

BEFORE THE IOWA CIVIL RIGHTS COMMISSION

ANN M. REDIES, Complainant,

VS.

BUMPER-TO-BUMPER and

**FAUSER OIL COMPANY, INC.
Respondents.**

CP # 06-87-16226

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Ann M. Redies against the Respondents Bumper-to Bumper and Fauser Oil Company, Inc. alleging discrimination on the basis of sex in employment. Specifically, Ms. Redies alleges that the Respondents denied her a promotion to the position of Assistant Manager because of her sex. This is the sole allegation of discrimination in her complaint.

A public hearing on this complaint was held on May 24, 1989 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Fayette County Courthouse in West Union, Iowa. The Complainant, Ann M. Redies, was represented by Larry F. Woods, Attorney at Law. The Respondents were both represented by T. David Katsumes, 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. 16(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(1).

The Iowa Civil Rights Act requires that the existence of sex 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 filed a verified complaint CP # 0687- 16226 with the Iowa Civil Rights Commission, on May 21, 1987, alleging violation of Iowa Code section 601 A.6 which prohibits discrimination in employment on the basis of sex. The date of incident stated in the complaint is May 4,1987.
2. The complaint was investigated. After probable cause was found, conciliation was attempted and failed. (Notice of Hearing). Notice of Hearing was issued on March 15, 1988. An order providing for a continuance until a new Administrative Law Judge was assigned to hear the case was issued on November 1, 1989. The final hearing date was set by a scheduling conference memorandum order dated February 6, 1989.

Background:

3. The Complainant, Ann M. Redies, began her employment as a cashier-clerk at the Bumper-to-Bumper auto parts and convenience store in Oelwein, Iowa in May of 1984. (C. Ex. F, Tr. at 10). In the summer of 1986 she voluntarily quit and was subsequently rehired in September or October of that year. (Tr. at 15). She continued to work in that position until she left her employment on May 13, 1987. (Tr. at 17).
4. Respondent Fauser Oil Company is an automotive related business with approximately fifty-five employees at nine locations in April of 1987. (Tr. at 182, 215). Neither the total number of management employees nor a breakdown of management or nonmanagement employees by sex throughout the corporation at any given time are reflected in the record. As of the date of hearing, there were nineteen employees at the Elgin location, seven of whom are female, five of whom are managers. There are a total of seven managers at the Elgin, Iowa location. (Tr. at 183, 215, 216). It should be noted four of the five female managers and the general manager, a male, are children of Don Fauser, President of the Fauser Oil Corporation. (Tr. at 181). One of these children, Jill Strong, a female, serves as both manager of the Elgin parts store and manager of the auto parts division of Fauser Oil Company. (Tr. at 229).
5. The Respondent Bumper-to-Bumper auto parts store at Oelwein is one of two auto parts stores wholly owned by Respondent Fauser Oil Company. The second auto parts store is at Elgin, Iowa. Fauser Oil Company is also part owner of a third auto parts store in Decorah. (Tr. at 183, 215). Jill Strong, manager of the auto parts division, has authority only over the Oelwein and Elgin stores. (Tr. at 229).
6. Of these auto parts stores, the Oelwein store is the only one with both an auto parts and a convenience section. (Tr. at 252). The Oelwein store is also the only store which has had an assistant manager. (Tr. at 253). The manager of the Oelwein store, Tony Habeger, who was hired in January 1985, is the third person, all of whom were males, to manage that store. (Tr. at 218, 259).

7. As of early April 1987, the staff at the Oelwein store consisted of two males, Tony Habeger, manager, and Ron Torrey, assistant manager, and five females, Ann Redies, Susan Kortenkamp, Thelma Smith, Anne Bagby and Linda Woodward, all cashier-clerks. (Cp. Ex. A, J; Tr. at 225).

8. A typical biweekly schedule for the store would have Tony Habeger at the store from 45 to 55 hours per week, usually during the hours of 6:00 a.m. to 3:00 p.m. Ron Torrey would be scheduled to work 45 to 55 hours per week, usually during the hours of 1:00 p.m. to 10:00 p.m. The Complainant and Susan Kortenkamp would each be scheduled to work 35 to 40 hours per week, usually during the hours of 7:00 a.m. to 3:00 p.m. and 2:00 p.m. to 9:00 p.m. (C. Ex. A).

9. Jill Strong would visit the Oelwein store approximately one time a week, usually on a Wednesday or Thursday afternoon, to inspect the store and ascertain whether the cashier-clerks were doing their jobs correctly. (Tr. at 28, 57, 300). She would be in the Oelwein store approximately four to eight hours per week. (Tr. at 246). Don Fauser would stop by the Oelwein store, approximately two times a week for periods ranging from five minutes to one hour. (Tr. at 226, 300). Don Fauser and Jill Strong had very limited communication directly with either the Complainant or Susan Kortenkamp. (Tr. at 57-59, 226-27).

The Assistant Manager Position:

10. At some point in early April 1987, Ron Torrey quit, thereby creating an opening for the Assistant Manager position. (Tr. at 126, 222). As of the date of hearing, this opening was the only Assistant Manager opening in the company since February 1985, when the Assistant Manager position was created and Ron Torrey was hired. (Tr. at 18, 219, 227-28).

11. The Assistant Manager position in Oelwein was created so that someone would be available to either (a) manage the Oelwein store in the event that the company chose to transfer Tony Habeger to a position at a new store in West Union or at the established Elgin, Iowa location, or (b) manage a new store which the company was contemplating opening in Independence, Iowa. (Tr. at 189-90, 228, 263). There is no evidence in the record that any concrete actions, other than the placement of Assistant Managers at the Oelwein store, were taken to bring either of these potential goals to realization. By the time Mr. Torrey left, he had been at the store for over two years. (Tr. at 126, 222, 227-28). After he left, it was anticipated by Don Fauser that the new Assistant Manager would not be required to take over a store for at least one year and possibly longer. (Tr. at 190, 202). When the person hired to replace Mr. Torrey, Lloyd Patrick, left, in July of 1988, he had been in the position for over one year without being transferred or promoted to manager. (Tr. at 221, 250-51, 286). He was not replaced with another Assistant Manager. (Tr. at 218-19). At the time of the public hearing, Tony Habeger was still employed as Manager of the Oelwein store. (Tr. at 259).

12. There is no written job description for the Assistant Manager position. (Tr. at 226, 248). The duties of the Assistant Manager at the Oelwein store, who was also known as the "parts person," were primarily involved with the parts area of the Oelwein store. (Tr. at 30-31, 271 72). These duties included being responsible for the parts area, waiting on customers in that area, running a sales route to parts dealers twice a week, ordering parts, handling refunds, writing up charges, defective parts and returns, waiting on customers at the cash register in the convenience area

when the cashier clerks were out making a delivery, stocking shelves, emptying the garbage can, sweeping and mopping floors. (Tr. at 30-31, 111, 119, 128, 147-49, 271-72).

13. Although this position was denominated a management position, it involved very limited supervisory duties. (Tr. at 29, 93, 112, 115, 121-22, 128-29). In the usual course of events, Ron Torrey, the former Assistant Manager, did not direct the Complainant or other employees as to what their duties were. (Tr. at 29, 93, 112, 128-29, 140, 147). He did ensure that the night convenience cashier got her list of cleaning and stocking duties done for the night. (Tr. at 129, 139-40). This list would be prepared and provided by Tony Habeger and given to Ron Torrey. (Tr. at 120-21, 148). Mr. Torrey did the scheduling of employees' hours only if Mr. Habeger were on vacation. (Tr. at 93, 147).

14. In addition to the above duties, if a part was brought back for refund, either Ron Torrey or Tony Habeger would approve the refund. (Tr. at 93, 112). At times, if Mr. Torrey was there and Mr. Habeger was not, Mr. Torrey would hold the part in order to allow Mr. Habeger to make the decision. (Tr. at 93). At other times, the convenience clerks would make refunds, but would be certain to inform Mr. Torrey or Mr. Habeger if there was any question about the refund. (Tr. at 94). This might happen once or twice a month. (Tr. at 94). At times there might be other customer complaints or problems which only Mr. Torrey could handle. (Tr. at 115).

The Cashier-Clerk Position:

15. There is no written job description for the cashier-clerk position. (Tr. at 248). The duties of the cashier-clerks, such as the Complainant, changed over time. Before Mr. Habeger became manager in January of 1985, the cashier-clerks worked only in the convenience section which involved running the cash register, stocking and selling food and other convenience store items, cleaning, and selling gasoline to customers. (Tr. at 19, 23, 103, 207). After January of 1985, Mr. Habeger gradually instituted a system whereby cashier-clerks learned parts department duties and parts department personnel learned how to handle the cash register, the gasoline counter and other convenience department functions. (Tr. at 66, 103, 262). This was done so that employees in the two areas could cover for each other at busy times and so they could be scheduled to allow a more effective operation. (Tr. at 38, 262).

16. Over time, some cashier-clerks, such as the Complainant, Susan Kortenkamp, and Linda Woodward learned parts department duties and skills. Other employees, such as Thelma Smith elected not to be as involved in the parts area. (Tr. 23-24). The Complainant and Susan Kortenkamp would be assigned to the parts area at times instead of the convenience area. Whichever area the employee was assigned to was his or her first priority. (Tr. at 146-47). On the average night, when Ron Torrey was still employed, the Complainant might spend thirty per cent of her time in the parts area. (Tr. at 39).

17. These parts-related duties would include waiting on customers in the parts area. This involved looking up parts for customers in a catalog and then locating the parts for them. (Tr. 21). Other duties related to the parts area included ordering parts, occasionally doing monthly and daily books, checking freight that came in, pricing and stocking it, and doing inventory, (Tr. at 19-24)

Remarks Made By Manager Tony Habeger:

18. At some time during the interval between Ron Torrey's leaving the position of Assistant Manager and the commencement of interviews for that position, Tony Habeger made statements on three separate occasions to three individual female employees at the Oelwein store indicating that a man should be hired in order to do physical tasks such as heavy lifting or emptying garbage cans. (Tr. at 49, 107, 108, 133). Once, while the Complainant was filling the shelves with oil, he told her that he needed a man there to do the heavy lifting. (Tr. at 49). On another occasion, he informed Susan Kortenkamp that he would like to have a man at the store to do the heavy lifting. (Tr. at 133). On a third occasion, Mr. Habeger told Thelma Smith that he wanted a man for the Assistant Manager position so a man would be available to empty the garbage cans, a task previously done primarily by the former Assistant Manager. (Tr. at 107-08). During his conversation with Ms. Smith, Mr. Habeger also informed her that he had a bad back. (Tr. at 116).

19. Female employees at the Oelwein store performed tasks requiring the lifting of weights up to 35 pounds. (Tr. at 49). Female employees had been "dumping the garbage can since Ron (Torrey) quit." (Tr. at 119).

20. As of the time these remarks were made, the Complainant had three years of experience with the store; Susan Kortenkamp had a year and ten months experience; Thelma Smith had four years of experience with the store. (Cp. Ex. C, F; Tr. at 99-100).

21. These statements show that Tony Habeger acted with an intent to ensure that a male was hired for the Assistant Manager position and to exclude females from that position. Mr. Habeger was not only the supervisor of the recipients of the remarks, he was also an active participant in the hiring process for the Assistant Manager position. See Findings of Facts Nos. 24, 27, 32. The recipients of these remarks were not only his subordinates, but also were experienced female employees who could have a potential interest in the position. See Findings of Facts Nos. 16, 20. Such remarks may have been part of a strategy, albeit a failed one, to lower their expectations in regard to this position or to even discourage them from applying for it. In light of the source, the timing, the content, and the intended audience of these statements, they cannot be dismissed as stray sexist remarks. There is no evidence in the record of any statements made by other management personnel reflecting an intent to discriminate on the basis of sex.

The Selection Process:

22. After Mr. Torrey left, the vacancy in his former position was not advertised, but was made known only by word of mouth. (Tr. at 225). The Complainant and Susan Kortenkamp were among those who were aware of the opening, as they worked at the store, and they completed applications for the position on or about April 14, 1987. (C. Ex. C, F). Both of them filled out their applications on the same date. (C. Ex. C, F; Tr. at 26, 131-32). Interviews were conducted on the date they submitted their applications. (Tr. at 131- 32, 134). Their applications were not seen by Tony Habeger, Don Fauser or Jill Strong until the day of the interviews. (Tr. at 131 32, 134, 220-221, 234). They were not interviewed for the positions. (Tr. at 135, 238-39). It should be noted, however, that the Complainant and Ms. Kortenkamp were considered and rejected for

the position before they ever submitted their applications to the Respondent. See Findings of Fact Nos. 24, 26.

23. It is necessary to set forth in some detail the chronology of the selection process during the interval from the time of Ron Torrey's leaving the Assistant Manager position to the time during which applications were reviewed and interviews were conducted. Since the chronology of the selection process is not as clear in the record as one might wish, reasonable inferences have had to be drawn at certain points in order to clarify the order of events. The chronology of this period will be discussed in detail in subsequent findings of fact. In summary, the chronology of the selection process during this period is:

a. Jill Strong and Tony Habeger meet to discuss whether the Assistant Manager should be hired from within the Oelwein store. Parts ability and customer relations are the criteria discussed. They decide to recommend to Don Fauser to not hire from within. See Findings of Fact Nos. 24-25.

b. Jill Strong and Don Fauser meet to discuss this recommendation. Together, they make the decision to not hire from within the Oelwein store to fill the Assistant Manager position. See Finding of Fact No. 26.

c. Jill Strong and Don Fauser decide to seek a candidate with supervisory experience to fill the Assistant Manager position. See Findings of Fact Nos. 29-30.

d. Don Fauser and Tony Habeger meet to discuss the position. Tony Habeger is informed by Don Fauser that the company will not be hiring from within for the Assistant Manager position. In stating why he believes neither the Complainant nor Susan Kortenkamp are qualified for the Assistant Manager position, Mr. Habeger compares their abilities in the areas of customer relations and parts. Mr. Habeger is also informed, for the first time, that the company is seeking a candidate with supervisory experience. See Finding of Fact No. 27.

24. After Mr. Torrey left, but prior to the interviews, Jill Strong and Tony Habeger discussed whether any of the Oelwein store employees were suitable for the Assistant Manager position. (Tr. at 235-36). At this meeting, Mr. Habeger recommended to Ms. Strong that neither the Complainant nor Sue Kortenkamp be hired for the position because neither of them were ready for the job. (Tr. at 273). They concluded that none of the Oelwein Bumper-To- Bumper employees "fit the one we were looking for." (Tr. at 236).

25. Although the testimony does reflect Mr. Habeger's and Ms. Strong's opinions on specific areas of the Complainant's and Susan Kortenkamp's job performance and how those areas would impact on their suitability for the position, it does not directly reflect whether or not these specific areas were discussed at the meeting. (Tr. at 235- 37, 269, 273, 274). While Mr. Habeger did not communicate his desire to hire a man to Ms. Strong, neither his testimony nor Ms. Strong's identifies what other specific criteria were or were not considered or discussed at this meeting. (Tr. at 235-36, 241, 269, 273, 274). A reasonable inference is drawn, however, that the criteria discussed at that meeting were (a) ability in the parts area, and (b) customer relations. See

Finding of Fact No. 28. A further reasonable inference is drawn that this meeting occurred before the meeting between Jill Strong and Don Fauser, to be discussed below, where supervisory experience was identified as a criterion in the search for an Assistant Manager. See Findings of Fact Nos 29-30.

26. After meeting with Mr. Habeger, Ms. Strong consulted with Don Fauser, President of Fauser Oil, on the question of whether or not to hire from within for the Assistant Manager position. (Tr. at 237). Although Mr. Fauser makes the ultimate decision on who will be hired for management positions, Mr. Fauser and Ms. Strong together made the intermediate decision, which was final in its effect on the Oelwein store employees, that the company would not hire within to fill the position. (Tr. at 186, 190-91, 222, 236). This decision was made approximately ten days before the interviews. (Tr. at 222). The conclusion that this decision effectively eliminated the Complainant and Susan Kortenkamp from consideration is further reinforced by Jill Strong's testimony that she knew, well before the interviews, that they would not be interviewed. (Tr. at 238-39).

27. Mr. Fauser subsequently met with Mr. Habeger to inform him of this decision. (Tr. at 190-91, 222). Mr. Habeger's first inquiry at this meeting was whether they were going to hire within. (Tr. at 191). Taken in context, this was an inquiry as to whether or not the recommendation to not hire within had been accepted. After being informed that it had been, Mr. Habeger told Mr. Fauser that, if the Complainant and Susan Kortenkamp were one person, they would make a good Assistant Manager. (Tr. at 191-92). Mr. Habeger indicated that the Complainant would have the knowledge of the parts business, while Ms. Kortenkamp would have a good attitude in the sense of being better able to get along with people. (Tr. at 191-92). He also told Mr. Fauser that Ms. Redies had problems in dealing with customers while Ms. Kortenkamp lacked knowledge of the parts business. (Tr. at 191-92, 199-200). At this point, apparently for the first time, Mr. Habeger was informed that the interest in eventually placing the Assistant Manager in charge of the Oelwein store, if Mr. Habeger left, or in charge of a new store in Independence, had led Mr. Fauser to conclude that they were going to look for someone with supervisory experience. (Tr. at 190-91). This meeting between Mr. Habeger and Mr. Fauser occurred prior to the interviews. (Tr. at 190-91, 268).

28. As previously noted, there is no testimony specifying the details of what criteria for selection of a new Assistant Manager were discussed or considered at the earlier meeting between Tony Habeger and Jill Strong. See Finding of Fact No. 25. The record shows that the next meeting which Tony Habeger had with any management official on the topic of hiring for Assistant Manager was his meeting with Don Fauser. See Finding of Fact No. 27. It is logical to infer that the criteria actually discussed when Mr. Habeger and Ms. Strong met, and relied upon for their recommendation, would be the ones which Mr. Habeger reiterated to Mr. Fauser at the subsequent meeting when they discussed Mr. Fauser's acceptance of this recommendation. The only criteria which Mr. Habeger mentioned to Mr. Fauser were (a) ability in the parts area, and (b) customer relations. These, therefore, are the only overt criteria about which it can be said, with any certainty, were relied on in the formulation of the recommendation to not hire within the company, and more specifically, to not hire the Complainant and Susan Kortenkamp.

29. Tony Habeger and Don Fauser were aware that the Assistant Manager position was created with the eventual goal in mind of placing the Assistant Manager into a Manager position at either Oelwein or Independence. (Tr. at 189-90, 228, 263). This concern was translated into a decision to seek a candidate with supervisory experience during consultation between Jill Strong and Don Fauser. (Tr. at 192). Although it is known that this meeting occurred at some time prior to the interviews, the record does not show the precise point in the chronology of the selection process where this occurred. (Tr. at 192). No written records of this meeting were kept. (Tr. at 253-54).

30. Nonetheless, it may be reasonably inferred that the decision to seek a candidate with supervisory experience occurred after the meeting between Jill Strong and Tony Habeger and before the meeting between Tony Habeger and Don Fauser. If supervisory experience had been determined to be an important criterion prior to the meeting between Jill Strong and Tony Habeger, certainly Mr. Habeger, who had no knowledge of the Complainant's supervisory experience until she applied, would have emphasized this perceived lack of supervisory experience in his subsequent discussion with Mr. Fauser, as opposed to the criteria he did emphasize. (Tr. at 270). See Finding of Fact No. 27. Also, the meeting between Mr. Fauser and Mr. Habeger is the only time shown in the record where Mr. Habeger was informed of the company's interest in obtaining a candidate with supervisory skills See Finding of Fact No. 27.

31. Applications received prior to the day of the interviews were reviewed by Don Fauser and Jill Strong to determine who would be interviewed. (Tr. at 225, 249-50, 289). The Complainant's and Susan Kortenkamp's applications were not reviewed because they were not received by Mr. Fauser and Ms. Strong until the day of the interviews. (Tr. at 192). Tony Habeger was not involved in the review of the applications, but was informed of which applicants to call to arrange interviews. (Tr. at 225, 249-50, 289).

32. Several interviews were conducted jointly by Don Fauser, Jill Strong, and Tony Habeger. (Tr. at 36, 197, 221). The persons interviewed included at least three male applicants and one female applicant, Melissa Sue Strempe. (Tr. at 196-98, 250-51). The record shows neither the total number of interviews nor the sex of the other persons interviewed. After further consideration of the applicants, Lloyd Patrick was hired for the Assistant Manager position approximately one week after the interviews. (Tr. at 250- 51). He began his employment as Assistant Manager on May 11, 1987. (C. Ex. A; Tr. at 221).

Customer Relations:

33. The only negative factor about the Complainant brought out during the discussion between Jill Strong and Tony Habeger, on whether to hire from within to fill the Assistant Manager position, was the concern about the Complainant's problems in the area of customer relations. This was also the only negative factor about the Complainant brought out by Mr. Habeger in his subsequent discussion with Don Fauser.

34. These problems included the use of offensive language in front of customers, which was noticed by Jill Strong, and the failure to have a smile on her face, which was noticed by Don Fauser. (Tr. at 200, 237-38). Nonetheless, the basic and predominant customer relations problem was the persistent refusal of certain male customers to deal with the Complainant because, when

they were looking for auto parts, they wanted to be served by men and not by women. (Tr. at 38). This problem was also encountered by Susan Kortenkamp. (Tr. at 135).

35. The Complainant brought this problem to the attention of Tony Habeger, who never personally observed her having any problems with customers. (Tr. at 76, 272). Mr. Habeger informed the Complainant that she should handle these situations as best she could. (Tr. at 76). When the Complainant informed him that she was walking away from some of these customers, Mr. Habeger made no response which would indicate that this practice was objectionable. (Tr. at 76). The Complainant would also refer such customers to a male employee if one was present. (Tr. at 77). Susan Kortenkamp, whose customer relations ability was favorably evaluated by Tony Habeger, informed reluctant male customers, when no male personnel were present to assist, that a man would be available in the morning if they wished to deal with a man. (Tr. at 151, 191-92).

36. Although the Complainant did, on occasion, exchange words" with male customers who did not wish to be served by female employees, such events were not frequent enough to constitute anything out of the ordinary. (Tr. at 101, 173). Other employees, including Tony Habeger, would also become upset with some customers on occasion. (Tr. at 101).

37. In light of the actual nature and magnitude of the Complainant's problems with customer relations, the steps she took to deal with these problems and her immediate supervisor's reactions thereto, the raising of this issue by Mr. Habeger, and his statements demonstrating a desire to hire a man for Assistant Manager, it appears that the customer relations reason for not promoting the Complainant is, in large part, a criterion utilized by Mr. Habeger in his recommendation in order to meet the desire of male auto parts customers to be served only by males.

Effect of the Habeger Recommendation:

38. Although Mr. Habeger was not directly consulted by Mr. Fauser until after the decision to not hire within was made, Mr. Habeger's considerable influence over that decision is amply demonstrated by his meeting with Ms. Strong and the subsequent adoption of his recommendation by Ms. Strong and Mr. Fauser. The importance of Mr. Habeger's recommendation is also shown by the testimony of Mr. Fauser that he would consult with the store manager prior to hiring an Assistant Manager as part of his usual hiring procedure whenever that position was open. (Tr. at 187-88). Mr. Habeger's recommendation would also be given considerable weight because he would be the supervisor of the new Assistant Manager, because he had supervised all the employees at the store, including the Complainant, and because he had greater opportunity to observe the employees' performance than either Don Fauser or Jill Strong. See Findings of Fact Nos. 5-9.

Sex a Motivating Factor in Decision to Not Hire From Within:

39. In light of the comments made by Mr. Habeger indicating he wished to hire a man for the position, the influence which his recommendation had, and the nature of the Complainant's "customer relations" problems, it is concluded that the greater weight of the evidence shows that the sex of the Complainant and the other cashier-clerks was a substantial or motivating factor in

the Respondents' decision to not hire an Assistant Manager from within the personnel at the Oelwein store. Although Mr. Habeger did not mention his desire to hire a man for the Assistant Manager position to Ms. Strong, this only demonstrates that Mr. Habeger chose to follow a more subtle strategy than to tell the head of the auto parts division, who was also a female, a parts store manager, and the daughter of the President of the company, that he wished to limit the Assistant Manager position to males. An evaluation of the abilities of the Complainant and Susan Kortenkamp which asserted that neither of them performed well enough in both the customer relations and the auto parts areas to be promoted to Assistant Manager was at least part of the strategy applied.

Selection Process Results in the Absence of Sex Discrimination:

40. On brief, the Respondents assert that the Complainant would not have been promoted to the Assistant Manager position even in the absence of sex discrimination. (Respondents' Brief at 6). They argue that the Complainant would not have been promoted in any event because of (1) her customer relations problems, (2) her behavior at a business meeting in Cedar Falls, Iowa, and (3) her lack of supervisory experience. (Respondents' Brief at 2).

41. To the degree to which the customer relations problems of the Complainant constitute a reason for not hiring the Complainant which is untainted by sex bias, the greater weight of the evidence does not show that the Complainant would not have been promoted into the Assistant Manager position due to this reason even in the absence of sex as a motivating factor. See Findings of Fact No. 33-37.

Supervisory Experience:

42. In relying on the supervisory experience criterion, the Respondents emphasize a comparison between the experience of the Complainant and Lloyd Patrick. Lloyd Patrick's supervisory experience consisted of (a) supervising 5 or 6 employees while constructing buildings during the period from July 1984 to May 1985, and (b) supervising 2 or 3 employees while doing insulation and siding work from May 1985 to November 1986. (Cp. Ex. B). The Complainant was a health and beauty department head in a discount store from June 1977 to October 1983 where she occasionally gave direction to two part-time employees who were not assigned exclusively to her, but worked in various departments of the store. (Cp. Ex. F; Tr. at 63-64).

43. The Complainant had been performing parts area duties with sufficient frequency to learn the parts department functions since her return in September or October of 1986. (Tr. at 15, 23). Mr. Patrick had no auto parts experience at the time of his hire. (Cp. Ex. B; Tr. at 202).

44. The supervisory experience criterion was not developed until after the Complainant's rejection, which became final at the time Jill Strong and Don Fauser decided to not hire from within. See Finding of Fact No. 26. In the absence of a negative recommendation resulting from sex discrimination, and in recognition of her parts experience, the management may well have decided to promote the Complainant into the position without further defining its criteria, which it did only after the decision was made to not hire from within. Under these circumstances, the

Complainant would never have had to compete with Lloyd Patrick or the other non-employee applicants.

45. Even assuming that supervisory experience were to become a criterion in the absence of sex discrimination, it is difficult to believe that it had or would have the importance ascribed to it by Don Fauser in light of the actual requirements and duties of the position and the nebulous nature of the plans to move the Assistant Manager into a Manager position at some time a year or more after the date of hire. (Tr. at 192, 201-02, 205). See Findings of Fact Nos. 10-13. Given these factors, his testimony is equally unpersuasive to the extent it indicates that no weight would have been given to parts experience in a selection process untainted by a discriminatory recommendation to not hire the Complainant. (Tr. at 192, 201-02, 205). Indeed such testimony is contradicted by his statement that, "[i]n the parts business, you have to have somebody that knows parts on that end of the business. . ." (Tr. at 213).

46. The greater weight of the evidence does not show that the Complainant would not have been promoted into the Assistant Manager position due to her lack of supervisory experience even in the absence of sex as a motivating factor.

The Cedar Falls Incident:

47. The Complainant and Susan Kortenkamp went to an evening meeting sponsored by Bumper-to-Bumper which was held in Cedar Falls, Iowa. (Tr. at 140, 152). They were sent there to note what was being said and to ascertain if it would be helpful to the store. (Tr. at 153). They both seated themselves at a table near the front of the room. (Tr. at 155). During the course of the presentation, they talked to each other about the presentation. (Tr. at 141). At times, they commented that the presentation did not pertain to their situation, but to owners of Bumper-to-Bumper stores and warehouses. (Tr. at 141, 163).

48. Their comments to each other were loud enough to be heard by other participants at the meeting who were bothered by them. (Tr. at 162). Mark Lauthen, a Bumper-to-Bumper warehouse employee was told to sit near them in order to see if that would quiet them down. (Tr. at 162). He sat down next to them, but they continued to talk. (Tr. at 163). He then asked them to quiet down, but the record does not reflect whether or not they did. (Tr. at 167).

49. Larry Slauson, a sales representative for a Bumper-to-Bumper distribution center in Iowa, was informed by Burl Blancher and Wayne Wickwire, the President and Vice-President, respectively, of Bumper-to-Bumper of Iowa, that they had observed personnel from the Oelwein store talking loudly enough to distract others at the Cedar Falls meeting. (Tr. at 168-72). He then informed Jill Strong. (Tr. at 172, 239).

50. Ms. Strong contacted Tony Habeger and told him to talk to the Complainant and Susan Kortenkamp. (Tr. at 240). They informed Mr. Habeger that they had not been disruptive, but were simply talking about the presentation. (Tr. at 153). Mr. Habeger informed Ms. Strong that there was no disruption at the meeting. (Tr. at 241). There is no credible evidence in the record that any further action, disciplinary or otherwise, was taken by Respondents' management in regard to this incident.

51. There is no evidence in the record to indicate that the Complainant's and Susan Kortenkamp's behavior at the Cedar Falls meeting played a role in the decision of Jill Strong and Don Fauser to not hire within the Oelwein store. Don Fauser testified that this incident did become a factor when the Complainant and Ms. Kortenkamp applied, which was after the decision to not hire within had been made. (Tr. at 190). To the extent that this testimony constitutes an assertion that the Complainant would not have been promoted due to this incident, even in the absence of sex discrimination, it is simply not persuasive when viewed in the light of the complete absence of disciplinary action against the Complainant and Susan Kortenkamp arising out of this incident, and the cessation of any further management inquiry into this matter once Jill Strong was informed by Tony Habeger that the Complainant's and Ms. Kortenkamp's behavior resulted in no disruption at the meeting. Also, any evaluation made by Mr. Fauser of the Complainant's qualifications at that juncture would have taken into account the prior decision to not hire from within as well as the negative recommendation and statements about the Complainant by Tony Habeger.

52. The Complainant, on brief, makes the assertion that the Cedar Falls incident was never brought to the attention of the Commission by Respondents' management during the investigation of this complaint. (Complainant's Brief at 3). There is no evidence in the record to show whether or not this is true. Therefore, this assertion has been given no weight in considering the Cedar Falls incident.

53. The greater weight of the evidence does not show that the Complainant would not have been promoted into the Assistant Manager position due to the Cedar Falls incident, whether it is considered individually or in combination with her customer relations problems and lack of supervisory experience, even in the absence of sex as a motivating factor.

Credibility:

54. The Complainant's testimony was generally credible with the exception of her testimony to the effect that she and Susan Kortenkamp filed their application one week before the interviews. (Tr. at 26). Susan Kortenkamp's recollection was clearer on this point. The testimony of Susan Kortenkamp, Thelma Smith, Mark Lauthen and Larry Slauson was credible.

, Mark Lauthen and Larry f 55. The testimony of Jill Strong and Don Fauser is also basically credible. That portion of their testimony which may be said to indicate that the Complainant would not have been hired in the absence of sex discrimination, due to the factors of customer relations, supervisory experience, and the Cedar Falls incident, is not persuasive because the greater weight of the evidence, including that portion of Mr. Fauser's and Ms. Strong's testimony which demonstrates the weakness of that conclusion, is to the contrary.

56. The testimony of Tony Habeger was highly unreliable and, with few exceptions, is cited only when supported by other witnesses or when his testimony constituted an admission against the interest of the Respondents. It is especially difficult to believe that Mr. Habeger could not recall any of the three separate conversations he had with the Complainant, Susan Kortenkamp, and

Thelma Smith wherein he informed them, in essence, that he wanted a man for the Assistant Manager position. (Tr. at 278-79).

57. Mr. Habeger also testified that he was informed by Thelma Smith, after he had talked to the Complainant and Susan Kortenkamp about the Cedar Falls incident, that the Complainant and Ms. Kortenkamp told Ms. Smith that they had been disruptive and that they thought it was funny. (Tr. at 276-77). He further testified that he informed Jill Strong of these events. (Tr. at 277).

58. This story was effectively rebutted by the testimony of Thelma Smith, who did not recall any such conversation with Mr. Habeger, as well as the testimony of Susan Kortenkamp and the Complainant, neither of whom recalled talking to Thelma Smith about the incident. (Tr. at 297-98, 301, 302). This story also directly contradicts the testimony of Jill Strong which reflects only one communication to her initiated by Mr. Habeger on this matter, i.e. that there was no disruption at the meeting. (Tr. at 241).

Equal Pay:

59. During the course of the hearing, the question arose of whether the Respondent's pay differential between the Complainant (and other cashier-clerks involved in the parts area) and the Assistant Manager constituted different treatment on the basis of sex.

60. At the time she left her employment, the Complainant was being paid \$3.80 per hour. (Cp. Ex. J; Tr. at 33). Ron Torrey, the former Assistant Manager, received a salary of \$240.38 per week. (Cp. Ex. J). Lloyd Patrick, the man who replaced Ron Torrey received a salary of \$230.77 per week. (Cp. Ex. J). Based on an average 50 hour week, Ron Torrey's hourly pay was \$4.81 per hour, \$1.01 per hour more than the Complainant was paid. Lloyd Patrick's hourly pay on the same basis would be \$4.61 per hour, \$.81 per hour more than the Complainant was paid.

61. The Complainant's duties in the parts area were basically the same as the Assistant Manager's with two exceptions: (1) the handling of refunds and other customer- related complaints, and (2) running a sales route to service dealers. See Findings of Fact No. 12-18.

62. The evidence in the record is not sufficient to show whether or not the work performed by the Assistant Manager is substantially equal, in terms of the degree of accountability required, to that of the Complainant in spite of these two additional duties or sets of duties. Although the record does show that, if Tony Habeger or Ron Torrey were present, refunds were to be brought to one of them for decision, it does not reflect how often this happened. Although the record establishes that there were other customer complaints or problems which could be handled only by Mr. Torrey, it does not establish, nor even address, the exact nature of those problems or their frequency. See Finding of Fact No. 14.

63. Although the record shows that Mr. Torrey ran a sales route to dealers two days a week, it is silent on the details of what was involved in the performance of this duty. For example, did this duty involve merely taking orders and making subsequent deliveries of the parts or did it involve promoting certain products and suggesting purchases by the dealer? See Finding of Fact No. 12.

Emotional Distress:

64. The Complainant left her employment on May 13, 1989, two days after Lloyd Patrick started on May 11, 1989. See Findings of Fact No. 3 and 32. She quit because she was never informed why she was not hired for the position, she realized her sex was a factor in not getting the position, she could not bring herself to continue to work under these circumstances with Lloyd Patrick, and because she had no real opportunity for advancement within the company for at least several years. (Tr. at 40, 55-57, 90). It had been a "total shock" to her to come to work and find out that Lloyd Patrick was hired for the position. (Tr. at 90). At the time she quit, she wondered how she was going to feed her daughter. (Tr. at 51). She felt "funny" going into Siegs to apply on the day she quit, but was otherwise not embarrassed by the failure to promote her. (Tr. at 44, 51-52).

65. The Complainant suffered no physical symptoms or sleeping problems as the result of not being promoted into the Assistant Manager position. (Tr. at 51). She was hired at Siegs on the Monday following the day she quit. (Tr. at 44-45). Official notice is taken of the fact that the Monday following May 13, 1987 is May 18, 1987, five days after the day she quit. Fairness to the parties does not require that they be given an opportunity to contest this fact.

Back Pay:

66. In the absence of discrimination in the selection process, the promotion of the Complainant to Assistant Manager would have occurred by April 13, 1987. This date is selected because, in the absence of the discriminatory decision to not hire from within, it would not have been necessary to obtain and review the applications of non-employee applicants, to interview them, or to contact their references. Given this reduction in the length of the selection process, and the Complainant's immediate availability to assume the position, it may reasonably be concluded that, in the absence of discrimination, she would have been promoted to the Assistant Manager position by that date.

67. The Complainant worked a total of 188 hours from April 14 to May 13, 1987 inclusive. (Cp. Ex. A). If she had been employed as Assistant Manager during that period of time, she would have worked an average of 50 hours a week during the four week period of April 13 to May 10, 1987, at a salary of \$230.77 per week. (Cp. Ex. A, J; Tr. at 209). See Finding of Fact No. 8. During the period from May 11-13, she would have worked a total of twenty-nine hours, the same as worked by Lloyd Patrick during that period. (Cp. Ex. A).

68. The Complainant's back pay would be the difference between what she would have earned during the period of April 13 to May 13, 1987 if she had been promoted to Assistant Manager, at the pay rate given to Lloyd Patrick, and what she actually earned during that period. In summary her back pay before interest would be calculated as follows:

$[(4 \text{ weeks} \times \$230.77/\text{week}) + (29/50 \text{ hours} \times \$230.77/\text{wk})] - [188 \text{ hours} \times \$3.80/\text{hour}]$

$[(\$923.08) + (\$133.85)] - [\$714.40]$

\$1056.93 - \$714.40 \$342.53.

CONCLUSIONS OF LAW

Jurisdiction:

1. Ann Redies 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 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 (1989). See Finding of Fact No. 2.

2. Ms. Redies complaint is also within the subject matter jurisdiction of the Commission as the allegation that the Respondents failed to promote her to the position of Assistant Manager due to her sex 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 refuse to hire ... or to otherwise discriminate in employment against any applicant . . . or employee because of the ... sex ... of such applicant or employee." Id.

Order and Allocation of Proof:

3. The burden of proof or "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding is on the complainant to persuade the finder of fact that she was not promoted into the Assistant Manager position because of her sex. Linn Co-operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981).

4. 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).

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 (11973), and subsequently adopted by the Iowa Supreme Court, e.g. Iowa State Fairgrounds Security v.

Iowa Civil Rights Commission, 322 N.W.2d 293 (Iowa 1982), is inapplicable. Price-Waterhouse v. Hopkins, U.S., 57 L.W. 4469, 4481 (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).

6. In this case, there is direct and circumstantial evidence in the record to the effect that the Complainant's and other cashier-clerks' sex was a factor in the decision to not hire within. See Findings of Fact Nos. 18-21, 24-25, 3337, 38-39. The inquiry, however, does not end there, for the 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).

7. In this case there is also a finding that the customer relations criterion was also part of the reason for the decision to not hire within the Oelwein store. This criterion was found to be, in part, a legitimate motivating actor in the decision. See Findings of Fact 37, 41. "When . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of 'sex.'" Price-Waterhouse v. Hopkins, U.S. , 57 L.W. 4469, 4473 (1989). When such a legitimate factor is present, the employer may offer the defense, as the Respondents have here, that "even if (they) had not taken gender into account, (they) would have come to the same decision regarding a particular person." Id.

8. This defense is an affirmative defense. Id. at 4474. The Respondents bear the burden of persuading the finder of fact by a preponderance of the evidence that "it would have made the same decision even if it had not taken the plaintiff's gender into account." Id. & 4478. A finding of liability can be avoided by the Respondents only if they meet this burden of proof. Id. at 4478.

[T]he employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, proving "that the same decision would have been justified ... is not the same as proving that the same decision would have been made." ... An employer may not, in other words prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Price-Waterhouse v. Hopkins, U.S. , 57 L.W. 4469, 4476 (1 989)(italics added).

9. The Findings of Fact demonstrate not only that the Respondent failed to meet it's burden of proof in regard to the one legitimate, in part, factor actually considered by the Respondents, customer relations, but the Respondents did not show that the decision would have been justified based on the factors of supervisory experience and the Cedar Falls incident. See Findings of Fact Nos. 41, 44-46, 51, 53. Even if those two factors had been shown to justify a decision to not promote the Complainant, the Respondent could not escape liability as they were not actually considered at the time the decision to not hire within the Oelwein store was made. Price-Waterhouse v. Hopkins, U.S. , 57 L.W. 4469, 4476 (1989).

Equal Pay:

10. In determining whether the Iowa Civil Rights Act's prohibition against discrimination on the basis of sex in employment has been violated through pay differentials based on sex, regulations promulgated and cases decided under the Equal Pay Act of 1963 may be cited as persuasive, but not controlling, authorities. Reference to such authorities has been made in at least one past Commission decision. Kathy Quakenbush, 2 Iowa Civil Rights Commission Case Reports 19, 22 (1978). One way for a Complainant to establish a prima facie case of sex discrimination in pay is to show "that an employer pays different wages to employees of opposite sexes for equal work on jobs requiring equal skill, effort, and responsibility and are performed under similar working conditions." 29 C.F.R. Section 1620.27(c).

11.

What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. [T]he broad remedial purpose of the law must be taken into consideration. The terms constitute separate tests, each of which must be met in order for the equal pay standard to apply. It should be kept in mind that "equal" does not mean "identical." Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality as between the jobs justifying differences in pay.

29 C.F.R. Section 1620.14.

12. "Responsibility is concerned with degree of accountability required in the performance of the job, with emphasis on the importance of job obligation." 29 C.F.R. Section 1620.17. An example of a situation where difference in responsibility may justify a pay differential occurs where a sales clerk, who is "authorized and required to determine whether to accept payment for purchases by personal checks of customers," is given higher pay than other sales clerks who do not have this responsibility. Id.

13. In accordance with the example cited above, the Assistant Manager's additional duties in regard to refunds and customer complaints or problems may indicate a significant difference in responsibility between him and the cashier-clerks. As noted in the findings of fact, there is not sufficient evidence in the record to show whether or not these duties, as well the sales route duties, are significantly different in terms of responsibility than those performed by the Complainant. See Findings of Fact No. 61-63. Under these circumstances, the Complainant did not establish a prima facie case of sex discrimination in pay

Remedies:

14. Violation of Iowa Code section 601 A.6 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.

Damages for Emotional Distress:

15. 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 601 A. 15(8)).

16. In this context, where emotional distress is "an item of damage," damages for emotional distress are treated as a component of actual damages. Dickerson v. Young, 332 N.W.2d 93, 98-99 (Iowa 1983); See Blessum v. Howard County Board, 245 N.W.2d 836, 844-45 (Iowa 1980). Therefore, the requirements for proof of damages for emotional distress here should not be confused with proof of the elements of the cause of action for intentional infliction of emotional distress, e.g. outrageous conduct, distress must be severe. Niblo v. Parr Manufacturing, Inc., No. 88-1531, slip op. at 14-15 (Iowa August 16, 1989); Dickerson v. Young, 332 N.W.2d 93, 98-99 (Iowa 1983).

17. 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 0)). sufficient to show the existence of distress.Dickerson v. Young, 332 N.W.2d 93, 98-99 (Iowa 1983). While these cases did not arise under the Iowa Civil Rights Act, it would be anomalous to mandate more stringent requirements for proof of emotional distress in cases under the Act than is required in the usual case where emotional distress is an item of damage. Also, such stringent requirements would violate the legislative command that the Act "be construed broadly to effectuate its purposes." Iowa Code S 601 A. 18 (1989).

18. 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 (1 984)(citing Nichols, Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview, 32 Drake L. Rev. 273, 301 (1982- 83)). In this case, the testimony of the complainant and the evidence of the surrounding circumstances, particularly her leaving her employment in response to the discriminatory failure to promote her, demonstrate that the Complainant did suffer some compensable emotional distress. See Findings of Fact Nos. 64-65.

19. Because compensatory damage awards for mental distress are designed to compensate a victim of discrimination for an intangible injury, determining the amount to be awarded for that injury is a difficult task. As one court has suggested, "compensation for damages on account of injuries of this nature is, of course, incapable of yardstick measurement. It is impossible to lay down any definite rule for measuring such damages." . - .

Computing the dollar amount to be awarded is a function of the finder of fact. Juries and judges have been making such decisions for years without minimums or maximums, based on the facts of the case [and] the evidence presented on the issue of mental distress.

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

20. 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, 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).

21. The testimony and circumstances set forth in the record show that the Complainant suffered mild to moderate emotional distress for a short period of time. See Findings of Fact Nos. 64-65. Even mild emotional distress can and should be compensated. See Niblo v. Parr Manufacturing, Inc., No. 88-1531, slip op. at 14 (Iowa August 16, 1989). Given the severity and duration of the distress shown by the record, the Commission concludes that an award of seven hundred fifty dollars (\$750.00) in damages for emotional distress is full, reasonable, and appropriate compensation for her loss.

Back Pay:

22. For the time she was still employed with the Respondents, the Complainant should receive back pay based on the amount she would have received if she had been promoted into the Assistant Manager position less the amount she actually earned during that period. Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975)(reproduced at B. Schlei & P. Grossman, Employment Discrimination Law 613 (2nd ed. 1983)); See Iowa Code S 601A.15(8)(a)(1) (1989). Unless the Complainant is constructively discharged, the back pay period terminates when the Complainant leaves her employment and is no longer eligible for promotion. Muller v. United States Steel Cor., 509 F.2d 923 (10 Cir. 1975)(reproduced at B. Schlei & P. Grossman, Employment Discrimination Law 613 (2nd ed. 1983)). See B. Schlei & P. Grossman, Employment Discrimination Law 1432-33 (2nd ed. 1983).

23.

Constructive discharge exists when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. . . to find constructive discharge the fact finder must conclude that "working conditions would have been so difficult or unpleasant" that a reasonable person in the employee's position would be compelled to resign.

First Judicial District Department of Correctional Services v. Iowa Civil Rights Commission, 315 N.W.2d 83, 87 (Iowa 1982).

23A. "Evidence of purposeful discrimination alone does not suffice to prove constructive discharge. Consequently, failure to promote, in and of itself, does not establish constructive discharge." B. Schlei & P. Grossman, Employment Discrimination Law: 1983-85 Cumulative Supplement 161 (1987). See Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975)(reproduced at B. Schlei & P. Grossman, Employment Discrimination Law 613 (2nd ed. 1983)). This rule would appear to have the approval of the Iowa Supreme Court. First Judicial District Department of Correctional Services v. Iowa Civil Rights Commission, 315 N.W.2d 83, 88 (Iowa 1982)(citing with approval three cases, including Muller, where no constructive discharge was found where there was a failure to promote). In light of the authorities cited, the Complainant was not constructively discharged and the back pay period ends as of her last day of employment.

Interest:

24. 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 S 535.3 (1989). In this case, interest should be paid on damages from the time of the filing of the complaint on May 21, 1987.

Attorneys Fees:

25. The Complainant having prevailed, she is entitled to an award of reasonable attorney's fees. Iowa Code S 601 A. 15(8)(1989). 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 Redies 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).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Ann M. Redies, is entitled to judgment because she has established that the refusal by the Respondents Bumper-to-Bumper and Fauser Oil Company to promote her into the position of Assistant Manager was based on her sex in violation of Iowa Code Section 601 A.6(1)(a) (1985).

B. Complainant Ann M. Redies is entitled to a judgment of seven hundred fifty dollars (\$750.00) in compensatory damages against Respondents Bumper-to-Bumper and Fauser Oil Company for the emotional distress she suffered as a result of the sex discrimination practiced against her by the Respondents.

C. Complainant Ann M. Redies is entitled to a judgment of three hundred forty-two dollars and fifty-three cents (\$342.53) in back pay for the loss resulting from the denial of the Assistant Manager position.

D. Interest shall be paid by the Respondents to Complainant Ann M. Redies on the above awards of compensatory damages at the rate of ten percent per annum commencing on May 21, 1987 and continuing until date of payment.

E. Within 20 calendar days of the date of this order, provided that agreement can be reached between the parties on this issue, the parties shall submit a written stipulation stating the amount of attorney's fees to be awarded Complainant Redies' attorney. If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Commission 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. 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.

F. The Commission retains jurisdiction of this case in order to determine the actual amount of attorneys fees to which Complainant Redies 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.

G. Respondents Bumper-to-Bumper and Fauser Oil Company are hereby ordered to cease and desist from any further practices of sex discrimination in promotion and hiring for management positions.

H. Respondents shall post, within 60 days of the date of this order, in a conspicuous place at each of their locations in areas readily accessible to and frequented by employees, including areas at the auto parts stores at Oelwein and Elgin, Iowa, the notice, entitled "Equal Opportunity is the Law" which is available from the Commission.

I. Respondents shall develop, and revise as necessary, written job descriptions for each management position setting forth in detail the job title, duties, responsibilities, and the qualifications, both subjective and objective, which are required for the positions. The qualifications stated shall be the ones utilized for filling vacancies. Any revision shall be made prior to the start of a selection process which is undertaken to fill a vacancy. These job descriptions shall be completed within 180 days of the date of this order.

J. Respondents shall internally post in a conspicuous place at each of their locations in areas readily accessible to and frequented by employees, including areas at the auto parts stores at

Oelwein and Elgin, Iowa, an announcement of each management position which becomes vacant. This notice shall include a copy of the job description and indicate time limits and methods for applying for the position. The notice shall state "An Equal Opportunity Employer" in type no smaller than the largest type in the announcement.

K. Respondents shall establish and adhere to written procedures for filling management positions. These procedures shall incorporate the procedures set forth in this order. These procedures shall be completed within 180 days of the date of this order.

L. Respondents shall provide a written explanation of the reasons for his or her rejection to any employee who, after being considered for a management position, is rejected.

M. Respondents shall make, and maintain for a period of 210 calendar days after the position is filled, a written record detailing the discussions at all management meetings where candidates are considered for management positions.

N. Respondents shall file a report within 210 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs H through M inclusive of this order.

Signed this the 3rd day of October, 1989.

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