drink during her work hours as he would not have been able to observe her work in the bar. (Tr. at 136).

D. OTHER CREDIBILITY FINDINGS:

37. The testimony of Commission investigator Thomas Good was credible. The testimony of witnesses James Dobbins, Michael Anderson, Robert Kasel, Judy Bannon, Clem Arterburn, Jason Gilliland, and Dian Wiler-Tomlinson was also credible.

38. The testimony of Shirley Miller seems credible in most respects. She seems to be confused with respect to her memory that Complainant Zesch-Luense told her that "Bob fired her because she wouldn't serve an Indian." (Tr. at 92). One thing that Complainant Zesch-Luense and Robert Pliley do agree on is that she was directed to inform at least one Native American that she would no longer serve him drinks and that she refused to follow that direction. (Position statement; Tr. at 27-29, 127-28, 131-32). The disagreement is over the rationale for the direction, i.e. was it

because the customer was a Native American or because the customer was drunk? In light of Complainant Zesch-Luense's testimony, it seems far more likely that she told Shirley Miller that she was discharged for refusing to deny service to an Indian, not for failing to serve drinks to him.

39. Some of Dale Miller's testimony seemed less than credible. Dale Miller testified that he had not heard Robert Pliley make any derogatory remarks about people of color. (Tr. at 81-82). He also testified, however, that derogatory remarks about Native Americans would not bother him any. (Tr. at 84-85). If Mr. Miller, who claimed to be part Native American, is not bothered by such remarks, it is less likely that he would have noticed or remembered such remarks if they had been made. (Tr. at 81, 83, 84-85).

V. COMPARATIVE EVIDENCE:

40. Respondents put on evidence in the form of testimony by former or present employees and customers to the effect that either they had not been subject to racial discrimination by Robert Pliley or had not witnessed such discrimination. The probative value of much of this testimony was greatly reduced or nullified because it solely concerned events that occurred after filing of the complaint on May 20, 1988. (Notice of Hearing-Complaint). This is true of the testimony of James Dobbins, Michael Anderson, and Judy Bannon. (Tr. at 64-65, 66-67, 73). For reasons discussed in the conclusions of law, it is well understood that corrective or non-discriminatory actions taken after the filing of a complaint are to be viewed with skepticism when determining the validity of the allegations in a complaint. See Conclusion of Law No. 20.

41. Other testimony is not especially probative because it addresses (a) the treatment of minorities other than Native Americans and (b) their treatment in the restaurant area, not the bar area. It is also important to note that the findings of discrimination and retaliation here are based primarily on credible direct evidence of discrimination and retaliation. The inference of discrimination raised from what appears to be unexplained different treatment of Guy Suda Tiger, a Native American, and Red Gunderson, a white, discussed previously, plays only a secondary role in the finding that Respondents engaged in race discrimination in public accommodations. See Finding of Fact No. 15.

42. In addition, much of the testimony elicited seems to be directed at the absence of overt discrimination, i.e. discrimination which is announced or made obvious to the intended victims. The complaint does not allege, and the direct evidence does not show, an announcement to the customers that they won't be served due to their race. Rather the employee, after inquiry as to why she was to tell a Native American that she would serve him no more drinks, is told by the owner that the reason is race. Nor does the complaint allege a standard or routine announcement of a discriminatory policy to employees. The facts of this case demonstrate, rather, that if Complainant Zesch-Luense had not asked Robert Pliley why he wanted her to tell Guy Suda Tiger she could no longer serve him, she would not have known for certain that it was due to his race.

43. Diann Wiler-Tomlinson, for example, who is an African-American, credibly testified that she had been a customer of the Chicken House since 1986 and had always felt comfortable dining at

the restaurant. She had never heard Robert Pliley make any remarks related to a person's color. (Tr. at 98). Ms. Wiler-Tomlinson has been an attorney since 1983. She has been county attorney for Marshall County since 1987. (Tr. at 99).

44. Similarly, Jason Gilliland testified that he could not recall any discrimination against customers. (Tr. at 77). But his pre-1988 experiences would all be concerned with his employment as an intermittent on call busboy and waiter in the restaurant. He started in 1983 or 1984 at the age of 13 or 14. (Tr. at 76, 78). Thus, he could not have been old enough (18) to work in the bar during his employment prior to 1988. (Tr. at 76-79).

45. Official notice is taken of Iowa Code section 123.49(2)(f) (1987) which prohibited the employment of "a person under eighteen years of age in the sale or serving of [alcoholic beverages] for consumption on the premises where sold." Fairness to the parties does not require that they be given the opportunity to contest this fact. Gilliland did not work at the Chicken House in 1988. (Tr. at 78). Thus, it was not until sometime after 1988, and therefore, after the filing of the complaint, that he occasionally worked as a bartender at Respondent Chicken House. (Tr. at 79-80). His testimony is so general that it is impossible to say whether he even saw a Native American at the Chicken House during his employment there.

46. Similarly, the testimony of Robert Kasel and Clem Arterburn is that they were not aware of any discrimination against their wives who were, respectively, Black and Columbian. (Tr. at 68, 75).

VI. EXTRANEOUS CIRCUMSTANCES:

47. Some time and effort was spent by the parties attempting to prove two asserted facts which have little probative value, although either the complainant or respondent obviously thought they did. Some explanation, therefore, should be given as to why these averred facts are not important.

48. First, the Respondents introduced testimonial evidence to prove that Robert Pliley, who does not appear to be Black, is "part Negro." (Tr. at 82, 84, 100). Even if it were to be assumed, without deciding, that Respondent Pliley was Black, in part or otherwise, this would not entitle him to any kind of presumption that he would not discriminate against Native Americans or, for that matter, against Blacks on the basis of race. The courts have long recognized that the dynamics of human psychology and race discrimination are too complex to automatically presume that a minority will not discriminate on the basis of race against another minority or even against a member of his or her own race. Obviously, evidence that one has "Indian friends" would also not be probative for the same reasons. (Tr. at 151). See Conclusion of Law No. 22.

49. Second, the complainant introduced testimony to prove that Robert Pliley had indicated to Shirley Miller that he felt his son should have married a white female and not a Korean. This is a statement which Pliley indicated, albeit while engaged in cross-examination and not while he was testifying, that he never made. (Tr. at 158-61). It is the impression of the Administrative Law Judge that this evidence was introduced to counter Respondents' evidence that Respondent Pliley was "part Negro" and had "Indian friends." Since this is not a case dealing with either

alleged bias against persons involved in racially mixed marriages or bias against Koreans, it is not necessary to determine whether this statement was made. This statement would have no probative value in this case.

VII. REMEDIES:

A. BACK PAY:

1. "Trial Basis" Status:

50. Respondents put on testimony to the effect that Complainant Zesch-Luense was hired on a "trial basis." This status was to end after four to six weeks. During that time, Complainant would have a chance to see if she liked the job and the employer would have a chance to see if it liked her. (Tr. at 86, 101, 123-25).

51. Complainant Zesch-Luense credibly denied such "trial basis" status. (Tr. at 44-45). However, even if Respondents' proffered testimony were believed, it is clear there is no real difference between this status and that of any at-will employee who can voluntarily leave for any reason or be terminated by her employer at any time for any reason which is not unlawful. See Conclusion of Law No. 26. There was, for example, no difference between this status with respect to benefits or the lack of them. (Tr. at 123-25). Even if an actual probationary status was proven, the rule is that all uncertainties in determining what back pay would have been in the absence of discrimination are to be resolved against the employer. In other words, Complainant would not have to prove she would have been retained past this temporary period. See Conclusion of Law No. 26. Thus, even if this "temporary" status had existed, it would have no effect on back pay.

2. Complainant's Back Pay Calculation:

52. After her termination by Respondents, Complainant Zesch-Luense looked for employment, but did not find any until she obtained full-time employment close to a year later. (Tr. at 32-33). She did not receive any unemployment insurance payments during that time. (Tr. at 49).

53. Payroll records indicate that Complainant earned $3.25 per hour at the Chicken House. Two out of the four weeks she worked there, excluding the first week and the fourth week in which she was terminated, were part-time at seven hours per week. Her earnings, therefore, were $22.75 per week. (R. EX. # 2). Since she did not obtain new employment until close to a year after her discharge, this weekly amount is multiplied by 50 weeks. Therefore, her **total back pay** is: $22.75 per week X 50 weeks = **$1137.50.**

B. EMOTIONAL DISTRESS DAMAGES:

54. Complainant Zesch-Luense suffered serious and substantial emotional distress resulting from the Respondents direction to discriminate against Native Americans on the basis of their race, from being referred to as a "nigger and Indian lover" when she questioned the policy, and from her termination for refusal to implement the policy. (Tr. at 28- 31, 53).

55. When Robert Pliley informed Complainant Zesch-Luense that he had never had "niggers and Indians coming into the establishment until I started working for him, and that I was more or less a nigger and an Indian lover," the Complainant started to cry. (Tr. at 28). She continued to cry as she headed out the door to tell Mr. Tiger he would no longer be served. (Tr. at 28-29). After she stopped, and returned to Respondent Pliley to inform that she wouldn't do it, he terminated her. Throughout this time, she was still crying and very upset. (Tr. at 29).

56. She stayed at the bar for approximately two hours and had some drinks at that time. (Tr. at 29-30, 36). Stan Zesch couldn't get her to talk about it for half an hour because she was upset and crying. (Tr. at 53). Finally, she told Robin Parker, who then told Mr. Zesch. (Tr. at 53).

57. The distress suffered by Complainant Zesch-Luense on April 2, 1988 was serious and substantial. There is some evidence reflecting the duration of the distress. The Complainant did credibly testify that this incident was "something that's been with [her] for four years now." (Tr. at 34). Given the extent of the emotional distress sustained by her on April 2nd, it may be reasonably inferred that the distress did not dissipate overnight. In light of the severity and duration of the emotional distress shown in the record, therefore, an award of two thousand dollars ($2000.00) in damages would be full, reasonable, and adequate compensation for the distress inflicted on complainant due to the illegal, discriminatory, and retaliatory actions of Respondents.

CONCLUSIONS OF LAW:

I. JURISDICTION AND PROCEDURE:

A. Subject Matter Jurisdiction:

1. Subject matter jurisdiction ordinarily means the authority of a tribunal to hear and determine cases of the general class to which the proceedings in question belong. Tombergs v. City of Eldridge, 433 N.W.2d 731, 733 (Iowa 1988). Ms. Zesch-Luense's complaint is within the subject matter jurisdiction of the Commission as the allegations that the Respondents told her to refuse service to a Native American due to his race and discharged her for failing to do so fall within the statutory prohibitions against race discrimination in public accommodations and aiding or abetting, including retaliation. Iowa Code *SS* 601A.7, .11 (now *SS* 216.7, .11).

2. The prohibition against discrimination in public accommodations states:

> It shall be an unfair or discriminatory practice for any owner, . . . proprietor, manager . . . of any public accommodation or any agent or employee thereof:
>
> > a. *To refuse or deny to any person because of race* . . . the accommodations, advantages, facilities, services or privileges thereof, *or otherwise to discriminate against any personbecause of race* . . . in the furnishing of such accommodations, advantages, facilities, services or privileges.

> b. *To* directly or indirectly advertise or *in any other manner indicate* or publicize *that the patronage of persons of any particular race . . . is unwelcome, objectionable, notacceptable, or not solicited.*

Iowa Code *S* 601A.7 (1987)(emphasis added).

3. The statutory prohibition against aiding and abetting states:

> It shall be an unfair or discriminatory practice for:
>
> > 1. *Any person to intentionally . . . compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter.*
> >
> > 2. *Any person to discriminate against another person in any of the rights protected against discrimination* on the basis of age, race, creed, color, sex, national origin, religion or disability by this chapter *because such person has lawfully opposed any practice forbidden under this chapter [or] obeys the provisions of the chapter, . . .*

Iowa Code *S* 601A.11 (1987)(emphasis added).

4. Because an employer has the power to discipline or discharge an employee, the employer's direction to an employee to violate the act is an act of compelling or coercing the employee to discriminate. *See* Iowa Code *S* 601A.11(1).

5. One of the "rights protected against discrimination on the basis of age, race, creed, color, sex, national origin, religion or disability by [the Iowa Civil Rights Act]", Iowa Code *S* 601A.11, is the right to be protected against discrimination in employment set forth in Iowa Code section 601A.6. Race discrimination in public accommodations is a "practice forbidden under this chapter," Iowa Code *S* 601A.11, by Iowa Code section 601A.7. Thus, discharging an employee because she refuses to discriminate in public accommodations on the basis of race or because she "obeys the provisions of the chapter" constitutes aiding and abetting in the form of retaliation. Iowa Code *S* 601A.11(2).

B. Timeliness:

6. Ms. Zesch-Luense's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code *S* 601A.15(11) (1987). See Finding of Fact No. 2.

C. Jurisdictional Prerequisites:

7. All the statutory prerequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code *S* 601A.15 (1987). See Finding of Fact No. 3.

II. ORDER AND ALLOCATION OF PROOF WHERE COMPLAINANT RELIES ON DIRECT EVIDENCE OF DISCRIMINATION AND AIDING AND ABETTING, INCLUDING RETALIATION:

A. Direct Evidence Defined:

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

B. Examples of Direct Evidence in Civil Rights Cases:

9. Examples of direct evidence that a protected class status, such as race, is a motivating factor in an employment or public accommodations decision include comments by decisionmakers expressing a preference for customers or employees who are members of a particular protected class or comments indicating that stereotypes of members of a particular protected class played a role in the challenged decision or practice. *See e.g.* Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 288 (1989)(promotion) ; Barbano v. Madison County, ___ F.2d ___, 54 Fair Empl. Prac. Cas. 1287, 1290, 1292 (2nd Cir. 1990)(hiring); Buckley v. Hospital Corporation of America, 758 F.2d 1525, 1530 (11th Cir. 1985)(discharge); Storey v. City of Sparta Police Department, 667 F. Supp. 1164, 45 Fair Empl. Prac. Cas. 1546, 1551 (M.D. Tenn. 1987)(hiring); Diane Humburd, 10 Iowa Civil Rights Commission Case Reports 1, 6-7 (1989)(denial of child care services). By analogy, these principles also apply to aiding and abetting, including retaliation.

C. Direct Evidence Analysis:

10. 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); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 473, 476 (2nd ed. 1989).

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

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

Price-Waterhouse v. Hopkins, 490 U.S. 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).

D. Discrimination and Aiding and Abetting, Including Retaliation, Proven By Preponderance of the Evidence:

12. In this case, there is direct evidence in the record that race was the motivating factor in Respondents directive to Complainant Zesch-Luense to refuse service to a Native American. There is also direct evidence that her refusal to do so was the reason for her discharge by Respondents. See Findings of Fact Nos. 11-14, 16. The inquiry, however, does not end there, for the affirmative defenses of the Respondent must be examined. Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985). The Respondents' failed to meet their burden of persuasion with regard to establishing any affirmative defenses to these allegations. Their only defense was that the true reason for directing Complainant Zesch-Luense to refuse service was due to the customer's drunkenness, not his race. This defense was contrary to the preponderance of credible evidence. See Findings of Facts Nos. 11-16, 23, 30, 38.

III. CREDIBILITY AND TESTIMONY:

A. Effect of Willfully False Testimony:

13. In addition to the factors mentioned in the findings of fact on credibility, the Administrative Law Judge 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).

B. Effect of Witnesses' Demeanor:

14. Second, when 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).

C. Adjudicator at Hearing Is In Best Position To Determine the Credibility of Witnesses:

15. Third, "[f]actual disputes depending heavily on the credibility of witnesses are best resolved by the trial court which has a better opportunity to evaluate credibility . . ." Capital Savings & Loan Assn. v. First Financial Savings & Loan Assn., 364 N.W.2d 267, 271 (Iowa Ct. App. 1984)(quoted in Board v. Justman, 476 N.W.2d 335, 338 (Iowa 1991)). The trier of fact who views the witnesses and observes their demeanor at the hearing "was in a far superior position to determine the question of credibility than is this court." Libe v. Board of Education, 350 N.W.2d 748, 750 (Iowa Ct. App. 1984).

16.

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

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

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

D. The Preponderance of the Evidence On An Issue Is Not Determined By Merely Counting the Number of Witnesses Supporting Each Side of An Issue:

18. 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).

> 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.

IV. OTHER EVIDENTIARY MATTERS:

A. Statements on Brief Are Not Evidence Unless They Militate Against the Interest of the Party Submitting the Brief:

19. On brief, the Respondents mentioned some purported facts, not supported by any evidence in the record, which it felt would damage Stan Zesch's credibility. See Finding of Fact No. 33. A brief is intended to be "A written statement prepared by counsel arguing a case in court. It contains a summary of the facts of the case, the pertinent laws, and an argument of how the law applies to the facts supporting counsel's position." BLACK's LAW DICTIONARY 174 (5th ed. 1979). Obviously, a brief is intended to be argument and not evidence. The one exception, which does not apply in this case, occurs:

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

Maxine Boomgarden, slip. op. at 59. The findings of fact are to be "based solely on evidence in the record and on matters officially noticed in the record." Iowa Code *S* 17A.12(8). With the exception noted above, statements on brief are not such evidence.

B. Evidence of Post-Complaint Nondiscriminatory Practices Is Not Determinative of Whether the Violations Alleged in the Complaint Occurred:

20. The courts and this Commission have long been skeptical of the probative value of evidence of nondiscriminatory practices occurring after the filing of the complaint. See Finding of Fact No. 40. Such post-complaint practices:

> "in the face of litigation are equivocal in purpose, motive, and performance." Reed v. Arlington Hotel, 476 F.2d 721, 724 (8th Cir. 1973)(quoting Jenkins v. United Gas Corporation, 400 F.2d 28, 33 (5th Cir. 1968) and citing Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970). *See also* Teamsters v. United States, 431 U.S. 324, 341-42 (1977)("The company's later changes in its [employment] policies could be little comfort to the victims of its earlier discrimination and could not erase its previous illegal conduct").

Cristen Harms, XI Iowa Civil Rights Commission Case Reports 89, 123 (1992).

C. Official Notice:

21. Official notice was taken of two facts which were capable of certain verification. See Findings of Fact Nos. 2, 45.

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

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 160 (1992).

D. There Is No Presumption In the Law That Members of A Minority Group Will Not Discriminate On the Basis of Race Against Their Own Or Other Minorities:

22. In the findings of fact, it was noted that evidence was presented to the effect that Respondent Pliley was "part Negro" and had "Indian friends". See Finding of Fact No. 48. However, as the Supreme Court of the United States has noted, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." Castenada v. Partida, 430 U.S. 482, 499, 51 L. Ed.2d 498, 513, 97 S.Ct. 1272 (1977)(Blackmun, J. for the majority). "Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes toward the minority." Id., 430 U.S. at 503, 51 L.Ed. 2d at 516, 97 S.Ct. at ___ (Marshall, J. concurring).

V. REMEDIES:

A. In General:

23. Violation of Iowa Code sections 601A.7 and 601A.11 (now 216.7 and 216.11) having been established the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code *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.

B. Compensatory Damages: Back Pay:

1. Purposes of Back Pay:

24.

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

Maxine Boomgarden, slip. op. at 91.

2. Principles to Be Followed In Computing Back Pay:

25.

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

Maxine Boomgarden, slip. op. at 91-92.

3. Ruling in the Alternative: Hire on a Trial Basis Is Not Determinative of Back Pay:

26. Complainant Zesch-Luense was not hired on a "trial basis." See Finding of Fact No. 51. Even if she had been, as suggested by Respondents, it would have affected neither a finding of liability nor back pay. The "trial basis" described by Respondents' witnesses basically corresponds to a

normal employee at will relationship. See Finding of Fact No. 51. That is, in an "at will" relationship the employee can be terminated at any time for any lawful reason or for no reason. *See e.g.* Springer v. Weeks & Leo Co., Inc., 429 N.W.2d 558, 559-60 (Iowa 1988)(finding a damages remedy for at-will employees discharged for reasons violating a "clearly articulated public policy of the state"); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 455 (Iowa 1978). Neither a probationary or other at will status is determinative of liability for discrimination in discharge cases. Schlei, Employment Discrimination Law 599 (1983). To require a probationary or trial basis employee to prove that she would have continued in employment beyond such a trial period would be contrary to the rule that "uncertainty in determining what the discriminatee would have earned but for discrimination is to be resolved against the defendants." Belton, Remedies in Employment Discrimination Law *S* 9.15 p. 318 (1992). *See* Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 530-531 (Iowa 1990).

4. Complainant Has Established Proof of Back Pay:

27. The Commission has the authority to make awards of backpay. Iowa Code *S* 601A.15(8)(a)(1) (1989). In making such awards, interim earnings and unemployment compensation received during the backpay period are to be deducted. Id. The Complainant bears the burden of proof in establishing his or her damages. Diane Humburd, 10 Iowa Civil Rights Commission Case Rpts. 1, 9 (1989)(citing Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). *See* Children's Home v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Diane Humburd at 10 (citing *e.g.* EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977)). This the Complainant has done. See Finding of Fact No. 53.

5. Respondents Have Failed To Establish Any Interim Earnings Or Failure to Mitigate Damages:

28. The burden of proof for establishing the interim earnings, including unemployment insurance payments, of the Complainant rests with the Respondent. Diane Humburd at 10 (citing Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). The Respondent also bears the burden of proof for establishing any failure of the Complainant to mitigate damages. Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). No interim earnings or failure to mitigate damages were established in this case. See Findings of Fact Nos. 52-53.

C. Compensatory Damages: Emotional Distress:

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

29. In considering the question of emotional distress damages, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and

economic structures for more than a century," Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971).

30. Race discrimination in public accommodations and aiding and abetting, including retaliation, are serious matters. The Iowa Civil Rights Act was enacted, in part, to provide remedies for these acts. *See* Iowa Code SS 601A.7, .11 (now 216.7, .11), 216.15(8)(a)(8).

31. **By 1978, it became clear to the legislature that the extremely limited remedies originally enacted in 1965 were woefully inadequate to carry out the remedial purposes of the act.Therefore, the act was amended, effective January 1, 1979, to give the Commission the power to award "actual damages."** 1978 Iowa Acts ch. 1179 *S* 16. **These are synonymous with"compensatory damages". The purpose of such authority is not to remedy only out-of-pocket losses while ignoring proven emotional distress damages, but to "make whole" thevictims of discrimination for all losses suffered as a result of discrimination**. *See* Iowa Code *S* 216.15(8)(a)(8)(1993); Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525-26 (Iowa 1990); Chauffers, Teamsters, and Helpers v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986). **"[T]he real purpose behind a civil rights award is to makethe person whole for an injury suffered as a result of unlawful employment [or public accommodations] discrimination [or aiding and abetting]."** Allison-Bristow v. Iowa Civil Rights Commission, 461 N.W.2d 456, 459 (Iowa 1990).

32. **"[D]amages for emotional distress are recoverable under our civil rights statute."** Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525 (Iowa 1990). **In1986, the Iowa Supreme Court held:**

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

Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986). **A victim of discrimination is to receive "a remedy for his orher complete injury," including damages for emotional distress.** Hy-Vee at 525-26.
33. The Iowa Supreme Court's observations on the emotional distress damages resulting from wrongful discharge are equally applicable to the distress resulting from aiding and abetting or public accommodations discrimination:

> **[Such action] offends standards of fair conduct . . . the [victim of discrimination] may suffer mentally. "Humiliation, wounded pride and the like may cause very acutemental anguish." [citations omitted]. We know of no logical reason why . . . damages should be limited to out-of- pocket loss of income, when the [victim] also sufferscausally connected emotional harm. . . .**

> **We believe that fairness alone justifies the allowance of a full recovery in this type of tort.**

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

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

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

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

35.

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

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

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

36. **Among the many forms of emotional distress which may be compensated are "anger," "upset," "hurt,"** Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24- 29 (1982)(citing Fraser and 121-129 Broadway Realty v. New York Division of Human Rights, 49 A.D.2d 422, 376 N.Y.S.2d 17 (1975)), **"humiliation, wounded pride, and the like."** Niblo v. Parr Mfg. Co., 445 N.W.2d at 355. Complainant Zesch- Luense suffered such distress. See Finding of Fact No. 54- 57.

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

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

38. Aiding or abetting and public accommodations discrimination violates:

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

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

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

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

5. Emotional Distress May Be Proven By Either Testimony of A Complainant Alone or Supported By the Testimony of a Spouse:

40. **"The [complainants'] own testimony [in this case is] solely sufficient to establish humiliation or mental distress."** Williams v. TransWorld Airlines, Inc., 660 F.2d 1267, 1273, 27 Fair Empl. Prac. Cases 487, 491 (8th Cir. 1981). *See also* Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977); Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. Ill. 1981); Belton, Remedies in Employment Discrimination Law 415 (1992). Of course, testimony of a complainant's spouse or ex-spouse may also be supportive of a finding of emotional distress, as it is here for Complainant Zesch-Luense. *See* Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980).

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

41. 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, the evidence of crying in this case, by the Complainant, may be considered when assessing the existence or extent of emotional distress. *See* Blessum v. Howard County Board of Supervisors, 295 N.W.2d

836, 845 (Iowa 1980); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988). See Findings of Fact Nos. 55-56.

7. Determining the Amount of Damages for Emotional Distress:

42.

> [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)).

43. Although awards in other cases have little value in determining the amount an award should be in another specific case, Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990), there are many examples of such awards, ranging from $500 to $150,000, for emotional distress in discrimination cases. *See e.g.* Belton, Remedies in Employment Discrimination Law 416 n.78 (1992)(listing awards in 19 cases; 17 of which were for $10,000 or over). The Iowa District Court for Polk County recently awarded eighty thousand dollars ($80,000) to a sex discrimination plaintiff for emotional distress. Pamela Farren v. Super Valu Stores, Inc., Law No. Cl100-57791, slip op. at 22 (Polk Co. Dist. Ct. March 4, 1994). While any award should be tailored to the particular case, one commentator has noted that "a $750 award for mental distress is 'chump change.' Awards must be made which are large enough to compensate the victim of discrimination adequately for the injury suffered." 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 60-61 (1982).

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

45.

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

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

D. Attorney's Fees:

46. The Complainant having prevailed, she is entitled to an award of reasonable attorney's fees. Iowa Code § 216.15(8)(1993). If the parties cannot stipulate to the amount of these fees, they should be determined at a separate hearing. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987). The Commission must expressly retain jurisdiction of the case in order to determine the actual amount of attorney's fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees. City of Des Moines Police Department v. Iowa Civil Rights Commission, 343 N.W.2d 836, 839 (Iowa 1984).

E. Hearing Costs:

47. The Commission has requested the assessment of hearing costs to Respondents. (Commission's Brief at 16). An administrative rule of the Iowa Civil Rights Commission provides, in relevant part, that: "If the complainant or the commission prevails in the hearing, the respondent shall pay the 'contested case costs' incurred by the commission." 161 IAC 4.7(1). "Contested case costs" include only:

> a. The daily charge of the court reporter for attending and transcribing the hearing.
>
> b. All mileage charges of the court reporter for traveling to and from the hearing.
>
> c. All travel time charges of the court reporter for traveling to and from the hearing.
>
> d. The cost of the original of the transcripts of the hearing.
>
> e. Postage incurred by the administrative law judge in sending by mail (regular or certified) any papers which are made part of the record.

161 IAC 4.7(3).

48. Since the Commission and the complainant have prevailed in this case, an order awarding contested case costs is appropriate. The record should be held open so a bill of costs may be submitted after this decision becomes final. *See* Tammy R. Collins, CP # 09-91-21524, 09-91-21525, slip op. (Iowa Civil Rights Commission June 24, 1994)(Final Order adopting modifications, including assessment of hearing costs, set forth in Exceptions to the Proposed Decision and Order).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. Complainant Connie Zesch-Luense and the Iowa Civil Rights Commission are entitled to judgment because they have established that Respondents The Chicken House and Robert Pliley directed Complainant to deny service to a Native American because of his race and terminated her for her refusal to do so. These actions constitute, respectively, violations of Iowa Code Sections 601A.7 and 601A.11 (now sections 216.7 and 216.11).

B. Complainant Zesch-Luense is entitled to a judgment of one thousand one hundred thirty-seven dollars and fifty cents ($1137.50) in back pay for the loss resulting from her discharge.
C. Complainant Zesch-Luense is entitled to a judgment of two thousand dollars ($2000.00) in compensatory damages for the emotional distress she sustained as a result of the discrimination and aiding or abetting, including retaliation practiced by the Respondents.

D. Interest at the rate of ten percent per annum shall be paid by the Respondents to Complainant Zesch-Luense on her award of back pay commencing on the date payment would have been made if Complainant had remained in her employment with Respondents and continuing until date of payment.

E. Interest at the rate of ten percent per annum shall be paid by the Respondents to Complainant Zesch-Luense on the above award of emotional distress damages commencing on the date this decision becomes final, either by Commission decision or by operation of law, and continuing until date of payment.

F. Within 45 calendar days of the date of this order, provided that agreement can be reached between the parties on this issue, Complainant Zesch-Luense and the Respondents shall submit a written stipulation stating the amount of attorney's fees to be awarded Complainant. If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Administrative Law Judge in writing and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of the determining the proper amount of fees to be awarded. If no written notice is received by the expiration of 45 calendar days from the date of this order, the Administrative Law Judge shall schedule a conference in order to determine the status of the attorneys fees issue and to determine whether an evidentiary hearing should be scheduled or other appropriate action taken. Once the full stipulation is submitted or the hearing is completed, the Administrative Law Judge shall submit for the Commission's consideration a Supplemental Proposed Decision and Order setting forth a determination of attorney's fees.

G. The Commission retains jurisdiction of this case in order to determine the actual amount of attorneys fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees. This order is final in all respects except for the determination of the amount of the attorney's fees.

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

I. Respondents The Chicken House and Robert Pliley are hereby ordered to cease and desist from any further practices of race discrimination in public accommodations or of aiding or abetting, including retaliation.

J. Respondents shall, within 60 days of the date of this order, at their own expense, have produced two posters, measuring eleven by fourteen inches or larger, which will be copies of the front side of the Iowa Civil Rights Commission's public accommodations mini-poster which states, in part "WELCOME . . . The Iowa Civil Rights Act of 1965 requires that every person receive full and equal service in public accommodations--without discrimination because of race, creed, color, sex, religion, national origin, or physical or mental disability." These two posters shall be placed in two separate but conspicuous positions in the bar and restaurant areas in Respondents' location at The Chicken House in Albion, Iowa, where they will be readily visible to and easily read by customers and potential customers visiting the establishment.

K. Respondents shall file a report with the Commission within 210 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs B through E, I and J inclusive of this order.

Signed this the 9th day of August 1994.

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

FINAL DECISION AND ORDER AND REMAND FOR DETERMINATION OF ATTORNEY'S FEES.

1. On this date, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order with one modification. The award for damages for emotional distress is increased from two thousand dollars ($2000.00) to ten thousand dollars ($10,000.00) in order to fully compensate Complainant Zesch- Luense for the distress suffered by her. The proposed decision, as so modified, is hereby incorporated in its entirety as if fully set forth herein.

2. In accordance with paragraph F on pages 43-44 of the Decision and Order, Complainant Zesch-Luense and Respondents The Chicken House and Robert Pliley are required, "provided that agreement can be reached . . . on this issue . . . [to] submit a written stipulation stating the amount of attorney's fees to be awarded Complainant" within 45 calendar days of this order. "If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Administrative Law Judge in writing and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of determining the amount of the fees to be awarded."

IT IS SO ORDERED.

Signed this the 4th day of November, 1994.

Jeff Courter
Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319