**BEFORE THE IOWA CIVIL RIGHTS COMMISSION**

**RACHEL HELKENN, Complainant,**

**VS.**

**EVCC CORP. d.b.a. ECHO VALLEY COUNTRY CLUB**

**and**

**RACCOON VALLEY INVESTMENT COMPANY,**

**Respondents.**

**CP # 06-86-14840**

**COURSE OF PROCEEDINGS**

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Rachel Helkenn which, as amended, alleges Respondents EVCC Corporation and Raccoon Valley Investment Company discriminated against her on the basis of age in employment. The complaint specifically alleges that the Respondents terminated Ms. Helkenn from the position of waitress because of her age.

A public hearing on this complaint was held on July 25, 1989 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Iowa Civil Rights Commission's off ices in Des Moines, Iowa. The Respondent was represented by Charles A. Coppola, Attorney at Law. The Iowa Civil Rights Commission was represented by Teresa Baustian, Assistant Attorney General.

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

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

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

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

**FINDINGS OF FACT**

Jurisdictional Facts:

1. The Complainant, Rachel Helkenn, filed a verified complaint CP # 06-86-1480 with the Iowa Civil Rights commission, on June 19, 1986, alleging violation of Iowa Code Chapter 601 A by discrimination on the basis of age in the termination of her employment, which filing was within the statute of limitations. She also alleged, in a subsequent amendment to the complaint, dated August 4, 1987, that she was "treated differently than younger waiters and waitresses by being assigned more and different job duties and ... being made to wear uniforms while younger waiters and waitresses could wear sports clothing and shorts." The complaint was investigated. After probable cause was found with respect to the allegation of age discrimination in termination, conciliation was attempted and failed. No jurisdiction was found in regard to the allegations concerning differing job duties and uniforms. All of these facts were admitted by Respondents. (See Request for Admissions by Respondents; complaint and amendment). Notice of Hearing was issued on February 24, 1989.

Amendment of Complaint at Hearing:

2. During the course of the hearing, the complaint was amended, without objection, to delete Coppola Enterprises as a Respondent and to substitute Raccoon Valley Investment Company. (Tr. at 229-230).

Background and Qualifications of Complainant Helkenn:

3. Rachel Helkenn, the Complainant, was hired as a part-time banquet waitress at Echo Valley Country Club (hereinafter "Echo Valley") by Dennis Navin, who was then assistant manager for the Food and Beverage department, on July 25, 1985. (Cp. Ex. 9; Tr. at 4-5, 25- 27). Since high school, she had accumulated a total of three to five years of experience as a waitress prior to her employment with Echo Valley. (Tr. at 27). Prior to her hire there, she had been employed full-time in positions ranging from cosmetologist to respiratory therapy technician. (Tr. at 25). She obtained part-time employment at Echo Valley in order to have more time to spend with her children. (Tr. at 26).

4. From her hire until April of 1986, Ms. Helkenn worked only in the Banquet Room. (Tr. at 29, 45). This was a formal dining area, located in the upper floor of the Club, which was used for banquets throughout the year. After that date, she also worked in the Terrace Room. (Tr. at 6, 46). The Terrace Room was an informal dining area, located downstairs, which provided sandwiches, drinks and snacks to golfers during the golfing season. (Tr. at 6, 29, 45, 97, 99).

5. Dennis Navin supervised the Complainant from the time of her hire until he left on May 9, 1986. (Tr. at 6, 11). Throughout this time, she was a punctual employee who had no difficulty

with tardiness, and who was willing to come in on short notice when other employees had canceled or not come in at their scheduled times. (Tr. at 7, 8, 9-10). She was "very good" in providing service to customers and in performing her "side work" or preparatory work for banquets or for dining in the Terrace Room. (Tr. at 7-8). During the time from her hire until at least May 9, 1986, Rachel Helkenn acted as a "trained, experienced and a loyal employee" who was "extremely dependable." (Cp. Ex. 1; Tr. at 10, 14).

6. Rachel Helkenn was discharged on May 22, 1986 by Ryan Dotson, Director of the Food and Beverage Department. (Complaint; R. Ex. A). She was 42 years old as of the date of her discharge. (Tr. at 78).

Management Changes at the Echo Valley Country Club:

7. During the last months of the Complainant's employment, management changes were effected at Echo Valley. In January of 1986, the incumbent manager, James Hutchison voluntarily left to assume a new position elsewhere. (Tr. at 12, 231). A new manager, James Corwin, age 39, was hired at approximately that time. He remained in that position until June of 1987. (Tr. at 12, 213, 234). A new director of the Food and Beverage area, Ryan Dotson, age 40, was hired in late February or early March 1986. He left Echo Valley in August of 1986. (Tr. at 198). Dennis Navin, who had been assistant manager in charge of Food and Beverage, voluntarily left employment with Echo Valley on May 9, 1986. (Tr. at 11). There was some overlap in time between the management of Mr. Navin and Mr. Dotson. (Tr. at 13).

8. Ryan Dotson had the responsibility for hiring, firing, staffing, training and evaluating waiters, waitresses and other personnel in the Food and Beverage area. Jr. at 198). Among those he supervised were both seasonal employees, who were temporary part-time employees for the summer, and permanent part-time employees, who were employed throughout the entire year. (Tr. at 32-33, 95- 96, 198). Rachel Helkenn was such a permanent part- time employee. (Tr. at 32-33, 96).

9. On May 11, 1986, a staff meeting was held at Echo Valley during which Mr. Corwin and Mr. Dotson were officially introduced as the management to the Food and Beverage staff. (Tr. at 36, 38-39). At that time, the employees were informed that changes would be made and that any of the employees could be replaced. (Tr. at 37). The employees present, which included permanent part-time employees, were specifically reminded that Echo Valley went to Drake University every spring to recruit students and that they could be replaced by these students. (Tr. at 36-37, 94-95). Although no reference to age per se was made at this meeting, reference to replacement by Drake students was made. (Tr. at 94-95, 96). Rachel Helkenn was present at this meeting and heard these statements. Jr. at 36-37).

10. The nature of changes to be made included such matters affecting the Food and Beverage staff as restricting use of the company telephone for personal calls, requiring employees to check with management when they took meal breaks, requiring employees to refer to Ryan Dotson as "Mr. Dotson," and modifying the way tables were set and food prepared and served. (Tr. at 41,200-01,216). These changes were seen by Mr. Dotson as necessary to end "the loose-knit, very unprofessional way that everyone was carrying themselves." (Tr. at 215- 26). During the

course of instituting these changes, there was some resistance to them by employees. (Tr. at 13, 190, 201-02). Mr. Dotson thought that this resistance was especially prevalent among longer-term employees, sixty or seventy per cent of whom he believed were resisting the changes. (Tr. at 201-02). It was a practice of Dotson's and Corwin's, when they became aware of resistance or perceived resistance by an employee, to write an informal note indicating the problems they had with the employee. (Tr. at 202).

Comments by Mr. Dotson and Mr. Corwin Indicating an Age Preference In Regard to Food and Beverage Employees:

11. Mr. Corwin made comments in the presence of Marilyn Bruce to the effect that he preferred bosomy college age waitresses. (Tr. at 156). Mr. Corwin and Mr. Dotson made similar comments concerning age and certain parts of the body which led Natalie Phelps to conclude they preferred employees in the nineteen to twenty-five age group. (Tr. at 135-36). Emma Thomas heard them indicate that, in her words:

> They wanted younger girls because they felt like if they had younger girls, like if they sent them out on the booze cart, that the golfers would get to looking at the young girls with their shorts on and they would buy more drinks and that would make more money for them.

(Tr. at 183).

12. Marilyn Bruce was also informed by Helen Stiffler that Ryan Dotson had told her, when she inquired as to why there weren't more Drake students at Echo Valley, that they had interviewed at Drake but had not found any young, good- looking girls. (Tr. at 157, 159). This last statement was properly objected to as hearsay by the Respondents. (Tr. at 157). If this statement attributed to Ms. Stiffler was the sole statement in the record concerning comments by Dotson expressing an employment preference for young, attractive waitresses, it would be entitled to little weight. Nonetheless, given the testimony of Ms. Bruce, Ms. Phelps, and Ms. Thomas indicating similar statements by Dotson and Corwin, it is more likely than not that this statement was made and is entitled to some weight on the issue of whether an age preference was in force for Food and Beverage personnel at Echo Valley during the time of Mr. Dotson's management.

Ages of Food and Beverage Employees Discharged, Hired, and Retained During Mr. Dotson's Management:

13. During the course of Mr. Dotson's management of the Food and Beverage Department, three employees were discharged. These employees and their ages at time of discharge were: Rachel Helkenn, age 42; Marilyn Bruce, age 48; Linda Svec, approximately 40. (Tr. at 24, 33, 87, 102, 148- 49, 155, 165, 171). All of these employees were permanent part-time employees. (Tr. at 33).

14. The permanent part-time employees in Food and Beverage, in addition to the three employees discharged, and their approximate ages or age ranges were, as of 1986: Helen Stiffler, 60s; Joyce Wessel, 41; Fran Morgan, 35-36; Melissa Davey, 20s; a "Carol", age 18 or 19; Walt

Cramer and Colleen Shafer, both of whom were in their late 30s or older; Steve Purcell and Kristi Allison, neither of whose ages are reflected in the record. (Tr. at 33, 50, 87, 102, 117, 133-34, 147, 165, 171-72, 189).

15. Out of these twelve employees, at least eight were in their late thirties or older. Of these eight, three were discharged and four, Colleen Shafer, Helen Stiffler, Fran Morgan, and Walt Cramer, quit during Dotson's management. (Tr. at 126, 129, 130, 172). Of these four, Colleen Shafer, Fran Morgan, and Helen Stiffler informed their co-workers that they quit their jobs in reaction to the terminations of Ms. Helkenn, Ms. Bruce, and Ms. Svec because these terminations led them to believe that they would also be discharged. (Tr. at 129, 134, 171). The record does not indicate why Walt Cramer left.

16. After the time when Rachel Helkenn was terminated, Echo Valley hired new and retained previously employed seasonal Food and Beverage employees, including waitresses, who were significantly younger and less experienced than the complainant and the other discharged employees. (Tr. at 134,156,161-62,164,172, 192). The retained employees included recent hires, of approximately twenty to twenty-five years of age, who the three discharged employees had trained. (Tr. at 156, 161, 162, 171). These newly hired and retained inexperienced younger employees, who included Drake University students, took over the waitressing duties of the discharged employees. (Tr. at 134- 35, 161). The inference of age discrimination, which arises from the hiring and retention of inexperienced young employees while experienced older employees were discharged, is strengthened by the account of Marilyn Bruce, a nine year employee at Echo Valley and the oldest employee discharged, who, upon inquiring what was the reason for her discharge, was told by Ryan Dotson only that "You don't fit into our plan." (Tr. at 149, 155).

17. Although Helen Stiffler and Fran Morgan eventually returned to work at Echo Valley, after Mr. Dotson and Mr. Corwin left, the net impact of these terminations, retentions, and hires in 1986 was that an increasingly youthful workforce was coming into being in the Food and Beverage Department at Echo Valley. (Tr. at 88, 127, 136). *See* Findings of Fact Nos. 13-16.

18. It was Echo Valley's annual practice, even before the management of Mr. Corwin and Mr. Dotson, to recruit at Drake University and to hire seasonal help, largely composed of college students, for the Food and Beverage and other areas. (Tr. at 32, 95, 164-65, 192). Nonetheless, it is appropriate to conclude that, after the Complainant's discharge, persons significantly younger and less experienced than the Complainant were hired or retained as Food and Beverage employees, because (a) these seasonal employees, both newly hired and retained, did take over the duties of the discharged permanent parttime employees, and (b) the management had previously notified Food and Beverage employees, without drawing a distinction between the permanent and seasonal employees, that they could be replaced by seasonal employees, specifically college students hired from Drake University. *See* Findings of Fact Nos. 9, 16.

Alleged Different Treatment of Complainant and Other Waitresses on the Basis of Age in Regard to Job Duties:

*Operation of the Liquor Cart:*

19. The liquor cart, or "booze cart" was a vehicle with a bar which was driven out to the golf course by Food and Beverage employees in order to serve drinks to golfers. (Tr. at 52). The Complainant was informed by Paul Belding that an operator was needed for the cart. (Tr. at 55). Although Belding had no formal supervisory position, and did not make assignments to the cart, he did serve as a conduit for communications from Ryan Dotson, i.e. he told the Complainant what to do based on what Dotson told him. (Tr. at 54-55). The Complainant asked if she could operate the cart and was informed by Belding that Dotson might place Melissa Davey on the cart because she was "burned out" in the Terrace Room. (Tr. at 55).

20. Although Ms. Helkenn did not ask Ryan Dotson to assign her to the liquor cart, it is clear that Dotson did not limit assignment to the cart to those who might request such assignment. (Tr. at 137). He made assignments to the cart on his own discretion. (Tr. at 137, 208). The assignments that were made under Dotson prior to the discharge of Ms. Helkenn and through at least June of 1986 were Natalie Phelps, a 19 year old employee who had prior experience with the cart, and newly hired employees who were trained on the cart in 1986. (Tr. at 137,147). Newly hired Food and Beverage employees at this time were all approximately age 25 or younger. (Tr. at 156). *See* Finding of Fact No. 16. The assignment of such employees to the liquor cart was consistent with the previously noted comments of Mr. Dotson and Mr. Corwin to the effect that they preferred to hire younger women because, if they were placed in positions such as the liquor cart, the golfers were likely to buy more drinks. *See* Finding of Fact No. 11.

21. As of the beginning of the summer of 1986, there was at least one other employee, in addition to Natalie Phelps, who had training on the cart. Neither the employee's name or age or whether the employee operated the cart in 1986 is revealed by the record. (Tr. at 137). Although Joyce Wessel, age 41, operated the cart at sometime at least "[a] couple [of] years" before the hearing, there is no evidence in the record as to whether or not she operated it during the time of Dotson's or Corwin's management. (Tr. at 189, 195).

*Other Job Duties:*

22. The Complainant was told to wash dishes from the Terrace Room, to clean up after the cook, and to keep track of what time golfers teed off, while younger employees were not required to perform these duties. (Tr. at 48-50). She also asserted that she was asked to train new Food and Beverage staff while younger employees were not. (Tr. at 49, 51). She was informed by Mr. Dotson that she was requested to perform such additional responsibilities because she was a more reliable employee, i.e. "they knew it would get done and they would only have to ask me once." (Tr. at 50). This reason is supported by the record as it accurately reflects the quality of the Complainant's work. (Tr. at 138, 154-55). *See* Finding of Fact No. 5. Furthermore, Natalie Phelps, a substantially younger but experienced employee, also trained new hires. (Cp. Ex. 5; Tr. at 137, 210-11).

The Complainant's Discharge:

23. The Complainant left her work at approximately noon on May 21, 1986 to attend a doctor's appointment. (R. Ex. A; Tr. at 58, 63). This time was before the time her shift was originally

scheduled to end. (Cp. Ex. 4, 5; R. Ex. A; Tr. at 61). The Complainant was informed by Ryan Dotson, on May 22, 1986, that she was being discharged because she left before completing the schedule she had originally been assigned. (R. Ex. A; Tr. at 64). There is, however, substantial dispute in the record concerning whether or not this absence was excused or made in accordance with management's conditions for allowing the absence.

24. At various points in the record, the Respondent produced evidence articulating several reasons for the complainant's discharge on May 22, 1986, i.e. failure to provide advance notice of or to obtain approval for the absence, failure to inform management, on May 21 st, that she was leaving, and failure to have another waitress cover for her during the absence:

> a. "The reason for her termination is that she did leave in the middle of that scheduled shift without any prior knowledge, to me, that she was going to do so." (Dotson testimony-Tr. at 204, 221-22).
>
> b. "[T]he direct reason [the complainant was terminated] was that she didn't check with the supervisor upon leaving during her scheduled shift." (Dotson testimony-Tr. at 203, 224).
>
> c. "[I]t was really strictly because she wasn't cooperating in areas that I had cautioned her on before and it was leaving a shift without checking with somebody or getting the shift covered." (Dotson testimony-Tr. at 207).
>
> d. "[L]eft her assigned work station without obtaining proper coverage in her absence." (6/2/86 Letter from Dotson to Job Service-R. Ex. A).

25. The reference to the Complainant's failing to cooperate in areas on which Dotson had previously cautioned her refers to two events: (1 ) a conversation Mr. Dotson and Ms. Helkenn had on May 7, 1986 concerning the completion of sidework and, (2) an incident on May 14, 1986 where Ms. Helkenn purportedly left work early. (Cp. Ex. 2; R. Ex. A; Tr. at 44, 203, 205-07, 218-19). Ms. Helkenn denies the May 14th incident. (Tr. at 44, 110-11).

26. The side work conversation came about because both the day shift and the night shift were complaining about the failure of the previous shift to finish various minor clean- up details at the end of the shift. (Tr. at 205). On May 7th, Dotson discussed this with the Complainant, who was on the day shift, and reminded her that both shifts had to get their side work done. (R. Ex. 2; Tr. at 44, 205). The alleged incident of May 14th was mentioned by Dotson in his testimony and his letter to Job Service not as a seperate reason for termination, but in order to show that the Complainant's leaving on May 21st occurred after a similar incident where counseling had been given. (R. Ex. A; Tr. at 218).

27. The assertions that Mr. Dotson terminated the Complainant (a) because he had no prior knowledge that she was going to be leaving her shift, or (b) because she didn't check with him upon leaving her shift are not credible. They are effectively contradicted by his own testimony, his June 2,1986 letter to Job Service explaining why he terminated the Complainant, and by the Complainant's testimony.

28. When asked "what, if any, notice had Ms. Helkenn given you that she was going to be gone?," Mr. Dotson's initial response was that he did not recall. (Tr. at 203). He also testified, twice, that his letter to Job Service states all the reasons for Ms. Helkenn's dismissal. (Tr. at 206, 213). This letter does not mention any alleged failures by the Complainant to give notice of her impending absence or to check with Mr. Dotson upon leaving her work. (R. Ex. A). Nor is there any comment on her side work. (R. Ex A). It also states, in part:

> On or about May 19th or 20th, 1986, Ms. Helkenn notified me that she had made a doctor's appointment for May 21, 1986. She indicated that the appointment interruped (sic) her scheduled work assignment. At that time, I told Ms. Helkenn that she needed to find someone to finish her shift for that day.

(R. Ex. A)(emphasis added).

29. There is also contradiction between Dotson's deposition and trial testimony, his letter to Job Service, and his note concerning the purported incident of May 14th. (Cp. Ex. 2; R. Ex. A; Tr. at 203, 206, 218, 221-226). In his handwritten note dated "5-14," Dotson stated "Rachel Helkenn left shift 1/2 hr early. Did not check w/ supervisor. Spoke w/her 5-15-86 about incident. Explained need to check with supervisor." (Cp. Ex. 2). At trial, Mr. Dotson was confronted with his deposition testimony to the effect that Ms. Helkenn's absence to attend her doctor's appointments was excused. He responded that this statement referred to this May 14th incident and not the absence of May 21 st. (Tr. at 222- 225). This, of course, is contrary to the content of the note which indicates an unexcused absence. (Cp. Ex. 2). In his letter to Job Service, Mr. Dotson mentions this incident, but refers to a failure to find coverage for the shift, not to an unexcused absence or any failure to notify management of the absence. (R. Ex. A).

30. The Complainant credibly testified that she had initially informed Mr. Dotson one week before May 21st that she had a doctor's appointment on that date. (Tr. at 58). At first, he denied her request. (Tr. at 58). She continued to ask a total of three or four times for the time off. Tr. at 59). Finally, Dotson agreed to allow her absence if she found someone to cover for her. (R. Ex. A; Tr. at 59). At approximately noon on May 21st, Mr. Dotson asked her why she was not gone yet and she replied that she was making a sandwich for a member. (Tr. at 63). She then left after completing the sandwich. Tr. at 63).

31. The assertion that Mr. Dotson terminated the Complainant because she failed to obtain coverage for her shift in her absence is also not worthy of credence. This assertion rests entirely on the testimony of Mr. Dotson and his letter to Job Service. The inconsistencies within and between Mr. Dotson's testimony and documents authored by him in regard to the reasons for Ms. Helkenn's discharge and related matters have already been detailed. *See* Findings of Fact Nos. 24, 27-29. Taken together, they are sufficient to seriously undermine whatever credibility the letter and testimony might otherwise have.

32. It is true that the letter to Job Service was written prior to the filing of Ms. Helkenn's complaint. (Complaint; R. Ex. A; Tr. at 213). It is also true, however, that it was written in response to a claim for unemployment insurance filed by the Complainant. (R. Ex. A, F; Tr. at

220). As such, it may be viewed with some skepticism as there is an obvious financial incentive for the Respondent to state a reason for Complainant's termination which it believes may disqualify the Complainant for unemployment insurance.

33. This reason is also effectively rebutted by Complainant's testimony. Prior to May 21 st, Ms. Helkenn made arrangements with Kristi Allison, a co-worker, to cover for her. (Tr. at 59, 117). Nonetheless, when she informed Mr. Dotson that she had someone to cover for her, he informed her that he had already arranged coverage. (Tr. at 59). Therefore, the complainant called Ms. Allison and cancelled their arrangement. (Tr. at 59).

34. Finally, both Complainant and Respondents have referred to copies of the original and revised schedules for May 21st. The Complainant asserts that the revised schedule showing three waitresses scheduled for the Terrace Room on that date, an increase of one over the original schedule demonstrates that Dotson did obtain coverage for her. The Respondents assert, however, that the presence of Ms. Helkenn's name on both schedules for the full shift demonstrates she was not excused. (Final Argument and Brief of Respondents at 10; Tr. at 61-62). Neither contention is supported because (1) waitresses were present on May 21 st who were not listed on either schedule, and (2) Dotson's letter to Job Service strongly implies that, at the time Ms. Helkenn requested the time off, the weekly schedules had already been posted. (R. Ex. A; Tr. at 62).

35. The previously cited evidence, of the statements by Dotson and Corwin concerning their preference for younger employees, of their statements indicating that present employees could be replaced by college students, of an age preference in regard to assignments to the liquor cart, and of the discharge and replacement of experienced, older employees while substantially younger, less qualified personnel were retained and hired, demonstrate that, despite the reasons articulated by Respondents, the discharge of the Complainant was more likely motivated by the management's preference for younger employees. *See* Findings of Fact Nos. 3-6, 9, 11-17. Although, at one point in her testimony, the Complainant expressed a doubt about whether her discharge was due to her age, the determination of the Respondent's motivation for the firing must be based upon the material facts and not upon a Complainant's degree of certainty or uncertainty regarding this issue. (Tr. at 128).

Credibility Findings:

36. The testimony of Ryan Dotson, and documents authored by him, particularly his testimony and documentation addressing the reasons for Complainant Helkenn's discharge, are so contradictory that his credibility is questionable. *See* Findings of Fact Nos. 24, 27-29. With some exceptions, his testimony is cited in support of a finding of fact only when it was supported by other credible evidence, or when it constituted an admission against the interest of Respondents, or when it was supported by some other indicia of reliability.

37. Complainant Helkenn was a credible witness. Her testimony is internally consistent and reflects few or no contradictions on material matters. Her testimony reflects a willingness to admit adverse facts with candor, such as her admission that she could "not honestly say" whether her discharge was due to her age or simply an unjust termination. (Tr. at 128).

38. Marilyn Bruce was a credible witness. Her testimony was also internally consistent. Her testimony was in error on two points, i.e. that James Hutchinson, the former manager, was fired and that Walter Cramer, the cook, was fired. (Tr. at 158, 172). Ms. Bruce admitted that she had no personal knowledge in regard to Mr. Hutchinson, but that it was her honest impression that he had been fired. (Tr. at 158). Whether Mr. Hutchinson voluntarily left or not is not material because the answer to that question makes no difference to the any issues of liability or damage in this case. The question of whether or not Mr. Cramer voluntarily left is material because it was suggested that he was one of the older permanent part-time Food and Beverage employees terminated. Nonetheless, in neither case was Ms. Bruce's testimony willfully false.

39. Based on their demeanor and the internal consistency of their testimony, Dennis Navin, Natalie Phelps, Emma Thomas, Joyce Wessel, and William C. Richardson were all credible witnesses.

Compensation:

*Gross Earnings at Echo Valley:*

40. When Rachel Helkenn worked in the Banquet Room she was paid $5.00 per hour. (Tr. at 68). When she worked in the Terrace Room she was paid in either one of two ways. First, she would be paid $3.25 per hour and receive a percentage of what was known as the "tip hour." (Tr. at 6869). The Food and Beverage receipts for the week would be divided by the number of waitresses working and multiplied by a set percentage. (Tr. at 68-69). The record does not reveal what that percentage was. (Tr. at 69, 139). Second, if there was no "tip hour," the waitresses were paid $4.25 per hour. (Tr. at 69).

42. In 1986, the Terrace Room opened in April. (Tr. at 45). The Complainant's hours, which were less in the fall and winter, then increased to the point where she worked 30 to 40 hours in the Terrace Room and still did some banquets. (Tr. at 50-51). The schedule for May 15-21, 1986 indicates that a typical week for the Complainant would be 32-33 hours in the Terrace Room and 8 hours in the Banquet Room. (Cp. Ex. 4, 5).

43. A summary of the 1985 and 1986 earnings of Complainant Helkenn at Echo Valley was entered into the record. (Cp. Ex. 9). The summary consists of two pages. The first lists the gross quarterly earnings and total annual earnings of Rachel Helkenn, Marilyn Bruce, and Linda Svec for 1985 and 1986. The second page consists of a monthly breakdown of the gross earnings of Rachel Helkenn in 1985 and 1986. (Cp. Ex. 9).

44. There is, however, an error of calculation in regard to the 1986 earnings of Complainant Helkenn. The totaled monthly earnings for 1986 are listed as "$2208.42." The correct sum is $1781.14, a difference of $427.28. An examination of the quarterly listings of the Complainant's earnings for 1986 reveals that the error's effect is reflected entirely in the earnings for the second quarter which are listed as "$1659.28." The correct sum of monthly earnings for that quarter is $1232. 00, again a difference of $427.28.

45. If the complainant worked 32 hours in the Terrace Room and 8 hours in the Banquet Room during a typical week in the second quarter of 1986, her weekly earnings would be: [Terrace Room Earnings + Banquet Room Earnings] [($4.25 X 32 hours) ($5.00 X 8 hours)] [($136.00) + ($40.00)] $176.00 per week. Over the seven week period during the second quarter when Complainant Helkenn worked, she would earn $1232.00, ($176.00 X 7 weeks), precisely the figure reached by adding the monthly earnings during that quarter. This tends to show that the error is one of miscalculation and not one of neglecting to list monthly earnings of the Complainant.

46. The average weekly earnings of the Complainant for the third quarter of 1985 were: ($935-73 divided by 9.5 weeks worked in that quarter) $98-50. If she had worked the entire third quarter, her earnings for that quarter would be: ($98.50 X 12 weeks) $1182.00. 47. The Complainant's earnings for the fourth quarter of 1985 were $1229.65. Her earnings for the first quarter of 1986 were $549.14. If she had worked the entire second quarter of 1986, her earnings would have been: ($176.00 X 12 weeks) $2112.00.

48. The above calculations, concerning the Complainant's earnings from the third quarter of 1985 to the second quarter of 1986, support an estimate of the Complainant's annual gross earnings at Echo Valley which takes into account the seasonal variations in earnings as well as her having worked less than a full year at Echo Valley. A reasonable estimate of Complainant Helkenn's annual gross earnings at Echo Valley would be: ($1182.00 + $1229.65 + $549.14 + $2112.00) = $5072.79.

*Mitigation of Damages*

49. After her discharge, Complainant filed for unemployment insurance and searched for part-time work comparable to her position at Echo Valley or work she had previously done,i.e. office work, waitressing, hospital work or hairdressing. (Tr. at 69-70). She obtained employment as a side cook with Willow Creek Golf Course from October 30, 1986 to May 8, 1987. (Cp. Ex. 8; Tr. at 71). She left as she was making only the minimum wage with no tips. (Tr. at 72).

50. Official notice is taken of the fact that, in 1986 and 1987, the minimum wage was $3.35 per hour. Fairness to the parties does not require that they be given an opportunity to contest that fact.

51. Ms. Helkenn then obtained temporary full-time employment as a receptionist with KFMD Radio from July through September of 1987. (Cp. Ex. 8; Tr. at 72-73). She made $151.71 more in the three months she was employed there than she made in the six months she was employed at Willow Creek. (Cp. Ex. 8). After this position ended, her next employment was with Mercy Hospital Beauty Shop as a part-time hairdresser. (Tr. at 73). She was in this position for four months starting in April or May of 1988. (Tr. at 73). She left this position because she "just couldn't take it. I couldn't do hair on people that were dying and very sick." (Tr. at 73-74). She was in this position for four months starting in April or May of 1988. (Tr. at 73). She left this position because she "just couldn't take it. I couldn't do hair on people that were dying and very sick." (Tr. at 73-74). She ceased searching for work in October of 1988 when started taking care of her mother. (Tr. at 122).

52. Although Ms. Helkenn did not reapply with Echo Valley, she continued to seek work at beauty salons, offices, printing companies, and similar employers. (Tr. at 119, 127). At various times in 1988 the Complainant did some light typing without pay at her husband's office for a total time of two weeks. (Tr. at 120-21). The Complainant was not required to commit to be at the office at some time in advance of her going there. (Tr. at 121). She could leave early if she had to. (Tr. at 121). Her husband has no ownership interest in the business. (Tr. at 120).

*Gross Back Pay:*

53. Based on annual earnings at Echo Valley of $5072.79, the Complainant's gross back pay from May 22,1986 through September 30,1988 would be calculated as follows:

A. Gross Back Pay for the two year period from May 22, 1986 through May 22, 1988: $5072.79 per year X 2 years $10145.58.

B. Gross Back Pay from May 23,1988 through September 30, 1988: [$5072.79 X (4.25 months/12 months)] [$5072.79 X .35] $1775.48.

TOTAL GROSS BACK PAY A + B $10145.58 + $1775.48 = $11921.06.

*Interim Earnings and Unemployment Compensation:*

54.

| YEAR | SOURCE | GROSS INCOME |
|---|---|---|
| 1986 | Unemployment Compensation | $895.13 |
| | Willow Creek Golf Course | $208.30 |
| 1987 | KFMD Radio | $1005.00 |
| 1988 | Mercy Hospital | $587.11 |

TOTAL INTERIM EARNINGS AND UNEMPLOYMENT: $2695-54

*Net Back Pay:*

55. The amount which Complainant Helkenn is due in net back pay is reflected in the formula: [Gross Back pay - (interim earnings and unemployment compensation)] $11921-06 -$2695.54 = $9225-52 TOTAL NET BACK PAY.

Emotional Distress:

56. The circumstances under which Complainant Helkenn was discharged have already been set forth. *See* Findings of Fact Nos. 23, 30, 33. Some emotional distress may be inferred from the circumstances of being discharged for one's age while being informed that one is being

discharged for what was actually an excused absence. Furthermore the Complainant felt shock, anger and humiliation upon being informed of her discharge. (Tr. at 65). There is no direct evidence in the record of the duration of the distress, but it may be reasonably inferred that the combined duration and severity of her distress warrant an award to Complainant Helkenn of one thousand dollars ($1,000.00) as full, reasonable, and appropriate compensation.

**CONCLUSIONS OF LAW**

Jurisdiction:

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

2. The complaint is also within the subject matter jurisdiction of the Commission as the allegation that the Respondent discharged her from her employment falls within the statutory prohibition against unfair employment practices. Iowa Code S 601A.6 (1985). "It shall be a . . . discriminatory practice for any person to ... discharge any employee . . . because of the age . . . of . . . such employee." Id.

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

3. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of persuasion in this proceeding is on the complainant to persuade the finder of fact that Respondents discriminated against the Complainant on the basis of her age when she was terminated from her position as waitress. Linn Co- operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981).

4. The following discussion on the order and allocation of proof in discrimination cases where direct evidence is present relies on Federal case law because the Supreme Court of Iowa has not yet confronted the issue of what the order and allocation of proof should be in a case involving direct evidence. Although Federal court decisions applying Federal anti-discrimination laws are not controlling in cases under the Iowa Civil Rights Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978), they are often relied on as persuasive authority in these cases. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Opinions of the Supreme Court of the United States are entitled to particular deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866 (Iowa 1978). Nonetheless, a ruling in the alternative will also be made following the order and allocation of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S, 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973).

5. 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), is inapplicable. Price-Waterhouse v. Hopkins, 490 U.S. ,109 S. Ct. 1775,104 L. Ed. 2d 268,301 (1989)(O'Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985)(Age Discrimination in Employment Act case); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 473, 475-78 (2nd ed. 1989).

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

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

Price-Waterhouse v. Hopkins, 490 U.S. , 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring).

7. In this case, there is direct evidence in the record which supports the conclusion that the Complainant's age was a motivating factor in Respondent's decision to discharge her. See Findings of Fact No. 11 and 12. Such comments by management officials expressing a preference for a more youthful workforce are sufficient to show that age discrimination is the underlying reason for a discharge. Cf. Buckley v. Hospital Corporation of America, 758 F.2d 1525,1530, 37 Fair Empl. Prac. Cases 1082, 1085 (11th Cir. 1985)(constructive discharge). InBuckley, the court held that a hospital administrator's expression of surprise at longevity of staff members, his statements that the hospital needed "new blood," that he intended to recruit younger doctors and nurses, and his reference to the plaintiff's "advanced age" would support a conclusion that the employer acted with discriminatory intent. Id.

8. The inquiry, however, does end not 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). Here the defenses set forth by Respondents have been examined and found wanting. See Findings of Fact Nos. 24-35. Respondents have not met their burden of persuasion in regard to their defenses.

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

9. 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).

10. In the typical discrimination case, which alleges disparate treatment on a prohibited basis, this burden of producing evidence shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 443, 448 (Iowa Ct. App. 1981). These shifting burdens of production *"are designed to assure that the [Complainant has] his day in court despite the unavailability of direct evidence."* Trans World Airlines v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523, 533 (1985)(emphasis added).

11. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). Once a prima facie case is established, a presumption of discrimination attaches. Id.

12. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, non-discriminatory reason for its action. Id.; Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Once it has produced such evidence, the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

13. The introduction of evidence, by the Respondent, which would allow the finder of fact to rationally conclude that the challenged decision was not motivated by discriminatory animus is sufficient to rebut the prima facie case. Linn Co- operative Oil Company v. Quigley, 305 N.W.2d 7287 733 (Iowa 1981). The Respondent need not persuade the finder of fact that it was actually motivated by the proffered reasons. Id. Nonetheless, the nondiscriminatory reason proffered "must be specific and clear enough for the [Complainant] to address and legally sufficient to justify judgment for the [Respondent]." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988).

14. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175,178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089,1095, 67 L. Ed. 2d 207, 216 & n.1 0 (1981)).

15. 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. When the Complainant demonstrates that the Respondent's reasons are pretextual, the Complainant must prevail. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 717-18 (1983)(Blackmun, J. concurring).

16. In this case, Complainant Helkenn established a prima facie case by showing:

> (1) that [s]he belongs to a group protected by the statute, (2) that [s]he was qualified for the job from which [s]he was discharged, (3) that, despite [her] qualifications, [s]he was terminated, and (4) . . . that after [her] termination, the employer hired a person not in [complainant's] protected class or retained persons with comparable or lesser qualifications who are not in a protected group.

Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 177 (Iowa Ct. App. 1988). See Findings of Fact Nos. 3-5, 16,18.

17. The Iowa Civil Rights Act protects persons of all ages against age discrimination in employment with two exceptions: persons under eighteen years of age if they are not considered by law to be adults, and employees over fortyfive years of age in apprenticeship programs.Hulme v. Barrett, 449 N.W.2d 629, 631-32 (Iowa 1989)(citing Iowa Code §§ 601A.6((2)). Although the persons hired or retained by Respondents after the Complainant's discharge, who were less qualified than the Complainant, are therefore also within the protected group, the age difference of more than 15 years between these persons and the complainant is sufficient to find, in conjunction with these other factors, that a prima facie case has been established. See Buckley v. Hospital Corporation of America., 758 F.2d 1525, 1530, 37 Fair Empl. Prac. Cases 1082, 1085 & n.2. (11 th Cir. 1985). See Findings of Fact Nos. 16, 18, 20.

18. The McDonnell-Douglas formulation of the facts adequate to establish a prima facie case, on which the prima facie case set forth in Wingis based, is not:

> the only means of establishing a prima facie case of individual discrimination. . . . 'The facts necessarily will vary in [employment discrimination] cases, and the specification ... of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations. The importance of McDonnell Douglas lies not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any [employment discrimination] plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396, 429 (1977).

19. The complainant also established a prima facie case of age discrimination in her termination by showing (1) that Respondents' management, at the time Complainant was employed, made statements expressing a preference for young employees, particularly young waitresses, (2) that Respondents' managers informed their Food and Beverage employees that they could be replaced by college students, (3) only Food and Beverage employees of approximately 40 or over were discharged, and (4) that less experienced, substantially younger new hires and retained employees, including college students, took over the duties of the discharged employees. In addition, the manager of the Food and Beverage department assigned only younger employees to the liquor cart after he and the manager of Echo Valley made comments indicating he would do so. The showing of age discrimination in the liquor cart assignments supports the prima facie case, but is not essential to it. See Findings of Fact Nos. 9, 11-13, 16, 18-21.

20. The Respondents articulated, through the production of evidence, legitimate non-discriminatory reasons for Complainant Helkenn's termination. See Findings of Fact No. 24-26. By so doing, Respondents met their burden of production and rebutted Complainant's prima facie case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154,156 (Iowa 1986).

21. The complainant demonstrated that the reasons articulated by Respondents were pretexts for discrimination by showing that, in light of all the evidence, (1) the reasons were not worthy of credence, and (2) age bias was the more likely motivation for the termination of Complainant Helkenn. See Findings of Fact Nos. 2733, 35. The complainant has met her burden of persuading the Commission that intentional age discrimination has occurred.

Motion to Dismiss:

22. During the course of the hearing, Respondents made a motion to dismiss based on its assertions that the Complainant failed to establish a prima facie case of age discrimination. (Tr. at 186-88). The motion should be denied on the basis that a prima facie case of age discrimination, and more, has been established by the evidence. See Conclusions of Law Nos. 16-21.

Complainant's Allegations of Discrimination in Regard to Job Duties and Uniforms:

23. It should be noted that the only reason age discrimination in regard to job duties is discussed in this decision is because the Commission's representative relied on this in order to demonstrate discriminatory intent by showing that "the employer has a history of treating [complainant's] class unfairly." Posthearing Brief of the Iowa Civil Rights Commission at 4-5. As previously noted the Commission has already found "No Jurisdiction," because of timeliness concerns, in regard to Complainant's allegations of discrimination in regard to job duties and uniforms. That decision is final and no separate finding of discrimination in regard to job duties and uniforms is made in the decision and order set forth below.

Remedies:

24. Violation of Iowa Code section 601 A.6 (1985) having been established, and no affirmative defense having been shown, the Commission has the duty to issue a cease and desist order and to

carry out other necessary remedial action. Iowa Code S 601A.15(8) (1989). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "An appropriate remedial order should close off 'untraveled roads' to the illicit end and not 'only the worn one.'" Id. at 771. It should also seek to eliminate any effects of past discriminatory practices. Id.

Compensation:

25. The Commission has the authority to make awards of backpay. Iowa Code 601 A.1 5(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 her damages. Diane Humburd, CP # 03-85-12695, slip op. at 32-33, (Iowa Civil Rights Comm'n Sept. 28, 1989)(citingPoulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Id. at 34-35, 37 (citing *e.g.* EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.&. 1976), aff'd mem., 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977)). This the Complainant has done. See Findings of Fact Nos. 40- 48, 53). The burden of proof for establishing either the interim earnings of the Complainant or any failure to mitigate damages rests with the Respondent, although the Complainant may, as the Complainant has done here, choose to provide evidence of the interim earnings she is willing to concede. Diane Humburd, CP # 03-85-12695. slip op. at 35-37, (Iowa Civil Rights Comm'n Sept. 28, 1989)(citing e.g. Stauter v. Walnut Grove Products, 188 N.W.2d 305,312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). See Finding of Fact No. 54.

26. The award of backpay in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a backpay award ... provide[s] the spur or catalyst which causes employers and unions to self examine and to self-evaluate their employment practices and to endeavor to eliminate [employment discrimination]." Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (975). Second, backpay serves to "make persons whole for injuries suffered on account of unlawful employment discrimination." Id. 422 U.S. at 419, 95 S.Ct. at 2372. Both of these purposes would be served by an award of backpay in the present case.

27. "Iowa Code section 601 A.1 5(8) gives the commission considerable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, No. 88- 934, slip op. at 47 (Iowa January 24, 1990). The Iowa Supreme Court has approved two basic principles to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Id. at 45. "It suffices for the [agency] to determine the amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. (Quoting with approval Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973)).

Mitigation of Damages:

28. In order to meet its burden of proving that Complainant failed to mitigate her damages, Respondents must establish:

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

EEOC v. Sandia Corp., 639 F.2d 600, 627 (11 Oth Cir. 1980).

29.

> [A] back pay period terminates when the [complainant] obtains comparable employment, and will not resume if [complainant] voluntarily quits ... *a new*, better *paying* position. The back pay period may also be terminated when the [complainant] ceases to look for alternative employment.

Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 531 (2nd ed. 1989)(emphasis added). If a Respondent shows that a Complainant *unjustifiably quits* a job, the minimum earnings which would have been accrued in that position should be treated as interim earnings and deducted from the back pay award. EEOC v. Riss International, 35 Fair Empl. Prac. Cas. 423, 425- 26 (W.D. Mo. 1982). "[Tlhe back pay provision is income replacing and ... quitting a job for *reasons unrelated to amount of income* or further mitigating damages (absent discriminatory conditions or other *justifying* factors) should not entitle a party to additional back pay." Id. at 426 (emphasis added).

30. It is clear that the back pay period should end by September 30, 1988 as the complainant ceased looking for work in October of 1988 in order to care for her mother. See Finding of Fact No. 51. Prior to that date, Complainant maintained a diligent work search. See Findings of Fact Nos. 49, 52.

31. Complainant did quit employment as a side cook on May 8, 1987 because the pay was minimum wage and was without any tips, i.e. $3.35 per hour. See Findings of Fact Nos. 49, 50. This amount was substantially less than the $4.25 per hour she earned as a waitress in the Terrace Room and the $5.00 per hour she earned as a banquet waitress at Echo Valley. See Finding of Fact No. 40. Within two months she obtained temporary employment which paid substantially more than her employment as a side cook. See Findings of Fact No. 51, 54. Under the authorities cited above, complainant's back pay should neither terminate as of this quit nor should the earnings which would have accrued in this position after the quit be treated as interim earnings. See *also* Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 41 Fair Empl. Prac. Cas. 341, 347 (7th Cir. 1986).

32. Complainant also quit her work with Mercy Hospital in 1988 as she found it too distressing to do hairdressing for seriously ill and dying patients. See Finding of Fact No. 51. Complainant continued to search for work after this quit. See Findings of Fact Nos. 49, 52. Under these circumstances complainant's back pay should neither terminate as of this quit nor should the earnings which would have accrued in this position after the quit be treated as interim earnings. *See* Baggett v. Program Resources, Inc., 806 F.2d 178, 42 Fair Empl. Prac. Cases 648, 651 (8th Cir. 1986)(back pay continued to plaintiff who quit job to go to Florida to get married and find other work). Cf. EEOC v. Exxon Shipping Co. 745 F.2d 967, 36 Fair Empl. Prac. Cas. 330, 340 (5th Cir. (1984)(back pay continued despite refusal of job which required complainant to work every weekend when she had been discriminatorily denied a job which required only occasional weekend work).

Damages for Emotional Distress:

33. In accordance with the statutory authority to award actual damages, the Iowa Civil Rights Commission has the power to award damages for emotional distress. Chauffeurs Local Union 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986)(interpreting Iowa Code S 601A.15(8)). The following principles were applied in determining whether an award of damages for emotional distress should be made and the amount of such award.

34. "[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, No. 88-934, slip op. at 32 (Iowa January 24, 1990).

35. 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)(housing discrimination case). "Humiliation can be inferred from the circumstances as well as established by the testimony." Id. (quoted with approval in Blessum v. Howard County Board, 245 N.W.2d 836,845 (Iowa 1980)). 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).

36. When the evidence demonstrates that the complainant has suffered emotional distress proximately caused by discrimination, an award of damages to compensate for this distress is appropriate. Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984)(citing Nichols, Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview, 32 Drake L. Rev. 273, 301 (1982- 83)). The Complainant did suffer some compensable emotional distress. See Finding of Fact No. 56.

37.

> Because compensatory damage awards for mental distress are designed to compensate a victim of discrimination for an intangible injury, determining the

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

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

38. The amount of damages for emotional distress will depend on the facts and circumstances of each individual case. Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984). Past Commission decisions have referred to the consideration of various factors in awarding damages for emotional distress. Id. Upon examination of the Commission's cases, and the authorities cited therein, it is concluded that the two primary determinants of the amount awarded for damages of emotional distress are the severity of the distress and the duration of the distress. *See* Cheri Dacy, 7 Iowa Civil Rights Commission Case Reports 17, 24- 25 (1985); Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984). Even mild emotional distress can and should be compensated. *See* Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, No. 88-934, slip op. at 31-32 (Iowa January 24,1990).

Interest:

39. Interest begins to run on an award of damages from the date of the commencement of the action at the rate of ten percent per annum. Iowa Code 535.3 (1989). In this case, interest should be paid on damages from the time of the filing of the complaint on June 19, 1986.

Credibility and Testimony:

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

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Rachel Helkenn, is entitled to judgment because she has established that her discharge by the Respondents EVCC Corporation and Raccoon Valley Investment Company was based on her age in violation of Iowa Code Section 601A.6 (1985).

B. Respondents' motion to dismiss is denied.

C. Complainant Helkenn is entitled to a judgment of nine thousand two hundred twenty five dollars and fifty-two cents ($9,225.52) in back pay for the loss resulting from her discharge by the Respondents.

D. Complainant Helkenn is entitled to a judgment of one thousand dollars ($1000.00) in compensatory damages against Respondents for the emotional distress she sustained as a result of her discriminatory discharge by the Respondents.

E. Interest shall be paid by the Respondents to Complainant Helkenn at the rate of ten percent per annum, commencing on June 19, 1986 for all back pay then due; and commencing, for all back pay due after June 19, 1986, on the date payment of wages would have been made if Complainant had remained in her employment with Respondents, and continuing until date of payment.

F. Interest shall be paid by the Respondents to Complainant Helkenn on the award of compensatory damages for emotional distress at the rate of ten percent per annum commencing on June 19, 1986 and continuing until date of payment.

G. Respondents are hereby ordered to cease and desist from any further practices of hiring or discharging employees at Echo Valley Country Club on the basis of their age, except in regard to those positions where an age requirement is established by law.

H. Respondents' present management personnel at Echo Valley Country Club shall read, within 60 days of the date of this order,Successfully Interviewing Job Applicants, a publication which is available from the Commission or the Job Service of Iowa.

I. Respondents shall post, within 60 days of the date of this order, in a conspicuous place at its location at the Echo Valley Country Club, in an area readily accessible to and frequented by employees, the notice, entitled "Equal Employment Opportunity is the Law," which is available from the Commission.

J. All of Respondents' future job advertising concerning positions at Echo Valley Country Club shall, for a two year period commencing with the date of this order, state "An Equal Opportunity Employer".

K. In addition to whatever recruitment sources it presently uses, Respondents shall, for a two year period commencing with the date of this order, notify the Des Moines local office of the Job

Service of Iowa of any waitress, waiter or other Food and Beverage openings which occur at the Echo Valley Country Club.

L. Respondents shall file a report with the Commission within 180 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs H through K inclusive of this order.

M. To the extent that any exception, appeal, or other objection to any part of this ruling, whether made before the Administrative Law Judge or before the Commission, has not been specifically adopted, rejected, or otherwise decided in this ruling, such exception, appeal or other objection has been considered and is hereby found to be without merit and is overruled.

Signed this the 3rd day of April, 1990.

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319
515-281-4480