BEFORE THE IOWA CIVIL RIGHTS COMMISSION

ORLANDO RAY DIAL, COMMISSIONER; CRISTEN HARMS, and MIKE DE VOLDER, Complainants,
and
IOWA CIVIL RIGHTS COMMISSION,

VS.

FRIEDMAN MOTORCARS, LTD., MIKE FRIEDMAN, TIM MANNING, GARY FRIEDMAN, SCOTT HENRY, PAT SULLIVAN and CHERYL RUBLE, Respondents.

CP # 06-89-18956
CP # 11-89-19422
CP # 12-89-19466

COURSE OF PROCEEDINGS

This matter came before the Iowa Civil Rights Commission as three complaints filed by Commissioner Orlando Ray Dial, Cristen Harms, and Mike Devolder.

In Commissioner Dial's complaint (CP # 06-8918956), as amended, he alleges that Respondents Friedman Motorcars Ltd., Mike Friedman, Tim Manning, Scott Henry, and Pat Sullivan engaged in race, sex, and disability discrimination in employment and race discrimination in public accommodations. Specifically, Commissioner Dial alleges that Respondents "treated Black persons, disabled persons, and females less favorably than White persons, nondisabled persons, and males" in "the consideration [and] hiring of applicants for the salesperson position." He also alleges that respondents engaged in sexual and racial harassment. He further alleges that "in the offering [and] providing of services" the Respondents "treated Black persons less favorably than White persons."

In Cristen Harms' complaint (CP # 11-89-19422), she alleges that Respondents Friedman Motorcars Ltd., Gary Friedman, Mike Friedman and Cheryl Ruble engaged in sex discrimination in employment. Specifically, she alleges that she was sexually harassed by Respondent Mike Friedman and constructively discharged on the basis of her sex after Respondents Cheryl Ruble and Gary Friedman failed to take corrective action to end the harassment.

In Mike DeVolder's complaint (CP # 12-89-19466) against Respondents Friedman Motorcars Ltd, Mike Friedman, Scott Henry and Pat Sullivan, he alleges that he was aggrieved by illegal discrimination in employment on the bases of race and sex and that he was subjected to illegal retaliation. Specifically, Mr. Devolder alleges that his "work environment was pervaded by sexual harassment of female employees and customers and racial harassment of Black customers." He also alleges that, he was subjected to physical abuse and terminated "after I complained to management about their mistreatment of women and blacks, and after assisting in the investigation of the harassment and discrimination of women and blacks."

A public hearing on these complaints was held on April 1-5, 1991 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Conference Room of the Iowa Civil Rights Commission in Des Moines, Iowa. The Complainant, Mike DeVolder, was represented by Paul Curtis, Attorney at Law. The Respondents were represented by Patrick Brick, Attorney at Law. Commissioner Orlando Ray Dial and the Iowa Civil Rights Commission were represented by Teresa Baustian, Assistant Attorney General. Complainant Cristen Harms was not represented by counsel.

The findings of fact and conclusions of law are incorporated in this contested case decision in accordance with Iowa Code § 17A.16(l) (1991). 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 race, sex, and disability discrimination, as well as retaliation, be determined in light of the record as a whole. See Iowa Code § 601A.15(8) (1991). 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.

RULING ON MOTION FOR CHANGE OF VENUE AND REASSIGNMENT

Findings of Fact:

1A. On Thursday, March 28, 1991, four days before the hearing, Respondents, relying on Iowa Rule of Civil Procedure 167(b) and 161 Iowa Administrative Code 4.2(4), filed a motion for change of venue and reassignment. The motion did not seek a change of location of the hearing but did seek disqualification of the Administrative Law Judge and appointment of an administrative law judge not employed by the Commission. After the opportunity was given to present evidence on this issue, and after argument by counsel, the motion was denied at the outset of the hearing on April 1, 1991. (Tr. at 5-20). The findings of fact and conclusions of law set forth below clarify and expand the reasons for that decision.

2A. Respondents introduced no affidavits or other evidence into the record in support of their motion. (Tr. 5-20).

3A. On January 25, 1991, a motion for continuance filed by Respondents was granted. Ruling on Respondents' Motions to Compel Discovery and For Continuance. Respondents conceded that, on that date, they were aware of the following facts, which were all the facts set forth as the basis for their motion for change of venue and reassignment:

(a). The Administrative Law Judge assigned to this case was employed by and performed his duties for the Iowa Civil Rights Commission. (Tr. at 11-12).

(b). That Orlando Ray Dial was a commissioner of this commission. (Tr. at 1 1). [The fact that Orlando Ray Dial was a commissioner was also set forth in Commissioner Dial's complaint filed on June 7,1989. (Complaint). It was also set forth in the Notice of Hearing issued on October 23, 1990.]

(c). Assistant Attorney General Teresa Baustian, in the words of the motion, "Works solely for the Iowa Civil Rights Commission, though she is employed through the Attorney General's Office for the State of Iowa." (Tr. at 12).

(d). That the Respondents believed (1) the Administrative Law Judge assigned to this case investigates cases for the Commission, and (2) that the Administrative Law Judge assigned to this case 11 personally knows" Commissioner Orlando Ray Dial within the meaning of that phrase as used in 161 Iowa Administrative Code 4.2(4). (Tr. at 12).

4A. In the course of ruling on this motion, it was proposed that official notice be taken of the following facts. (Tr. at 20-22). No resistance to the taking of official notice of these facts nor any evidence contradicting them was offered. Therefore, official notice is taken of the following facts:

(a). The Administrative Law Judge assigned to this case is an employee of the Iowa Civil Rights Commission. He does not have any investigative or prosecutorial duties. He has only adjudicative duties with respect to contested cases..

(b). Orlando Ray Dial is a commissioner of the Iowa Civil Rights Commission and was one at the time he filed the complaint in his capacity as a commissioner.

(c). The Administrative Law Judge assigned to this case knows Commissioner Dial in the sense that he can identify him, but does not know him in the sense that one personally knows a friend or close associate.

(d). Teresa Baustian is an Assistant Attorney General employed by the Attorney General's office and assigned to the Iowa Civil Rights Commission. She prosecutes contested cases in support of the complaint as the Commission's representative. She has no adjudicative responsibilities.

(e). As described and required by statute, Iowa Code Section 17A.17(3), there is in effect a separation of functions at the Iowa Civil Rights Commission, i.e. "No individual who participates in the making of any proposed or final decision in a contested case shall have

prosecuted it or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties. Nor shall any such individual be subject to the authority, direction or discretion of any person who has prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy, involving the same parties."

5A. The underlying facts supporting Finding of Fact No. 4A(e) above include those facts stated in Findings of Fact Nos. 4A(a) and 4A(d). In addition, official notice is taken that the Administrative Law Judge assigned to this case is not subject to the authority, direction or discretion of any person involved in the prosecution or advocacy of this or other contested cases before this Commission. Fairness to the parties does not require that they be given an opportunity to contest this fact.

6A. Official notice is taken of the fact that, since the issuance of the notice of hearing in the Frank Robinson case on May 23, 1990, all notices of hearing in contested cases, including this one, have included the Iowa Civil Rights Commission as a named party in order to ensure the parties are aware that, as mandated by statute, the Commission will be represented at hearing in its prosecutorial capacity. See Conclusion of Law No. 16A. This also helps to make the parties aware that the Assistant Attorney General prosecuting the case is representing the Commission and not the complainant albeit their goals may be very similar at the public hearing stage. This practice of naming the Commission as a party is not limited to cases in which a Commissioner or the full Commission initiates a charge. Fairness to the parties does not require that they be given an opportunity to contest these facts.

7A. Official notice is taken of the fact that individual Commissioners of the Iowa Civil Rights Commission, when acting in their capacity as commissioners and not as private individuals, file complaints to promote the public interest in investigating, conciliating, and ending the practices of discrimination alleged therein. When acting in this capacity, the Commissioner is acting as a representative of the people of the State of Iowa and not on the basis of his own personal interest. See Conclusions of Law No. 15A-16A. Fairness to the parties does not require that they be given an opportunity to contest this fact.

Conclusions of Law:

1A. Official notice has been taken of several facts. Official notice may be taken of all facts of which judicial notice may be taken and of facts within the specialized knowledge of the Commission, such as its own internal operating procedures. See Iowa Code § 17A.14(4).
Rulings on Procedure:

2A. The procedural authority relied on by the Respondents for their motion for change of venue and reassignment was Iowa Rule of Civil Procedure 167 (b), which permits such motions in district court: The Rule states, in relevant part:

> 167. **Grounds for change.** On motion, the place of trial may be changed as follows:
>
> ...
>
> b. Interest of Judge. Where the trial judge is directly interested in the action.
> Iowa R. Civ. P. 167(b) (emphasis in original).

3A. The Rules of Civil Procedure, however, "govern the practice and procedure in all courts of the state." Iowa R. Civ. P. 1. (emphasis added). "The functions of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies unless made so by statute." Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 769 (Iowa 1971)(quoting with approval 1 Davis, Administrative Law § 8.03 p.522 (1958)).

4A. For example, the Iowa Administrative Procedures Act provides that the rules on discovery applicable in civil actions shall also apply in contested cases before administrative agencies. Iowa Code § 17A.13(l). (1991). Therefore, under that statutory authority, Respondents' motions to compel discovery and for continuance were granted in order to protect their discovery rights. Ruling on Respondents' Motions' to Compel Discovery and For Continuance. There is, however, no statutory authority, case law, or rule providing that Iowa Rule of Civil Procedure 167(b) shall apply in administrative proceedings. **Respondents conceded they knew of no such authority.** (Tr. at 9-1 0).

5A. Iowa Code § 17A.4(4) sets forth the proper procedure for seeking disqualification of an Administrative Law Judge, either for violating the separation of functions provision in Iowa Code 17A.17(3), or for personal bias:

> A party to a contested case proceeding may file a timely and sufficient affidavit asserting disqualification according to the provisions of subsection 3, or asserting personal bias of an individual participating, in the making of any proposed or final decision in that case. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

Id. (emphasis added). Respondents' failure to file any affidavit, as well as its failure to seek disqualification until the Thursday preceding a Monday hearing, requires rejection of the bias claim. Cf. B. Schwartz, Administrative Law § 6.19 p. 325 & nn. 2-3 (2nd ed. 1984)(citing NLRB v. Sanford Home, 669 F.2d 35 (2nd Cir. 1981)(failure to file affidavit-Federal Administrative Procedures Act); Capital Transportation Co. v. United States, 612 F.2d 1312 (lst Cir. 1979)(untimely bias claim)). The motion was properly denied.

6A. **Additional procedural and substantive rulings** in **the alternative to this ruling were made as independent grounds for denial of the motion.** (Tr. at 22-33). If Rule 167(b) did apply in administrative proceedings, then Iowa Rule of Civil Procedure 168(d) would also apply:

168. Limitations. Change of venue shall not **be allowed:**

...

(d). After a continuance, except for a cause arising since such continuance or not known to the moveant prior thereto.

Iowa R. Civ. P. 168(d)(emphasis added).

7A. In this case, a continuance had been granted at Respondents' request on January 25, 1991, approximately two months prior to the time when Respondents filed their motion for change of venue and reassignment. Respondents conceded that, as of January 25th, they were aware of every fact which they alleged in support of their motion for change of venue or reassignment. See Finding of Fact No. 3A. Therefore, there was no "cause arising since [the] continuance or not known to the moveant prior thereto," and the motion was properly denied on that basis. Iowa R. Civ. P. 168(d).

Rulings on the Merits:

Presumption of Impartiality:

8A. There is a rebuttable presumption of regularity and impartiality in all official actions of administrative agencies. Cedar Rapids Steel Transportation, Inc. v. Iowa State Commerce Commission, 160 N.W.2d 825, 836 (Iowa 1968). This encompasses "a presumption of honesty and integrity in those serving as adjudicators." Withrow v. Larkin, 421 U.S. 35, 47 (1975)(quoted with approval in Hartwig v. Board of Nursing, 448 N.W. 321, 323 (Iowa 1989)). "Without a showing to the contrary, state administrators 'are assumed to be (persons) of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own merits.'" Id. at **55** (quoting United States v. Morgan, **313 U.S. 409, 421** (1941)).

Requirement for Proof of Bias:

9A. The same basic legal principles govern the disqualification of administrative law judges and district court judges for legal bias. B. Schwartz, Administrative Law § 6.16 p. 315 (2nd ed. 1984). The reason why an affidavit, or other evidence, is required for the disqualification of an administrative law judge is because the party proposing disqualification bears a substantial burden of persuasion when it seeks to prove, as it must, its reasons for disqualification. Anstey v. Iowa State Commerce Commission, 292 N.W.2d 380, 390 (Iowa 1980); Hartwig v. Board of Nursing, 448 N.W. 321,323 (Iowa 1989); State v. Smith, 242 N.W.2d 320, 324 (Iowa 1976); Caylor v. Employers Mutual Casualty Company, 337 N.W.2d 890,895 (Iowa Ct. App. 1983). The party proposing disqualification must prove its reasons based on "allegations of fact, not conclusions or frivolous assertions." State v. Smith, 242 N.W.2d at 324. "[I]t is actual prejudice on the part of a judge, and not mere apprehension of it, which disqualifies. The disqualifying interest of a judge does not include every bias or partiality he may entertain." In Re Hale's Estate, 231 Iowa 1018, 1022, 2 N.W.2d 775 (1942). "in order to disqualify [an administrative decision

maker], it must be shown 'that he is not capable of judging a particular controversy fairly on the basis of its own circumstances.'" Anstey v. Iowa State Commerce Commission, 292 N.W.2d at 390. The party alleging bias must prove "an adverse, preconceived mental attitude or disposition toward the [party] by the administrative tribunal of such substantial weight as to impair materially or destroy the impartiality necessary to a fair hearing." State v. Iowa Merit Employment Commission, 231 N.W.2d 854, 857 (Iowa 1975).

10A. In summary:

> A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. "Bias and prejudice are never implied and must be established by clear averments." (Citation omitted). Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute resolving tribunals. "A judge should not be disqualified lightly or on frivolous allegations or mere conclusions." (Citation omitted).

Andrews v. Agricultural Labor Relations Board, 171 Cal. Rptr. 590 623 P-2d 151,157 (Cal. 1981)(upholding Administrative Law Officer's refusal to disqualify himself).

Alleged Grounds for Disqualification:

11A. The Respondents' motion set forth three grounds for disqualification:

> 6. That the due process rights of the Respondents require that this Commission appoint an independent, disinterested, fair and impartial Administrative Law Judge to hear this case, who is employed other than through the Iowa Civil. Rights Commission. The present posture of the case allows for the Commission's own employee to hear this matter, even though the Commission is a directly named party to this action. Thus, allowing the Commission to be a party, prosecutor, and judge within the same action.
>
> 7, Iowa Rule of Civil Procedure 167(b) provides for a change of venue "where the trial judge is directly interested in the action . . . ."
>
> 8. 161 Iowa Administrative Code 4.2(4) provides that interested parties shall disqualify themselves to serve as a hearing examiner.

Respondents Motion for Change of Venue and Reassignment at 2. (emphasis added).

12A. Although this factor was not mentioned in their motion, during the course of argument Respondents also asserted that the Administrative Law Judge assigned to this case should disqualify himself under the rule requiring disqualification of "[p]ersons who ... personally know the complainant or respondent," 161 Iowa Administrative Code 4.2(4), as the Respondents

believe he "personally knows" Commissioner Orlando Ray Dial as that phrase is used in this rule. (Tr. at 6-7).

Due Process:

13A. The requirement for due process in any proceeding in which the government seeks to compel a person to pay damages or otherwise surrender property is based on the constitutional command "nor shall any State deprive any person of..... property, without due process of law." U.S. CONST. amend. xiv, § 1.

14A.

> **Due process requires an impartial tribunal that ensures neutrality in adjudicative proceedings.** "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' . . . This applies to administrative agencies which adjudicate as well as to courts." **The law recognizes two main types of legal bias: (1) interest; (2) personal bias and prejudice.** When any of these types of bias is present, the tainted adjudicator must disqualify himself. If he does not do so, the decision he made or participated in must be set aside. The rules [i.e. legal principles] governing legal bias apply equally in courts and agencies.

B. Schwartz, Administrative Law § **6.16** p. **315** (2nd ed.1984)(emphasis added).

15A. The Commission, like many administrative agencies, may file a complaint alleging a violation of the statute it enforces. Iowa Code 601A.15(l); B. Schwartz,.Administrative Law § 6.20 p. 329 (2nd ed.1984). An individual commissioner or the attorney general also has this right. Iowa Code §601A.15(l). And, of course, "any person claiming to be aggrieved by an unfair or discriminatory practice" may file a complaint with the Commission. Iowa Code § 601A.15(l). In light of the absence of any requirement that the Commission, a commissioner or the attorney general claim to be aggrieved by a discriminatory practice, it is clear that complaints filed by them serve a purpose other than remedying any personal loss or damage sustained as the result of discrimination. It is reasonable to conclude that their power to file complaints is designed to serve the public interest in eliminating discrimination.

16A. After the complaint is filed, the Commission has the power to investigate the complaint, attempt to conciliate it, issue a notice of hearing, prosecute the case, hear the case, and decide it. Iowa Code § 601A.15. Even where the original complaint was not filed by the Commission or a commissioner, it is the agency's prerogative, as part of its prosecutorial discretion, to decide whether to proceed to public hearing, what parties to prosecute, and what allegations it will prosecute. See Iowa Code § 601A.15(5); Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 766 (Iowa 1971). The charges preferred by the agency are set forth in the Notice of Hearing. Iowa Code § 601A.15(5). In this sense, every complaint litigated before this agency is an agency complaint. At the hearing, "the commission's attorneys or agents" present "the case in support of the complaint." Iowa Code 601A.15. Therefore, in every case:

> [t]he Commission acts in the capacity of a"plaintiff" although complaining persons [may have] presented the original issues. An administrative agency often acts upon a complaint by a citizen, although the agency through its staff, will run the proceeding against the alleged offending party and not the citizen who complains. Thus the agency, acting in the public interest, "complains of an injury."

Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District, 222 N.W.2d 391, 395 (Iowa 1974). **"Unlike a court, which occupies an arbitral position between two contesting parties, the agency may be both an interested party and a trier of the contentions advanced by its counsel at the hearing."** B. Schwartz, ' Administrative Law § 6.20 p. 329-330 (2nd ed. 1984).

17A. Like many other administrative agencies, such as the Federal Trade Commission, the functions of accuser, investigator, prosecutor, and judge are combined within the agency. See Iowa Code § 601A.15; B. Schwartz, Administrative Law § 6.20 p. 329 (2nd ed. 1984). **"A 'fair day in court' [however] is not defeated by the fact the hearing is before the same administrative authority which lawfully conducted a preheating investigation or preferred charges."** Cedar Rapids Steel Transportation, Inc. v. Iowa State Commerce Commission, 160 N.W.2d 825, 836 (Iowa 1968) (emphasis added). **"[A]ny legal attack upon [such] combination [of functions] must be a constitutional one, based upon the claim that due process is violated when an agency is investigator, prosecutor, and judge in a case.** The claim has been **rejected by the courts."** B. Schwartz, Administrative Law § 6.21 p. 331 (2nd ed. 1984)(emphasis added). Under Withrow v. Larkin, 421 U.S. 35 (1975), the leading United States Supreme Court decision on this subject, **"the multiple impersonation [within the agency] of the roles of complainant, counsel, judge, and jury may present difficulties, but it does** not **violate any constitutional prohibition."** B. Schwartz, Administrative Law §6.21 p.331,332 (2nd ed.1984)(emphasis added). **While advocating the opposite view, the Respondents could cite no legal authority to support their position.** (Tr. at 17-18).

18A. This combination of functions within the agency does not violate due process where the prosecution and adjudication functions are performed by separate individuals within the agency. B. Schwartz, Administrative Law §§ 6.20- 6.21 pp. 330331, 332 & n.8 (2nd ed. 1984). See Findings of Fact No. 4A(a), (d)-(f). "[A]n unconstitutional combination of prosecutory and adjudicative functions may occur where the individual who is responsible for presenting one party's case to a decision maker also acts as a decision maker." Wedergren v. Board of Directors, 307 N.W.2d 12, 18 (Iowa 1981). Even if (a) the hearing were held before the Commission itself, and not just an administrative law judge employed by the Commission, and (b) the Commission was a directly named party, there would be no unconstitutional combination of the adjudication and prosecution functions as long as the actual prosecution was handled by an assistant attorney general assigned to the Commission, as it was in this case. Hartwig v. Board of Nursing, 448 N.W.2d 321, 323-24 (Iowa 1989); See Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 236 (Iowa 1991); Board of Dental Examiners v. Hufford, 461 N.W.2d 194, 200 (1990). The mere fact that the complaint was filed by a Commissioner also does not indicate a combination of adjudication and prosecution functions as "[f]iling of the original complaint was a ministerial act, not prosecutorial conduct." Eaves, 467 N.W.2d at 236.

19A. The Administrative Law Judge assigned to this case performed only adjudicatory functions, and did not perform any investigative or prosecutorial function. See Finding of Fact No. 4A(a). Therefore, it is not necessary to consider the question of combination of the investigation and adjudication functions which is, in any event, often constitutionally permissible. See Hartwig at 323-24.

Disqualification of Persons With An Interest:

20A. As previously noted, interest and personal bias and prejudice are forms of legal bias which, if present in the adjudicator, violate the due process guarantee. See Conclusion of Law No. 13A. The above cited authorities make it clear that it is not a violation of the due process guarantee of an impartial tribunal for an agency employee or member to adjudicate charges brought by the agency and tried before the agency member or employee as long as the same individual does not both prosecute and adjudicate. See Conclusions of. Law No. 13A-19A. It may reasonably be inferred from these authorities that the courts do not view agency employees who adjudicate charges brought by the agency to be infected with an interest or personal bias or prejudice, merely by reason of their employment by the agency, which would violate due process guarantees.

21A. **Respondents could not cite and could not find any legal authority to support their position that employment of the Administrative Law Judge, by a Commission who was a named party in the case, would constitute an interest which would disqualify the judge. (Tr. at 15).** Respondents also argued, without citation of any of their authorities, that the cases they had read allowing the presiding Administrative Law Judge to be employed by the agency, although the agency was a party, held that this was not a violation of due process because a de novo hearing (a new trial of the case) would be allowed or; appeal to district court. (Tr. at 15). Judicial review of contested case decisions of administrative agencies, however, is on the record made before the agency and not de novo. Iowa Code § 17A.19(7). None of the authorities cited in this ruling rely on the availability of de novo review as a factor in allowing an agency employee to preside. Indeed, although mandated by statute, "judicial review of the findings and orders of an administrative agency is not necessary for compliance with due process." Cedar Rapids Human Rights Commission **v.** Cedar Rapids Community School District, 222 **N.W.2d** 391, **402** (Iowa 1974).

22A. An examination of the law concerning interest confirms the view that employment of an administrative law judge by the administrative agency instituting the case is not disqualifying. Interest usually refers to financial interest. B. Schwartz, Administrative Law § 6.16 p. 315 (2nd ed. 1984). "The interest which disqualifies a judge is a direct pecuniary, or direct property interest, or one which involves some individual right or privilege, in the subject matter of the litigation, whereby a liability or pecuniary gain must occur in the event of the suit." Piuser v. City of Sioux City, 220 Iowa 309, 319 (1935)(emphasis added). "A disqualifying pecuniary or property interest is an interest in the event or subject matter of the action or in the judgment to be rendered therein such that by the judgment the judge will be directly affected by a pecuniary gain or loss." 46 **Am. Jur. 2D** Judges § 99 (1969).

23A.

> The leading case [on interest] is Tumey v. Ohio [273 U.S. 510 (1927)] which arose out of a conviction in a mayor's court for traffic offenses.The mayor shared in the fees and costs levied against convicted violators. This gave him a direct pecuniary interest which rendered his decision voidable.... Nor is this true only when the proscribed financial stake is as direct as that in Tumey. In the more recent case of Ward v. Village of Monroeville, [409 U.S. 57 (1972)], also involving traffic convictions in a mayor's court, the mayor was responsible for village finances; and the mayor's court, through fines, forfeitures, costs and fees, provided a major part of the village's income..... [H]ere too, the trial was not before the disinterested and impartial adjudicator demanded by due process.

B. Schwartz, Administrative Law § 6.16 p. 316 (2nd ed. 1984). Chapter 601A does not provide for the Administrative Law Judge to receive any portion of the damages awarded or to be responsible for Commission finances.

24A. Mere employment and receipt of a salary as a judge, moreover, does not disqualify a judge from hearing cases where the entity employing the judge is a party:

> [A disqualifying] interest . . . must be such an interest in the subject matter that he will be directly affected through pecuniary or property loss. [T]he fact that a judge was receiving a salary from a municipality as such judge does not disqualify him from sitting in an action against said city.
>
> The fact that a judge receives a portion of his salary from a county which is a defendant and cross-complainant in an action before him does not create such a personal interest as would disqualify him from presiding at trial... where no matter of public interest or public policy which would work such a disqualification is shown.

Board of Education v. Getz, 33 N.W.2d 113,114 (Mich.1943).See also 46 **Am. Jur. 2D** Judges § 105 (1969).

25A. This view is consistent with the language of the Iowa Administrative Procedures Act which requires agencies needing permanent full time or part-time administrative law judges to appoint them to its staff. Iowa Code § 17A.1 1 (1). Also, any administrative law judge assigned to hear a case, even a temporary appointment from another agency, would be paid out of funds budgeted to this Commission. Iowa Code § 17A.1 1 (3). Even nonjudicial employment by a party is not disqualifying if the judge's duties or practices are not related to the subject matter of the suit. See Board of Education v. Getz, 33 N.W.2d 113,114 (Mich. 1948)(faculty member of university may preside as judge in condemnation case to take land for its use); 46 **Am. Jur. 2D** Judges § 116 **(1969).There is, in any event, no evidence in the record of the administrative Law Judge having any disqualifying financial interest in this case.** See Finding of Fact No. 2A.

26A. There is another view of interest which overlaps the second form of legal bias, personal bias or prejudice:

> [N]o man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.
>
> ...
>
> The critical determination here in assessing the charge of partiality is whether in weighing the evidence [the adjudicator) is required to call on his own personal knowledge and impression of what occurred. In such cases, the [litigants] would be deprived of [their] right to examine or cross-examine a witness and the decision maker would become the arbiter of his own credibility and fairness.

Keith v. Community School Board of Wilton, 262 N.W.2d 249,259 (Iowa 1978)(emphasis in original).

27A. **There is no evidence in the record to establish that the Administrative Law Judge had to rely on his own personal knowledge of what occurred in regard to the allegations of discrimination as opposed to evidence presented at the hearing.** See Finding of Fact No. 2A. When, as here, the Commission must present its evidence at hearing and the administrative law judge must base his decision solely on evidence in the record and facts officially noticed, no such disqualifying interest arises. See Wedergren v. Board of Directors, 307 N.W.2d 12, 17 (Iowa 1981). Cf. Iowa Code § 17A.12 (findings of fact based solely on evidence in the record and facts officially noticed).

Disqualification of "[P]ersons who..... Personally Know the Complainant or Respondent":

28A. Rule 4.2(4) states:

> 4.2(4) Disqualification. ' Persons who have any interest in the case at issue, or personally know the complainant or respondent, shall disqualify themselves to serve as hearing examiner. The investigation commissioner in the case at issue shall not be appointed to serve as a hearing examiner.

Id. (emphasis added).

29A. Administrative rules are interpreted and construed under the same rules as statutes. Motor Club of Iowa v. Dept. of Transportation, 251 N.W.2d 510, 118 (Iowa 1977). Phrases within a rule should be construed according to the context of the language. See Iowa Code § **4.1(2).** When a rule is ambiguous, as this one is because the phrase "personally know" is not defined, the object sought to be obtained by the rule, the common law on the same or similar subjects, and the consequences of a particular construction should be considered in determining the legal effect of the rule. See Iowa Code § 4.1(6).

30A. Taken in context. it is clear that the requirement that "persons who... personally know the complainant or respondent, shall disqualify themselves," 161 I.A.C. § 4.2(4) does not apply to Commission or commissioner initiated complaints. This rule is a subsection of a rule governing hearing procedures. The immediately preceding subsection states:

> 4.2(3) Hearing officers. The chairperson of the commission shall designate three members of I the commission, or an administrative hearing officer, to conduct the hearing. The absence or disqualification of one or more members of a hearing panel appointed to hear a particular case shall not prevent the remaining panel members from hearing the case as independent hearing commissioners, unless good cause can be shown that would prevent the individual commissioner(s) from acting as independent hearing commissioners).

161 I.A.C. § 4.2(3)(emphasis added).

30A. If the "personally know" language, however defined, applies to hearings on Commission or commissioner initiated complaints, then no commissioner hearing panel on such complaints could withstand a motion for disqualification. The Commission, however, cannot lawfully, by rule, reduce the power conferred by statute, Iowa Code §§ 17A.11, 601A.15(l), (6)-(7), (and recognized by subsection 4.2(3)), to hear and decide cases filed by it. See e.g. Eastern Iowa Light and Power Coop. v. Interstate Power Co., 164 N.W.2d 135, 138 (Iowa 1969)(a rule may not change the legal meaning of a statute or the common law).

31A. If the Commission had intended to disqualify its administrative law judges from hearing cases filed by the Commission or Commissioners, it would have directly stated such disqualification as it did with regard to investigating commissioners. 161 I.A.C. § 4.2(4)("[t]he investigating commissioner in the case at issue shall not be appointed to serve as a hearing examiner"). Such a prohibition, however, would be contrary to the previously cited case law on due process and interest which allows either an administrative law judge employed by the Commission, or the Commission itself, to hear Commission or commissioner initiated complaints. See Conclusions of Law No. 2OA-27A.

32A. Another reason to believe the "personally know" rule does not apply to commission or commissioner initiated complaints is because such complaints are not filed on behalf of the personal interest of the commissioners, but to represent the public interest, i.e. the real party in interest is the people of the State of Iowa. See Conclusions of Law No. 15A-16A.

33A. Even if the "personally knows" rule were to apply to Commission or commissioner initiated complaints, the personal relationship required to disqualify would be more than mere recognition or an acquaintanceship. See State v. Smith, 242 N.W.2d 320, 324 (Iowa 1976)(upholding the refusal of a judge in a murder case to disqualify himself although he had previously dined at the victim's restaurant).

> [A judge] must have neighbors, friends and acquaintances, business and social relations, and be a part of his day and generation. * * * the ordinary results of

> such associations and the impressions they create in the mind of the judge are not the "personal bias or prejudice" to which the statute refers.

Id.

34A. Given that the first part of subsection 4.2(4) is concerned with "interest," it is likely that the second part [the "personally know" rule] was intended to implement the prohibition against the second form of legal bias, i.e. **"personal bias and prejudice."** This refers to:

> **such personal dislike of a litigant as an individual or party to the suit, or such personal favoritism or regard for some opposite party to the suit as that the mind of the judge will be swayed or prevented by the one or the other from an impartial consideration of the merits of the controversy.**
>
> ....
>
> General partiality toward prolabor, procompetition, or other policies that the agency is established to further, should be distinguished from partiality toward or hostility against specific persons.

B. Schwartz, Administrative Law § 6.17 pp. 31819 (2nd ed. 1984)(emphasis added). Undue "partiality toward or hostility against specific persons" is disqualifying. Id.

35A. It is reasonable to conclude that the 11 personally knows" rule is intended to result in a disqualification when the administrative law judge and the complainant or respondent have a sufficiently close or intense personal relationship that it yields "personal bias or prejudice" as defined above. **No such relationship existed here.** See Finding of Fact No. 4(A)(c). 36A.

> [A judge may] pass upon a motion for change of venue based on allegations of his own prejudice. [In so doing] he must consult his own feelings, as well as other matters, and grant or deny the change, as he may think the right demands, in the exercise of a careful discretion.
>
> ...
>
> The right to a change of judge is not one of absolute right. The judge is entitled to consult his own mind, and he, perhaps better than anyone else, knows whether or not he can give a defendant on trial a fair and impartial trial in every way. The high appreciation of judicial duties should prompt any judge to refrain from presiding at the trial . . . when he feels a consciousness that he cannot act in the matter with impartiality and without a feeling of prejudice.

State v. Smith, 242 N.W.2d 320, 324 (Iowa 1976).

Ruling:

36A. In light of the findings of fact and conclusions of law set forth above, the Respondents' motion for change of venue and reassignment was properly overruled. In overruling this motion, the Commission does not rule on the constitutional validity of any statute mandating or permitting the employment of Administrative Law Judges by the Commission for hearing cases before the Commission. See Conclusions of Law Nos. 25A and 30A. No administrative agency has the legal authority to rule on the constitutionality of a statute. Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830, 836 (Iowa 1 §79).

RULING ON PARTIAL MOTION TO DISMISS:

Findings of Fact:

1B. Respondents Scott Henry, Pat Sullivan, and Cheryl Ruble filed a partial motion to dismiss in three divisions. After the opportunity was given to present evidence, and after argument by counsel, the motion was denied. (Tr. at 33-49). The findings of fact and conclusions of law set forth below clarify and expand the reasons for that decision.

Division I (Commissioner Dial's Complaint):

2B. The first division of the motion requested that Commissioner Dial's complaint, CP # 06-89-18956, against Respondents Scott Henry and Pat Sullivan be dismissed for the following reasons:

> a. These Respondents were not notified of the finding of probable cause or no probable cause as required by 161 Iowa Administrative Code § 3.12(3).
>
> b. These Respondents were not provided with a synopsis of the facts leading to a finding of probable cause or a written recommendation for a resolution of the case as required by 161 Iowa Administrative Code § 3.12(6).
>
> c. These Respondents were not notified in writing of the time, date, and location of any conciliation meeting as required by 161 Iowa Administrative Code § 3.12(7).
>
> d. These Respondents were not served with the Notice of Hearing as required by 161 Iowa Administrative Code § 4.1 (1).

3B. It is not disputed that probable cause was found in regard to sex and race discrimination ;n hiring and in regard to all allegations concerning failure to consider, harassment and unequal service set forth in Commissioner Dial's complaint or that conciliation was attempted from approximately March 30, 1990 until April 16, 1990. (Request for Admissions and Response). See Conclusion of Law No. 2B. Official notice is also taken that, during conciliation, offers and counteroffers for settlement are often transmitted orally. Fairness to the parties does not require that they be given an opportunity to contest this fact.

4B. There is no evidence in the record, with respect to Commissioner Dial's complaint, indicating (a) whether Scott Henry or Pat Sullivan were or were not notified of the finding of probable cause by certified mail within 15 days of that determination, (b) whether Scott Henry or

Pat Sullivan were or were not provided with a synopsis of.the facts leading to a finding of probable cause and a written recommendation for a resolution of the case, or (c) who was or was not notified in writing of the time, date, and location of any conciliation meeting. Nor is there any evidence that either Scott Henry or Pat Sullivan were prejudiced by any failure of the Commission to perform any of these acts.

5B. A letter, dated January 22,1990, informing some of the parties of the probable cause finding, was attached to the request for admissions. This letter indicates that copies were sent to Commissioner Dial and Respondents Friedman Motorcars, Ltd., Mike Friedman, and Tim Manning. There is nothing in the request for admissions or the letter to indicate whether or not a similar letter was sent to Scott Henry or Pat Sullivan. In the absence of such evidence, it cannot be reasonably inferred that the absence of Scott Henry's or Pat Sullivan's name on the January 22nd letter indicates they were not sent such a notification. See Conclusion of Law No. 2B.

6B. During the course of the hearing, Respondent Scott Henry stipulated that he was served with the Notice of Hearing as reflected in the records of service. (Tr. at 45- 46). Although no notice was served directly on Pat Sullivan, one was mailed to and received by his attorney. (Tr. at 41, 43). Official notice is taken of the record listing the parties served with the Notice of Hearing, including Scott Henry, and indicating the mailing of the notice to Respondents Henry, Sullivan, and Ruble's attorney Mary Bernabe, who represented the Respondents during the preheating stage of the litigation. Both Ms. Bernabe and Patrick Brick, Respondents' counsel at trial, are with the same law firm. Ms. Bernabe participated in the scheduling conference where the original dates for the hearing were discussed and agreed upon by counsel for the parties. Fairness to the parties does not require that they be given the opportunity to contest these facts. Respondents' counsel conceded that, during the investigation stage, the firm's appearance was made on behalf of all Respondents. (Tr. at 47).

Division 11 (Cristen Harms' Complaint):

7B. The second division of the motion requested that Cristen Harms' complaint, CP # 11-89-19422, against Cheryl Ruble be dismissed for the following reasons:

> a. Respondent Ruble was not notified of the finding of probable cause or no probable cause as required by 161 Iowa Administrative Code § 3.12(3).
>
> b. Respondent Ruble was not provided with a synopsis of the facts leading to a finding of probable cause or a written recommendation for a resolution of the case as required by 161 Iowa Administrative Code § 3.12(6).
>
> c. Respondent Ruble was not notified in writing of the time, date, and location of any conciliation meeting as required by 161 Iowa Administrative Code § 3.12(7).
>
> d. Respondent Ruble was not served with the Notice of Hearing as required by 161 Iowa Administrative Code § 4.1 (1).

8B. It is not disputed that probable cause was found on January 17,1990 or that conciliation was attempted from approximately January 31, 1990 until April 16, 1990. (Request for Admissions; Response to Request for Admissions).

9B. There is no evidence in the record, with respect to Cristen Harm's complaint, indicating (a) whether Cheryl Ruble was or was not notified of the finding of probable cause by certified mail within 15 days of that determination, (b) whether Cheryl Ruble was or was not provided with a synopsis of the facts leading to a finding of probable cause and a written recommendation for a resolution of the case, or (c) whether Cheryl Ruble was or was not notified in writing of the time, date, and location of any conciliation meeting as required. Nor is there any evidence that Cheryl Ruble was prejudiced by any failure of the Commission to perform any of these acts.

10B. A letter, dated January 22, 1990, informing some of the parties of the probable cause finding, was attached to the request for admissions. This letter indicates that copies were sent to Complainant Harms and Respondents Friedman Motorcars, Ltd., Mike Friedman, and Gary Friedman. There is nothing in the request for admissions or the letter to indicate whether or not a similar letter was sent to Cheryl Ruble. In the absence of such evidence, it cannot be reasonably inferred that the absence of Scott Henry's or Pat Sullivan's name on the January 22nd letter indicates they were not sent such a notification. See Conclusion of Law No. 2B.

11B. Although no notice of hearing was served directly on Cheryl Ruble, one was mailed to and received by her attorney. (Tr. at 41, 43). Official notice has already been taken of the record indicating the mailing of the notice to Respondents' attorney. See Finding of Fact No. 6B.

Division III (Mike DeVolder's Complaint):

12B. The third division of the motion requested that Mike DeVoider's complaint, CP # 11-89-19466, against Pat Sullivan be dismissed for the following reasons:

> a. Respondent Sullivan was not notified of the finding of probable cause or no probable cause as required by 161 Iowa Administrative Code § 3.12(3).
>
> b. Respondent Sullivan was not provided with a synopsis of the facts leading to a finding of probable cause or a written recommendation for a resolution of the case as required by 161 Iowa Administrative Code § 3.12(6).
>
> c. Respondent Sullivan was not notified in writing of the time, date, and location of any conciliation meeting as required by 161 Iowa Administrative Code § 3.12(7).
>
> d. Respondent Sullivan was not served with the Notice of Hearing as required by 161 Iowa Administrative Code § 4.1 (1).

13B. It is not disputed that probable cause was found on April 9, 1990 or that conciliation was attempted from approximately April 13,1990 until June 14, 1990. These facts were admitted by Respondent Sullivan through his failure to respond to the Commission's Request for Admissions which states these facts.

14B. There is no evidence in the record, with respect to Mike DeVoider's complaint, indicating (a) whether Pat Sullivan was or was not notified of the finding of probable cause by certified mail within 15 days of that determination, (b) whether Pat Sullivan was or was not provided with a synopsis of the facts leading to a finding of probable cause and a written recommendation for a resolution of the case or (c) whether Pat Sullivan was or was not notified in writing of the time, date, and location of any conciliation meeting as required. Nor is there any evidence that Pat Sullivan was prejudiced by any failure of the Commission to perform any of these acts.

15B. A letter, dated January 22, 1990, informing some of the parties of the probable cause finding, was attached to the request for admissions. This letter indicates that copies were sent to Complainant DeVoider and Respondents Friedman Motorcars, Ltd., Mike Friedman, and Scott Henry. There is nothing in the request for admissions or the letter to indicate whether or not a similar letter was sent to Pat Sullivan. In the absence of such evidence, it cannot be reasonably inferred that the absence of Pat Sullivan's name on the January 22nd letter indicates he was not sent such a notification. See Conclusion of Law No. 2B.

16B. Although no notice of hearing was served directly on Pat Sullivan, one was mailed to and received by his attorney. (Tr. at 41, 43). Official notice has already been taken of the record indicating the mailing of the notice to Respondents' attorney. See Finding of Fact No. 6B.

Conclusions of Law:

Official Notice:

1B. Official notice may be taken of all facts of which judicial notice may be taken and of matters within the specialized knowledge of the agency. Iowa Code § 17A.14(4). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109,112 (Iowa 1980). Official notice of documents reflecting mailing of the notice of herring is proper because judicial notice may be taken of "all the ... jurisdictional papers in a case on trial and the same need not be introduced in evidence." Searis v. Knapp, 5 S.D. 325, 327, 58 N.W. 807, 808 (1894) (taking judicial notice of summons and pleading), quoted in In Re Williams Estate, 90 S.D. 173,240 N.W.2d 74,76 (S.D. 1976); see Slater v. Roche, 148 Iowa 413, 126 N.W. 121 (1910)(taking judicial notice of writ of attachment and return of service as papers properly filed or returned). See Findings of Fact Nos. 6B, 11 B, 12B.

Effect of Request for Admissions:

2B. The request for admissions is a discovery tool designed to elicit admissions from another party of the specific facts stated therein. Iowa R. Civ. P. 127. If a party serves a request for admissions upon any other party, and the receiving party either admits the matter, fails to respond within the time specified by rule, or responds with a limited denial, the matter sought to be admitted is conclusively established to the extent not denied. Iowa R. Civ. P. 127, 128. These discovery rules apply in administrative contested case hearings. Iowa Code § 17A.13(l). The party requesting the admissions may not necessarily seek admissions on every fact relating to a particular topic. Therefore, it cannot be reasonably inferred solely from the failure to mention a

particular act by a party in the request for admissions, or in a supporting document, that the act did not take place.

Effect of Failure to Provide Evidence Demonstrating That the Commission Failed to Comply With 161 Iowa Administrative Code Sections 3.12(3), 3.12(6) and 3.12(7):

3B. Administrative rule 3.12(3) of the Iowa Civil Rights Commission provides that the Complainant and the Respondent shall be notified of the finding of probable cause by certified mail within 15 days of that determination. 161 I.A.C. § 3.12(3). Rule 3.12(6) provides that the Respondent shall be presented with a synopsis of the facts leading to a finding of probable cause along with a written recommendation for a resolution of the case. 161 I.A.C. § 3.12(6). Rule 3.12(7), provides that the Complainant and Respondent are also to be notified in writing of the time, date, and location of any conciliation meeting. 161 1. A. C. § 3.12(7).

4B. "It is hornbook law that ordinarily the burden rests on the moveant to support his or her motion." In Re Matzen, 305 N.W.2d 479, 481 (Iowa 1981). Argument by counsel on the record is not evidence in the record. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed. 2d 207, 216 n.9 (1981)(burden of production of evidence cannot be met through argument of counsel). An attorney usually may not assert his personal knowledge of the facts in issue. Iowa Code of Professional Responsibility DR 7-105(C)(3).

5B. An attorney may, of course, concede facts adverse to his client's position. An attorney may also make a professional statement, which is:

> a statement of fact presented to a court [or administrative agency] by an attorney in connection with a matter then before the court [or administrative agency] verified in effect by the oath the attorney took when he was admitted to the bar, and designed or calculated to influence the determination of a given cause or issue.

State v. Williams, 315 N.W.2d 45 (Iowa 1982). The other parties have the right to cross examine the attorney making the statement. See id. The custom is for the attorney to state on the record that he is making a professional statement immediately prior to the time he makes it. This alerts the counsel for the other parties who will have the opportunity to cross examine the attorney making the statement. No professional statement or other evidence in regard to the Commission's compliance with Rules 3.12(3), 3.12(6) and 3.12(7) with respect to Scott Henry, Pat Sullivan or Cheryl Ruble was introduced by any of the parties. See Findings of Fact Nos. 4B, 9B, 12B.

6B. By failing to provide any evidence that the Commission failed to comply with the requirements of 161 Iowa Administrative Code sections 3.12(3), 3.12(6) and 3.12(7), with regard to Scott Henry, Pat Sullivan, or Cheryl Ruble, as indicated in the three divisions of their Partial Motion to Dismiss, or to provide any stipulation of these failures from the Commission, Respondents Henry, Sullivan, and Ruble have failed to meet their burden of persuasion with respect to these alleged grounds for dismissal. See Findings of Fact Nos. 4B, 9B, 12B.

Ruling in the Alternative: Legal Effect of Any Failure By the Commission to Comply With 161 Iowa Administrative Code Sections 3.12(3), 3.12(6) and 3.12(7):

7B. If it were assumed for the sake of argument that the Commission did fail to comply with 161 Iowa Administrative Code sections 3.12(3), 3.12(6) and 3.12(7), such failure would not warrant dismissal of the complaints. Respondents argued, without citation of authority, that the failure to comply with these rules is more than a technical violation and that such failure requires dismissal. (Tr. at 41).

8B. The controlling authority, however, is to the contrary. In Hartwig v. Board of Nursing, 448 N.W.2d 321, 322-23 (Iowa 1989). the Iowa Supreme Court stated:

> Petitioner suggests that any failure by an administrative agency to follow its own rules and regulations gives rise to a due process violation. We believe that this contention overstates the effect of such omissions. Neither Vitarelli v. Seaton, 359 U.S. 535,79 S.Ct. 968,3 L.Ed.2d 1012 (1959), nor Sherman v. Yakahi, 549 F.2d 1287 (9th Cir. 1977), cited by petitioner, stand for the proposition that all deviations by an agency from the agency's own rules give rise to a due process violation. This court has recognized that **if an** omitted **procedural step required by a statute or regulation is not essential to accomplishing the primary purpose of an agency's mission but is designed only to assure order and promptness in the proceeding a failure to follow the prescribed procedure will not invalidate subsequent proceedings unless prejudice is shown.**

Id. (citing e.g. Taylor v. Department of Transp., 260 N.W.2d 521, 523 (Iowa 1977)(emphasis added)).

9B. In the course of applying this standard, originally articulated in the Taylor case, to the Iowa Civil Rights Act, the Iowa Supreme Court held that, "[t]he principal purpose or objective of chapter 601A is 'to eliminate unfair and discriminatory practices in public accommodations and employment.'" Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 170 (Iowa 1982). If these rules are "essential to the main objective of the statute" they may be considered mandatory and failure to follow them will invalidate subsequent proceedings. See id. Where the purposes (of a rule or statute are "subsidiary and incidental to the larger, remedial purpose of the Iowa Civil Rights Act," then they may be considered directory only. See id. It would, in the absence of prejudice, "be fundamentally unfair to deny [complainants] the protection of the Act" because such a rule was violated. See id. (holding that statutory requirement for confidentiality is incidental to larger purposes of the Act).

10B. It is clear that the primary purpose of administrative rules 3.12(3) and 3.12(7) is to ensure order and promptness in the proceedings, i.e. to ensure that the parties are given prompt notice of the probable cause finding and the conciliation meeting. See 161 I.A.C. § 3.12(3), 3.12(7). Violation of rules fulfilling this purpose -"will not invalidate subsequent proceedings unless prejudice is shown." Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162,170 (Iowa 1982). No prejudice has been shown here. See Findings of Fact Nos. 4B, 9B, 12B.

11 B. The purpose of rule 3.12(6) is also subsidiary and incidental to the objective of eliminating unfair and discriminatory employment practices as the provision of a written synopsis of the facts leading to a finding of probable cause along with a written recommendation for a resolution of the case is not essential to that goal. This is particularly true when conciliation was attempted, as it must be in order to proceed to hearing. See Iowa Code § 601A.15(3)(d), (5). See Finding of Fact No. 3B. These facts could have been reviewed orally during the conciliation process. Proposals and counterproposals for resolution of the case are also often orally transmitted during that process. In any event, no prejudice has been shown. See Findings of Fact Nos. 3B, 4B, 9B, 12B.

Provision to Respondents of the Notice of Hearing As Required by 161 Iowa Administrative Code Section 4.1(1):

12B. Commission Rule 4.1 (1) provides:

> 4.1(1) Notice of Hearing. Where conciliation efforts fail, the executive director, with the approval of a commissioner, shall serve upon the parties notice of an administrative hearing on the merits of a complaint.

161 I.A.C. § 4.1 (1).

13B. This rule implements the statutory requirements for notice, see Iowa Code § 17A.12(l), 601A.15(5), and the constitutional due process requirement that notice and an opportunity to be heard be given before deprivation by the government of a person's property-. See Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District, 222 N.W.2d 391, 395 (Iowa 1974).

14B. It is this later aspect, that the final decision of the Commission can be afforded a finality which may either require a respondent to pay damages or which may deny a complainant damages, see Iowa Code § 601A.15(8), .17(2), which distinguishes the hearing process from the probable cause finding and conciliation process discussed previously. The effect of the probable cause finding is to trigger conciliation. See Iowa Code § 601A.15(3)(a). Conciliation is a process whereby a voluntary settlement is sought through "conference, conciliation, and persuasion." See Iowa Code § 601A.15(3)(d). Because of the voluntary nature of conciliation, no requirements of procedural due process apply to the probable cause finding or conciliation. See Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 306, 309-10 (Iowa 1979)(no probable cause finding does not implicate due process - requirements of procedural due process apply only to deprivation of liberty and property interests).

15B. In light of the Respondents' stipulation that Respondent Scott Henry was served with the notice of hearing, and of the findings that Pat Sullivan and Cheryl Ruble were not directly served with the Notice of Hearing, the issues remaining are (1) whether, under the standards given in Hartwig v. Board of Nursing and Foods, Inc. v. Iowa Civil Rights Commission, which were set forth above, is notice of hearing a directory or mandatory requirement? and (2) whether, if notice of hearing is a mandatory requirement, receipt of the notice by Respondents Sullivan's and Ruble's attorney fulfills that requirement?

16B. Despite the Commission's position to the contrary, (Tr. at 38, 44), provision of notice of hearing to a respondent is a mandatory requirement as it is essential to fulfill the Act's principal purpose of "eliminat[ing] unfair and discriminatory practices in public accommodations and employment."' Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 170 (Iowa 1982). This is so because, in order to accurately determine at hearing whether or not discrimination has occurred, the respondent must be given an opportunity to prepare and defend against the charges. Cf. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 768 (Iowa 1971) ("the key to pleading in an administrative process is nothing more or less than the opportunity to prepare and defend"). This can only occur if notice is given. Also, this statutory and rule requirement is constitutionally mandated. See Conclusion of Law No. 13B.

17B. Respondents argued, without citation of authorities, that cases pertaining to notice of appeal of contested cases were persuasive authority for the proposition that administrative agencies must "strictly comply with the provisions of the Code as they relate to notice" to the parties prior to a public hearing. (Tr. at 45). Respondents, however, conceded that, although they "couldn't find any rule that says service on the attorney will be deemed to be service upon the respondents. Perhaps if it's there, that will resolve, the issue." (Tr. at 41).

18B. Although there is no case law addressing these questions with respect to service of the notice of hearing under Iowa Code sections 17A.12(l) and 601A.15(5) or 161 Iowa Administrative Code Section 4.1(1), there is analogous authority with respect to service of the notice to appeal a contested case decision under Iowa Code section 17A.19(2). In Cowell v. All-American, Inc., 308 N.W.2d 92 (Iowa 1981), the court noted **"[w]e have rejected a standard of strict or literal compliance with section 17A.19(2)."** Id. at 94. Only "substantial compliance with statutory prerequisites is essential for the district court to acquire jurisdiction." Id. The Court held that a mailing of a copy of a petition for judicial review to the employer's attorney substantially complied with that statute's requirement that the copy be mailed to the last known address of the parties. Id. At that time, section 17A.19(2), like the present statutes and rules on service of notice of hearing, had no provision specifically allowing service on attorneys. Id. See Iowa Code § 17A.1 2(l), 601 A.15(5); 161 I.A.C. 6-4.1 (1).

19B. Another reason why receipt of the notice by Respondents' attorney is sufficient is that:

> [A] service of such notice upon the attorneys of the appellee is not a substituted service, in the ordinary sense, such as leaving a copy at th,e place of residence with a member of the family; nor is it a constructive service, in the sense that a publication of a notice is. The relations of litigant to his attorneys in the litigation are so close and active, and the responsibility of an attorney to his client in such a case is so definite and quasi official in its nature, that a notice to the attorney should be deemed the practical equivalent of actual notice to the client.

Stevens v. Peoples Savings Bank, 185 Iowa 619, 624, 171 N W. 130,132 (1919)(cited with approval in Cowell v. All- American, Inc., 308 N.W.2d 92,95 (Iowa 1981)).

20B. While service of the notice of hearing in this case directly on respondents would certainly have fulfilled the statutory and rule notice requirements, mailing of the notice to their attorneys, and receipt of the notice by the attorneys, substantially complied with these requirements. See Cowell v. All-American, Inc., 308 N.W.2d 92,95 (Iowa 1981).

Ruling:

21 B. In light of the findings of fact and conclusions of law set forth above, the Respondents Partial Motion to Dismiss was properly overruled.

FINDINGS OF FACT:

Jurisdictional and Procedural Facts:

1. On or before June 7, 1989, Commissioner Orlando Ray Dial filed his complaint CP # 06-89-18956 alleging race, sex, and disability discrimination in employment, which is prohibited by Iowa Code section 601A.6, and race discrimination in public accommodation, which is prohibited by Iowa. Code section 601A.7. (Complaint). The dates of alleged discrimination stated in the complaint are "before, on, and after May 18, 1989." Official notice is taken that June 7, 1989 is twenty days after May 18, 1989.

2. On November 17, 1989, Cristen Harms filed her complaint CP # 11-89-19422 alleging sex discrimination in employment, which is prohibited by Iowa Code section 601 A.6. The last date of alleged discrimination stated in the complaint is August 1, 1989. Official notice is taken that November 17, 1989 is ninety-eight days after August 1, 1989.

3. On December 6, 1989, Mike DeVolder filed his complaint CP # 12-89-19466 alleging race and sex discrimination in employment and public accommodations, which are prohibited, respectively, by Iowa Code sections 6OlA.6 and 601A.7. He also alleges that he was subjected to retaliation which is prohibited by Iowa Code section 601A.1l.The last date of alleged discrimination stated in the complaint is July 31,1989. Official notice is taken that December 6, 1989 is one hundred twenty-eight days after July 31, 1989.

4. Fairness to the parties does not require that they be given the opportunity to contest the facts officially noticed above.

5. These complaints were investigated. After probable cause was found, conciliation was attempted and failed. Notice of Hearing was issued on October 23, 1990. The hearing was held on April 1-5, 1991.

Background:

6. Commissioner Dial's complaint was filed in response to information provided by Mike DeVolder in May of 1989 concerning alleged discriminatory practices at Friedman Motorcars, Ltd. (hereinafter "Friedman's") and to the results of a "test" of that company's employment practices conducted by two Commission investigators on May 18, 1989. (Tr. at 158, 171, 177,

182, 192). Commissioner Dial was selected as the Commissioner to issue the complaint in accordance with a procedure whereby Commissioners are selected on a rotating basis to file complaints when Commission staff is aware of allegations of discrimination for which no complaints have been filed. (Tr. at 171-72).

7. Complainant Cristen Harms, a female, was employed at Friedman's as a Customer Relations representative from June 22, 1989 to on or about August 2, 1989. (Complaint; Tr. at 279, 304-05). She was hired by her supervisor and office manager, Respondent Cheryl Ruble. (Tr. at 281, 786-88). Ms. Harms' duties were to telephone customers who had either purchased or serviced cars at Friedman's and ascertain whether they were satisfied. (Tr. at 264, 788). Her work area was in the main office near the service department. (Tr. at 282). The main office was shared with Jackie Rice, Cheryl Ruble, and a man named Oren. (Tr. at 283). For one hour a day, she would also work in the receptionist cubicle on the showroom as relief for the receptionist, Catherine Koch. (Tr. at 225, 282).

8. Complainant Mike DeVoider, a white male, was employed as a salesperson selling new and used cars at Friedman's from April 12 to July 31, 1989. (Complaint; Tr. at 83). Mr. DeVoider was supervised by new car sales managers Mike Friedman and Scott Henry. He initially contacted the Iowa Civil Rights Commission when he became aware of race discrimination toward black customers and applicants for sales position. (Tr. at 97).

9. Respondent Friedman Motorcars Ltd. is a business engaged in the sales and service of new and used cars. The company has been owned by members of the Friedman family for many years. (Tr. at 465, 507, 630, 805). Initially, the company, then known as Friedman Motors, was owned by Harold Friedman and his brother. (Tr. at 465, 507). At some point, Mike and Gary Friedman, sons of Harold Friedman, became owners of the business. Respondent Gary Friedman bought out Mike Friedman and has been president and sole owner of the business since 1975. (Tr. at 630, 805, 825-26).

10. Immediately below Gary Friedman in the chain of command are several managers, i.e. the office manager, the business manager, new car sales manager(s), used car sales manager, parts man, service and parts director, and service man. (Tr. at 807). Of these, there are three positions in management which deal with car sales: new car sales manager(s), used car sales manager, and the business manager. (Tr. at 823-24). The supervision of salespersons is done by the new car sales manager(s) and the used car sales manager. (Tr. at 825).

11. The majority of the alleged discriminatory acts with respect to hiring and harassment which were the subject of these proceedings were said to have been committed by sales personnel on or near the showroom floor, in their offices, or outside on the car lot in 1989. The period of April 12 to August 2, 1989 encompasses the Commission's test of May 18, 1989 and the employment dates of Complainants Mike DeVoider and Cristen Harms. The chain of command for the sales department for that period was:

- Gary Friedman (President and Owner)
    - Pat Sullivan (Used Car Sales Mgr.)
        - Salespersons and Tim Manning (Finance Manager)

- Mike Friedman (New Car Sales)(Mgr. Saab/VW)
  - Salespersons and Tim Manning (Finance Manager)
- Scott Henry (New Car Sales) (Mgr. Toyota)
  - Salespersons and Tim Manning (Finance Manager)

12. Respondent Mike Friedman has been employed with Friedman Motors or Friedman Motorcars, Ltd. during three different periods in sales positions. For 11 years, until approximately 1975, he worked with Friedman Motors. (Tr. at 775). He came back as a salesperson for Friedman Motorcars, Ltd. from approximately April to July 1987. (Tr. at 776). The last time, he was new car sales manager for Volkswagen and Saabs from late 1987 or early 1988 to at least the end of 1989 when his position, along with that of Respondent Pat Sullivan, used car sales manager, was reduced to salesperson due to high overhead and poor business. (Tr. at 83, 205, 337, 500, 507, 509, 511 582, 656, 698, 741-42, 750, 774, 809, 81415). He was terminated from employment with Friedman's in January of 1991 by Gary Friedman. (Tr. at 738, 815). During his last period of employment, he reported directly to Gary Friedman. (Tr. at 492).

13. Respondent Scott Henry, who was still employed at Friedman's as of the date of the hearing, started there in 1980 as business and finance manager. (Tr. at 695-96). He has switched at various times from new car sales manager to used car sales manager over his 11 years. (Tr. at 697). He was new car sales manager for Toyota for at least the period of Mike DeVolder's employment, i.e. April 12 to July 31, 1989. (Tr. at 83, 696-97). During that period, he reported directly to Gary Friedman. (Tr. at 492).

14. Respondent Pat Sullivan, who was still employed at Friedman's as of the date of the hearing, worked at Friedman Motors in sales positions from 1958 to 1971. (Tr. at 464). After working elsewhere, he returned to take the position of new car sales manager at Friedman Motorcars, Ltd. in June of 1987. (Tr. a,%- 464, 496). He became used car sales manager in 1988 and remained in that position until at least the end of 1989 when he and Mike Friedman were both reduced to sales persons. (Tr. at 511, 814-15). During 1989, he reported directly to Gary Friedman. (Tr. at 492).

15. Respondent Tim Manning started with Friedman's as a service writer, writing up tickets of repairs, in April of 1981. (Tr. at 580). In September of 1983 be became finance manager. (Tr. at 581). In February of 1990, he became new car sales manager, a position which he still held as of the date of hearing. (Tr. at 581). In May of 1989, while finance manager, he was supervised byPat Sullivan, Scott Henry and Mike Friedman. (Tr. at 583-84).

16. Salespersons, other than Mike DeVolder, employed during the period of April 12 to August 2, 1989 included Jeffrey Rich, Curtis Peters, and Gene Cooksey, all of whom testified at the hearing. (Tr. at 236-37, 326, 335-36, 341, 644-45).

Application and Hiring Process for Salesperson Positions in 1989:

17. During 1989, Friedman Motorcars, Ltd. would periodically run newspaper advertisements for salespersons to sell new and used cars in the Des Moines Register. (Tr. at 206-07, 386,475-76, 590). The ad would usually give Friedman's address and list a particular time for the potential

applicant to come in. (Tr. at 476) **The advertisement would either indicate the potential applicant was to see Mike Friedman in person or call him at a specific telephone number listed** in **the ad.** Both methods of contacting him were used by potential applicants. (Tr. at 206-07). An advertisement might run for up to ten days and yield from ten to fifty applicants. (Tr. at 479-80, 591-92, 76061).

18. **For at least a one year period, during his time as sales manager, from the fall of 1988 to the fall of 1989, Mike Friedman was in charge of handling initial applicant contacts and conducting initial applicant interviews for the salespersons positions.** (Tr. at 99, 205, 207, 345, 474, 477, 620, 698, 719-20, 744, 811). **It is more likely than not that the actual period wasup to eleven months longer, beginning shortly after Mike Friedman was rehired in the fall of 1987 or spring of 1988 as a sales manager, a total of twenty-three months.** (Tr. at 474, 477, 742-43, 765). He handled at least "ninety-nine percent" of initial applicant interviews during that period. (Tr. at 699). During this period only one or two initial interviews each were handled by the other sales managers, Pat Sullivan and Scott Henry. (Tr. at 502). It should also be noted that, during his previous periods of employment with Friedman Motorcars Ltd. and Friedman Motors, he also had responsibility for interviewing applicants for salesperson positions.

19. An individual who wished to apply for a salesperson position would be given an application by the receptionist, or Mike Friedman or another employee. The potential applicant would then fill out the application. (Tr. at 207, 476, 699). The majority, but not all, of the applicants were interviewed. (Tr. at 480, 505). The decision on who would be interviewed was made by Mike Friedman. (Tr. at 505). After the initial interview was completed, he would decide whether the candidate was interesting enough to discuss with Pat Sullivan and Scott Henry. The three of them would then decide whether to hire the applicant based on Mike Friedman's interview or to conduct a further interview. (Tr. at 390, 475, 478, 50102, 756). If a second interview was given, it would be conducted by two of these three sales managers. Afterwards, they would decide whether to hire the applicant. (Tr. at 501-02).

20. There is a substantial turnover of salespersons at Friedman's. Fifteen to twenty sales persons, and probably more, are hired by Friedman's in any given year. A number also leave. (Tr. at 410, 484, 510, 59192). Because of this turnover, there is a continuing search for qualified salespersons. Normally, even if there is no hiring, applications are given out. (Tr. at 208). As car sales usually increase from the end of winter through the end of summer, the number of salespersons may also increase to a maximum of 12 or 13 in the summer. (Tr. at 593). In the spring of 1989, 10 toll people left sales positions at Friedman's. (Tr. at 205). Seven or eight salespersons, all white males, were hired as their replacements. (Tr. at 206).

21. **Although Friedman's has looked for applicants with prior car sales experience, it has hired more than one salesperson who had no previous car sales experience.** (Tr. at 475-77, 484, 503-04, 590, 700, 743). Pat Sullivan, Mike Friedman, and Scott Henry consulted together when making these hires of persons with no prior experience, as they did with other hires. (Tr. at 503-04). See Finding of Fact No. 19. One salesperson who was still employed in 1989, Curtis Peters, had worked at a farm, a gas station, and various part-time jobs prior to being hired as a salesperson by Bill Vestal, a former used car sales manager, in 1985. (Tr. at 644-45). Another salesperson, Mark Boyd, was hired by Mike Friedman and employed for one week in March of

1989. Although he had sales experience in other areas "on and off for ten years," he had only four months prior experience in car sales. (Tr. at 385-87, 390). In July of 1990, Friedman's hired James Sherman, whose total prior sales experience was six and one-half months selling cars. (Tr. at 396, 401-02).

Alleged Disability Discrimination in Employment:

22. Commissioner Dial's complaint specifically alleged that Respondents "treated . . . disabled persons . . . less favorably than . . . non-disabled persons . . . [in] the consideration [and] hiring of applicants for the salesperson position." (Complaint). On January 16, 1990, probable cause was found to believe that disability discrimination had occurred in regard to the consideration of applicants for employment. (Admissions). The Commission, however, presented no evidence or argument in support of this allegation. Therefore, this allegation must be dismissed.

Failure to Consider or Hire Blacks for Salesperson Positions:

Direct and Circumstantial Evidence of Race Discrimination:

23. During and after the Spring of 1989, Mike Friedman told Jeffrey Rich, a salesperson, that he did not want to hire Blacks as salespersons. (Tr. at 327). He would also frequently refer to Blacks as "niggers" and by other racial epithets which were overheard by Mike DeVoider and Cathy Koch, the receptionist. (Tr. at 85 88, 204, 212, 215, '133).

24. On some occasions, Black applicants would be allowed to fill out applications, but would either not be interviewed under circumstances where white applicants were interviewed; or Mike Friedman would talk to them for a very brief period of time while similarly situated white applicants would be interviewed at greater length. (Tr. at 93-94, 142, 327-28).

25. On other occasions, Mike Friedman would tell Black potential applicants that a job was not available or that it was filled, but would give white potential applicants, who responded to the advertisements after the Blacks, applications to fill out. (Tr. at 94-95, 357). On one of these later occasions, a Black potential applicant asked if he could leave his resume or fill out an application. He was told this would not be necessary. (Tr. at 95). No Blacks were interviewed, hired, or employed as salespersons at any time when Mike Friedman was in charge of interviewing at Friedman Motorcars Ltd. (:Tr. at 96, 357, 506-07, 770). There is no evidence in the record of any Black salesperson ever being employed at Friedman Motorcars Ltd. prior to February 13, 1990. (Tr. at 523).

Number of Black Applicants:

26. There is some dispute concerning how many Black applicants there were for sales positions in 1989. The greater weight of the credible evidence, however, supports the conclusion. that there were at least three and probably more Black applicants, including Bill Edwards, in the spring of 1989 alone.

27. On the one hand, some testimony of the Respondents presented a picture of almost no black applicants. Mike -Friedman testified, that during the twenty years when he was employed with either Friedman Motors or Friedman Motorcars, Ltd., he had responsibility for interviewing potential employees for sales positions. (it should be noted that Mike Friedman's total employment with both entities, including the times when he did not have responsibility for hiring salespersons, could not have exceeded fifteen years. See Finding of Fact No. 12). He testified that, during the time when he had that responsibility, a total of two Blacks, neither of whom were interviewed or hired, called or came to the dealership to make inquiry about employment as salespersons. (Tr. at 760, 766).

28. Sales manager Scott Henry maintained he was aware of less than five or six Black applicants from 1980 to 1991, three of whom applied during the year prior to the hearing. (Tr. at 717, 720).
29. On the other hand, Mike DeVolder testified that, in the Spring of 1989 alone, there were over three Black applicants, including Bill Edwards. (Tr. at 9395, 98-99). Cathy Koch saw at least two Black applicants during that period. (Tr. at 208-09). Jeffrey Rich's testimony indicates that he recalls there being six Black applicants during his employment with Friedman's which was essentially continuous from March 1987 to April or May of 1990 and then resumed from June of 1990 until the date of the hearing. (Tr. at 326-28, 340-42)..Two of these six applied and were hired after Mike Friedman was no longer conducting interviews. (Tr. at 343, 353). See Finding of Fact No. 12. More than one of the remaining four Blacks sought employment in the Spring of 1989. (Tr. at 327-28).

The employment test:

30. Mike DeVoider had originally telephoned the Commission to complain about race discrimination at Friedman Motorcars Ltd. after witnessing such discrimination in hiring for salesperson positions and in the treatment of Black customers. (Tr. at 97-98). At that time, Mr. DeVoider was not interested in personally filing a complaint. Therefore, after being informed of these incidents, Don Grove, the Commission's internal Administrative Law Judge, was requested by lnga Bumbary-Langston, the Commission's Executive Director, to listen to a tape recording of the Commission's interview of Mr. DeVoider and to recommend appropriate action ' (Tr. at 158). It was decided that a test be conducted to determine whether Mike Friedman considered race in the treatment of applicants for salesperson positions. (Tr. at 159).

31. The test was originally designed to occur in two parts, separated by at least a day. Part one utilized two male testers: Bill Edwards, a Black male, and Karl Schilling, a white male. (Tr. at 159, 168, 177-78, 192). Part two was to involve two female testers: one Black and one white. (Tr. at 159). Part two was never carried out. (Tr. at 171). In essence, the test called for the testers to observe what happened when they applied or attempted to apply, through Mike Friedman, for a salesperson position at Friedman's which was advertised in the newspaper. (Tr. at 155-56, 159, 182, 754). Both male testers were employed as Civil Rights Specialists with the Commission. (176-77, 191). Both were provided information on the automobile sales business concerning such subjects as sales training, what would constitute a good sales record, and salaries and commissions. (Tr. at 179,193). Both were given pseudonyms to use as testers in order to avoid being identified as Commission employees. (Tr. at 186-87)

32. Both testers were given personal profiles. (Tr. at 179, 193). Karl Schilling's profile was designed to represent his character as being somewhat less qualified than Mr. Edwards. (Tr. at 163,174, 180, 194). Mr. Schilling was to have had six months car sales experience with a Chevrolet dealer in Missouri. (Tr. at 193). His character's car sales performance was to have been lackluster, i.e. two months in training and slightly below average in sales at the end of six months. (Tr. at 194-196). His work background, other than car sales, was to be substitute teaching and full time teaching. (Tr. at 193).

33. Mr. Edwards' profile for his character, "Mr. Edmunds", included ten months of prior car sales experience with a Chevrolet dealer in Bloomington, Minnesota. (Tr. at 170, 180). He was ranked number 4 in the sales force there and always made his draw. He sold a minimum of 10 cars per month. (Tr. at 180). (At Friedman's the management liked to see sales-persons "at least hit 10" cars per month in sales.) (Tr. at 592). His prior experience included approximately two years in retail management at a shoe store. (CP. EX. # 3). In light of the minimum actual prior car sales experience and sales expectations of salespersons employed or hired at Friedman's during Mike Friedman's last period of employment, it is clear this is a profile of a qualified applicant. See Finding of Fact No. 21.

34. With respect to dress, both men were photographed, immediately prior to the test, wearing the suits and ties they wore to Friedman's. (CP. EX. # 1,2;Tr.at l66).With respect to demeanor and behavior during the test, both testers were instructed to act professional and polite and not overly aggressive, i.e. to essentially react to Mike Friedman and not attempt to elicit any particular kind of a response from him. (Tr. at 164, 179, 194). Both testers underwent pretest interviews to review their respective stories and instructions. (Tr. at 165, 181, 194). Both testers also immediately returned to the Commission after the test to undergo interviews so they could record what they had seen. (Tr. at 169, 181, 188, 195).

35. Bill Edwards, the Black tester, was sent out first. (Tr. at 159-60). He arrived at Friedman's at approximately 1:30 p.m. on May 18, 1989. (Tr. at 182-83). While waiting for the receptionist, a sales representative asked him if he could help. (Tr. at 183). When Edwards told him he was responding to Friedman's advertisement in the paper for a salesperson position, he was taken to Mike Friedman. The salesperson told Mike Friedman that Mr. Edwards wanted to apply for the position. Mr. Friedman gave him an application which Mr. Edwards began to complete. Mike Friedman came back two to three minutes later and read the newspaper for five minutes. Mike Friedman never made eye contact or looked at Edwards during this time. Friedman then left. (Tr. at 184-85). Edwards then finished the application and sought out Friedman's office. Friedman was on the telephone. He stopped the conversation long enough to take the application and say "I'll keep this on file". Mr. Friedman continued with his telephone conversation and Edwards left. At no time did Mr. Friedman ask Mr. Edwards who he was or try to shake his hand. (Tr. at 185, 770-71). Mike Friedman never interviewed Mr. Edwards. (Tr. at 183-86, 770). He barely looked at Mr. Edwards throughout this entire encounter. (Tr. at 184-85).

36. Mr. DeVoider saw Mr. Edwards apply, and spoke to him briefly on his way out. (Tr. at 98-99, 169, 185). They had both worked at the Des Moines Register previously, but had not seen each other since November of 1987. (Tr. at 181, 185). DeVolder did not know Edwards was employed with the Iowa Civil Rights Commission. (Tr. at 181). After Edwards left, DeVolder

asked Cathy Koch, who was working on the computer in Mike Friedman's office, to look in the wastebasket and tell him what she saw. (Tr. at 98, 209). She told him that there was an application in the wastebasket. (Tr. at 98, 169-70, 209). He told her that this was from the applicant who had just come in. (Tr. at 209). She had seen Mr. Edwards give his application to Mike Friedman and was aware that he was Black. (Tr. at 209). She had also heard Mike Friedman laugh and say, after Edwards left, "Imagine, he came in here thinking he was going to get a job here." (Tr. at 21 1).

37. Cathy Koch was not surprised that Edwards' application was in the wastebasket as she was aware that Mike Friedman seemed to feel Blacks were inferior. (Tr. at 21 1). Mike DeVolder took possession of the application. (Tr. at 98, 169-70, 209-210). Don Grove, who was in charge of the test, obtained the application from Mr. DeVoider the next morning. (Tr. at 155, 159-163, 169-70). The application was entered into the record of this hearing as Complainant's Exhibit No. 3.

38. Karl Schilling went to Friedman's after Mr. Edwards. (Tr. at 159-60). When Schilling made the appointment for the interview, **Mike Friedman indicated he was not actively soliciting sales persons as he had eight, but he might be able to add one.** (Tr. at 195-96). Mr. Schilling went to the receptionist and was directed to Mike Friedman's office. (Tr. at 196). Mike Friedman interviewed him. (Tr. at 196). Throughout the interview, Friedman treated Schilling in a friendly and professional manner. (Tr. at 198). Mr. Schilling introduced himself and the two of them shook hands. (Tr. at 196). Mr. Schilling informed him that he had six months experience. During that time, he had been two months in training. (Tr. at 196). He stated that by the end of six months his car sales were a little below average which he thought was doing reasonably well. (Tr. at 197). Mike Friedman then gave him an application and left the office. After filling out the application, Mr. Schilling handed it to Mike Friedman and left. (Tr. at 197).

39. Ms. Koch also witnessed Mr. Schilling's visit. (Tr. at 210). Although she entered Mike Friedman's office after the interview, she did not find Mr. Schilling's application in the wastebasket. (Tr. at 21 1).

40. After part one of this test was completed, Mr. Grove recommended, and Ms. Bumbary-Langston decided, that a commission initiated complaint should be filed in order to begin an investigation based on the information gathered to that date. (Tr. at 171).

Mike Friedman's Reasons for His Treatment of Bill Edwards' Application:

41. In his testimony, Mike Friedman denied that race was a factor in his Treatment of applicants. (Tr. at 743, 759). He also denied stating that he would not hire a Black, although he did tell Rodney Wright, a Black salesperson hired after he no longer played a role in the hiring process, that his grandfather would turn over in his grave if he knew that Wright was working at the dealership. (Tr. at 766-67). He claimed the advertised salesperson position had been filled. (Tr. at 754, 756). He stated that he did not spend as much time with Edwards as he did with Schilling because he was busier when Edwards arrived, as he was involved in a car deal on the telephone. (Tr. at 753, 769). He asserted that he threw away both Karl Schilling's and Bill Edwards' applications. (Tr. at 755). He also stated that he did not hire either Schilling or Edwards because

it was his judgment that neither of them had enough enthusiasm or drive to do well at Friedman's. (Tr. at 759).

42. There are several reasons why these explanations are neither credible nor supported by a preponderance of the evidence. First, although Mike Friedman testified that the time he would spend with an applicant would vary depending on how busy he was, this does not explain his failure to shake hands with Mr. Edwards or to otherwise treat him in a professional manner as he had Mr. Schilling.

43. Second, Mike Friedman's contention that the position was filled was effectively contradicted by Karl Schilling's testimony that Friedman told him they were not actively soliciting car salespersons because he had eight, but he might be able to add one more. This increase would be consistent with the number of salespersons that would be expected for the summer months. See Finding of Fact No. 20. Karl Schilling's testimony is more credible on this point because he is not a party in this case and has no self-interest in its outcome. Furthermore, his recollection of events in this matter is clearer than Mike Friedman's.

44. Third, although Mike Friedman may have eventually thrown away Schilling's application some time after his interview, (Tr. at 173-74), he threw Edwards' application away immediately after he had informed him he would keep it on file and before he had conducted any interview of him. Although Cathy Koch was present in Mike Friedman's office shortly after the interview of Karl Schilling, she did not find Mr. Schilling's application in the wastebasket.

45. Fourth, although Mike Friedman had an opportunity to evaluate Mr. Schilling's enthusiasm during an interview in which Schilling deliberately presented a "lackluster" image, (Tr. at 197), he never had the opportunity to evaluate Edwards' enthusiasm because he did not communicate with Edwards beyond handing him an application and telling him, once the application was completed, that the application would be kept on file. Mr. Edwards was never given the opportunity, in his role as "Mr. Edmunds," to tell Friedman that he was number 4 in car sales at his former employer, that he always made his draw, or that he sold a minimum of ten cars a month, all of which would be indicative of success at the job.

46. Finally, Mike Friedman's statements to Jeffrey Rich to the effect that he would not hire Black salesmen, his general derogatory statements concerning Blacks overheard by both DeVoider and Koch, and his comments, overheard by Cathy Koch, concerning Mr. Edwards' attempt to get a salesperson position at Friedman's further demonstrate that race was the real reason for his actions toward Mr. Edwards.

Post Complaint Hiring of Black Applicants As Salespersons:

47. Two Black applicants were hired by Friedman Motorcars Ltd. as salespersons after it was served with Commissioner Dial's and Mike DeVolder's complaints alleging, respectively, race discrimination in hiring and a racially hostile working environment. These applicants were also hired after Mike Friedman no longer had the responsibility for handling initial contacts with potential applicants for salesperson positions. Richard Lyle, a Black male, began his employment at Friedman Motors on February 13,1990, approximately eight months after Commissioner Dial's

complaint was served; two months after DeVolder's complaint was served; and three months after Mike Friedman's responsibility for initial applicant contact and interviews ended. (Admissions Dial and DeVoider complaints; Tr. at 523). See Finding of Fact No. 18.

48. Rodney Wright, also a Black male, began his employment at Friedman Motors on July 27, 1990, approximately thirteen months after Commissioner Dial's complaint was served; seven months after DeVolder's complaint was served; and eight months after Mike Friedman responsibility for initial applicant contact and interviews ended. (Admissions- Dial and DeVolder complaints; Tr. at 545). See Finding of Fact No. 18. Not only are hirings of Black salespersons at these times entitled to no weight in determining what the Respondents' employment practices were at the time Mike Friedman was in charge of initial applicant contact and interviewing; such hirings in the face of pending complaints should be viewed with suspicion when determining the true nature of a Respondent's employment practices. See Conclusion of Law No. 36.

Failure to Consider or Hire Females for Salesperson Positions:

Direct and Circumstantial Evidence of Sex Discrimination:

49. Mike DeVoider saw several females apply for salespersons positions. (Tr. at 103-04). On one occasion, DeVolder talked to one who was waiting for Mike Friedman to come back from lunch so she could be interviewed. She told him that she was from Omaha and had experience in selling cars. Mike Friedman had her fill out an application and did talk to her. When DeVolder asked about her, Friedman responded, "You know, in the last twenty years, I think we've hired only two girls here and they never work out. Either they're always having their periods or we end up fucking them and then we have to let them go because they don't ever work out. I don't want to start fucking all the help. I don't hire women.They're worthless." (Tr. at 104). Mike Friedman would typically comment on female applicants and other females entering Friedman's by making such remarks as "Would you fuck that?," "What do you think of that over there?..... Look at those tits on that girl!" and similar remarks. (Tr. at 105, 330-31).

50. On one occasion, Ms. Koch overheard Mike Friedman talking to a female who had telephoned about an advertised salesperson position. She heard him ask the woman, "What do you look like? Are you good looking?" Afterwards, he told Ms. Koch, "She wanted to apply for the job and all she wants to do is come in here and screw the salesmen." Ms. Koch asked how he could know this from a telephone conversation with the prospective applicant. (Tr. at 212). Mike Friedman replied, "Because that's how women are, you get a woman in here, and they just want to screw all the salesmen and that's what always happens." (Tr. at 212-13). Ms. Koch had expressed an interest in selling cars and was irritated by these remarks. (Tr. at 213).

51. On another occasion, Cathy Koch saw two females be refused applications by Mike Friedman when an ad was in the newspaper for salesperson positions. He told them, or had her tell them, the position was filled. This varied from the procedure with male applicants who were usually given applications. (Tr. at 207-08).

52. In October of 1988, Jody Borgman, a female, applied for a salesperson's position at Friedman's. (Tr. at 241, 712). Scott Henry took her application. (Tr. at 242). She had previously

sold cars at Des Moines Chyrsler Plymouth for two years. (Tr. at 242, 244). She called Scott Henry back and he informed her that the position was filled. (Tr. at 242-43). After this conversation, she talked to Janet Adams, a receptionist at Friedman's who had suggested she apply. Ms. Adams told her that no one had been hired for the position and that the ad was still being run. (Tr. at 241, 243, 248). Ms. Adams had heard that the position was still available from someone, possibly a salesman. (Tr. at 248).

53. Scott Henry testified that he did not hire Ms. Borgman because she was not qualified as she did not have prior successful car sales experience. He asserted that he had checked her references and found out that, at Des Moines Chrysler Plymouth, she had been in charge of a telephone room where salesperson's prospects were called in order to get them back into the dealership. If she got them back, she would get one-half of the commission. Mr. Henry did not consider that to be car sales experience and, therefore, felt she was not qualified. (Tr. at 712-13). This explanation is not credible because Mr. Henry had hired, in consultation with Pat Sullivan and Mike Friedman, applicants for salesperson positions with no car sales experience whatsoever. (Tr. at 503-04). K-either Mr. Henry nor Friedman's offered evidence of any other explanation, such as the hiring of a more qualified applicant, for the failure to hire Ms. Borgman.

54. Three female salespersons have been employed by Friedman Motorcars Ltd. since 1980. The last one was Lonnie Hanson who worked there for at least three years and left sometime between 1985 or 1986 and early 1989. (Tr. at 446- 447, 449, 589-90, 646, 722). The evidence in the record does not indicate who hired Ms. Hanson, although it is clear it was not Pat Sullivan or Mike Friedman, who were not employed at Friedman's in 1985 or 1986. (Tr. at 467-68, 499). See Finding of Fact No. 12. By the spring of 1989, there were no female salespersons at Friedman's. (Tr. at 212).

Different Treatment of Black Customers In the Offering and Providina of Services:

55. The evidence in the record demonstrates that some, but not all, sales personnel at Friedman's would be reluctant and would fail to wait on Blacks or sell a car to them because of their belief that Blacks would not be able to qualify for financing. The greater weight of the evidence does not support this conclusion with respect to sales managers Pat Sullivan and Scott Henry or finance manager Tim Manning. It does support this allegation with respect to Mike Friedman.

56. Mike DeVolder, Jeffrey Rich, Gary Cooksey and Mark Boyd, who were salespersons for Friedman's in 1989 for periods ranging from one week (Boyd), to the full year (Rich), testified that salespersons tended to avoid Blacks viewing cars because of the belief that they could not financially qualify. (Tr. at 84, 236, 341-42, 389). At one point, a management employee indicated white couples should be waited on prior to Black couples for this reason. (Tr. at 217). One afternoon, a Black couple came in and no one was there to help them. Cathy Koch paged for a salesman. A salesman responded to the call. Afterwards he told her, "I'm going to get you for that." She asked "For What?". He replied, "For calling me out to wait on a Black couple." Ms. Koch asked, "We don't wait on Black couples?" He repeated, "I'm going to get you for that." (Tr. at 216).

The Saab Incident:

57. After Mike DeVoider had been employed at Friedman's approximately 2 l/2 weeks, a Black couple, the McCiendons, came in to look at a Saab. (Tr. at 85-86, 415). DeVolder made a preliminary determination that they were qualified buyers. At this time, Friedman's had a Saab 9000 which had been on the showroom floor for a long time. (Tr. at 86-87, 416). Mike Friedman had indicated at a sales meeting that this is a car that wanted to be sold, i.e. the dealership was anxious to sell it. Mike DeVoider showed this car to the McCiendons, who indicated they liked the car and wanted to test drive it. In the past, it had been standard procedure to allow customers to test drive cars off the showroom floor in order to "seal the deal," i.e. to make the sale. (Tr. at 87).

58. Mike DeVolder told Mike Friedman that he had a prospective buyer for the car. Mike Friedman seemed excited to find a purchaser, until DeVoider pointed out the McClendons. Friedman then laughed and stated, "Those fucking boot-lipped niggers are going to buy my car? No way. You find somebody else. They don't have any money. You can't sell a car to a Black person. You're wasting your time. Go on to somebody else." DeVolder responded by pointing out that he indicated that allowing them to test drive the car would "cinch the deal." Mike Friedman's response was, "I don't want to waste my time, you go on to somebody else." (Tr. at 88). It is clear from these comments that Mike Friedman would not allow the McCiendons a test drive because of their race. DeVolder felt he could not simply "go on to somebody else" as the McClendons were ready to buy. Therefore, although he told them they could not take it off the showroom floor, he was able to negotiate a sale with them. (Tr. at 8889,415-16). When the car was taken off the showroom floor, Mike Friedman rebuked DeVoider for selling to this couple although financing had not yet received final approval. (Tr. at 92). Following this procedure with respect to white customers never resulted in such a rebuke. (Tr. at 96).

59. As Mike DeVolder made the deal, he noticed that there were two small dents on the hood and roof. (Tr. at 90). Friedman's usual policy is that if a new car is dented, and the dealership is aware of it, it is repaired prior to delivery to the customer. (Tr. at 821). DeVolder informed Mike Friedman of the dents and said they would have to be fixed by the dealership. Friedman responded, "No way. No way am I going to fix any dents. I've already lost enough money on this deal. I'm not about to fix any dents. When they ... drive it off and come back in, we'll just tell them that it happened while they were gone, and we're not going to stand behind it. It will be their word against ours. Just keep your mouth shut, Mike." Therefore, DeVolder did not inform the McCiendons of the dents at that time. (Tr. at 90).

60. After the McCiendons took possession of the Saab, Mrs. McClendon's co-workers noticed one of the dents. She informed Mike DeVoider of the dents during a telephone call. (Tr. at 416). He called her back, without even seeing the car, to set up an appointment to get it fixed. Mrs. McClendon noted that it was strange for a dealership to be ready to fix the dents on the car without even having seen them. When Mrs. McClendon took the Saab in the next day to have the rearview mirror fixed, she pointed out to DeVoider the dent she was aware of. At this time, DeVoider pointed out the other dents to her and told her to make sure they were repaired when she brought the car in for the appointment. (Tr. at 417-19).

61. Once DeVolder was informed that the McCiendons were aware of the dents, he went to Scott Henry and told him how Mike Friedman had decided to handle the dents. He did not go to Mike Friedman, the Saab sales manager, because of Friedman's plan to assert that the dents had not been present when the car had been delivered. (Tr. at 91-92). Scott Henry told DeVoider to forget what Mike Friedman had said, that the dealership would cover it. (Tr. at 92). Therefore, tha dents ultimately were fixed by the dealership. (Tr. at 92, 417-18). But, if the McCiendons had been white, and Mike Friedman had known of the dents, the car would not have been delivered with the dents unrepaired.

Actions of Scott Henry, Tim Manning and Pat Sullivan:

62. Although Respondent Scott Henry, on one occasion, told a salesman, Mark Boyd, that Black customers were a waste of time because they don't have the money to qualify, the record does not demonstrate any instance where he failed to wait on or sell a car to a customer because of his or her race. (Tr. at 387-88). As noted above, Scott Henry did aid Mike DeVoider in getting the Saab fixed for the McClendons. (Tr. at 91-92). Also, another Black couple, Raymond and Rosemary Jackson, have purchased Toyotas through Mr. Henry since 1985 or 1986. (Tr. at 444, 449,455, 457, 458, 462). Mr. Jackson is a "car buff," who at one time purchased up to two cars per year. (Tr. at 450). The Jacksons have purchased between 7 and 8 Toyotas from Friedman's from 1982 to 1989. (Tr. at 446, 452). The Jacksons have also dealt with Respondents Pat Sullivan and Tim Manning, have been satisfied, and have not observed anything to indicate they were being treated differently due to their race by either them or Scott Henry. (Tr. at 450-52, 458-60).

63. Van Clark is a Black customer who has dealt solely with Pat Sullivan at Friedman's for four years and has purchased two used cars from him there. (Tr. at 436-37, 439, 441-42). He has previously purchased two cars from him when Mr. Sullivan worked at Conway Buick. (Tr. at 437, 441). Mr. Clark is satisfied with Mr. Sullivan's service and has seen nothing to indicate adverse treatment on the basis of his race. (Tr. at 437-39).

Racially Hostile Working Environment:

64. As previously noted, Commissioner Dial's complaint alleges both "racial harassment" and less favorable treatment of Blacks than whites "in the consideration and hiring of applicants for the salesperson position ... in the offering [and] providing of services." Mike DeVoider's complaint refers to his "work environment [being] pervaded by . . . racial harassment of Black customers." The evidence on these issues is interrelated. It consists of evidence showing a combination of racially derogatory comments made about Blacks in general, Black applicants, and Black customers and of different treatment in the consideration and hiring of Black applicants and the offering and providing of services to Black customers. Evidence of comments concerning Black applicants and customers, and the different treatment of Black applicants and customers has already been presented. See Findings of Fact Nos. 23-48,55-63. These comments and actions would and did contribute to the perception of Mr. DeVolder and other employees that the working environment at Friedman's was marred by racial hostility toward Blacks.

65. In addition to the comments previously discussed, Respondent Tim Manning once suggested that Cathy Koch page a Black Toyota representative, whose name she did not know, as "Hey Coon." (Tr. at 214). She heard numerous derogatory racial comments and jokes on the showroom floor at Friedman's during the spring and summer of 1989. (Tr. at 215). Respondents Scott Henry, Pat Sullivan, and Tim Manning would make such comments. (Tr. at 85). Salesperson Curt Peters would comment, "You know, I'm open about how I feel. My father and grandfather are card-carrying members of the KKK. My father pays huge fines every year because he refuses... to hire Black people." (Tr. at 217).

Sexual Harassment:

Sexually Hostile or Discriminatory Working Atmosphere:

66. The treatment and comments concerning female applicants for salesperson positions which were discussed previously would and did contribute to Mike DeVoider's and others' perceptions that Friedman's had a sexually hostile or discriminatory environment. See Findings of Fact No. 49-54.

67. Mike DeVolder heard derogatory sexual remarks about women at Friedman's from his first day of work. Mike Friedman, in particular, would talk about his sexual fantasies or comment "Would you fuck that?" with regard to virtually every woman that came into the showroom. It got to the point DeVolder would walk away from Mike Friedman when he noticed women. (Tr. at 101-02).

68. Cathy Koch received the impression that sales staff, and particularly Mike Friedman, felt women employees were sex objects and not too smart. Mike Friedman made the most sexual comments that she heard. She did not hear Scott Henry, Pat Sullivan or other management staff make such comments. (Tr. at 218). These comments were either made directly in her presence or to other sales representatives where she could hear them. (Tr. at 218-19). With regard to attractive female customers, he would often say "Wouldn't you like to screw her?" (Tr. at 219). Mike Friedman told Ms. Koch that he had some past legal problems in California due to his preference for young (14 to 15 years old) women. (Tr. at 221). He also asked her if she wished she was single. When Ms. Koch replied she did not, he stated "one of us is strange, because there's a lot of women out there I want to screw." When Ms. Koch was first learning to use the computer in Mike Friedman's office, he would often sit by her and look down her bra if she was not buttoned up to the neck. (Tr. at 223).

69. Angie Whetro was a part-time receptionist at Friedman's who worked on Saturdays only from January to March 1989. She was nineteen years old at the time. (Tr. at 259). Mike Friedman, who was then forty-seven years old, would spend a lot of time watching her. He would ask her questions about her personal life. (Tr. at 260, 738). He suggested that she stop seeing the man she was dating "for an older man who can take care of you and give you everything you want." Ms. Whetro found these suggestions offensive. (Tr. at 261, 796-97). Mike Friedman told her that he had friends in California who would take pictures of her if she wanted to get into modeling. (Tr. at 261, 778-79). Scott Henry told her to watch out because "Mike has been known to take nudies of little girls like you." (Tr. at 261).

70. To a lesser degree, Ms. Whetro also found Scott. Henry's gross sense of humor to be offensive. She objected to him about this behavior. (Tr. at 262-63, 266, 269). On one occasion, he called her on the switchboard and asked her to page a fictitious "Mike Hunt," i.e. "my cunt," which she refused to do. On another occasion, Scott Henry told her, "if I were ever to sleep with you, I would do you so hard that your cunt would fall off and smoke at your feet." (Tr. at 262). Although this behavior was offensive and harassing, Ms. Whetro also felt Scott Henry was essentially harmless with a wild sense of humor, while she was afraid of Mike Friedman. (Tr. at 267, 269). She was also aware of a good deal of sexual talk about female employees by male employees, e.g. "Angie is nice looking and she has little titties." (Tr. 263).

71. Janet Adams was employed at Friedman's as a customer service representative from April 1988 to January 1989. She also dealt with accounts payable. (Tr. at 247- 48). Mike Friedman would come to the receptionist box and ask her whether she had any sex the previous night. He would stare at her from time to time while she was in the dealership. (Tr. at 251). She was informed by one of the sales representatives that Mike Friedman had referred to her as a "nigger screwer" and "whore," and would never want to touch her. (Tr. at 249). One day while in the receptionist box, a group of sales personnel told a sex joke. Respondents Scott Henry and Pat Sullivan and salespersons Curt Peters and Steve Rovner were there. After the joke, someone said something about unzipping their pants and letting their "pee- pee" hang out. Curt Peters responded, "You might as well, because Jan would look at it." Ms. Adams cried in response to that remark. She gave her two weeks notice to Cheryl Ruble on that day. (Tr. at 251).

72. Laura Farran was a part time cashier, evening and weekend receptionist from June to October of 1989, when she became full-time cashier. She was customer relations representative from March of 1990 to the end of her employment on February 18, 1991. (Tr. at 367-68). Lea Webb, who became off ice manager sometime after October 15, 1990, was her supervisor after that date. (Tr. at 373, 785-86).

73. Ms. Farran would hear groups of 6 to 8 salesmen, including Mike Friedman, whistle at her and comment about herself and other women, e.g. "Did you see those" and "Get a look at that." (Tr. at 371-72). Mike Friedman and other salesmen stared at her. (Tr. at 227, 372). She overheard him making remarks about sexual activity upstairs at the dealership on a cot. (Tr. at 374). She had no problems with the conduct of Pat Sullivan, Scott Henry,or Tim Manning. (Tr.at 264). Once, when Gary Friedman heard salesmen whistle at and comment about her, when she was wearing a jeans jacket and skirt for a "Western Days" promotion, he told Lea Webb that she should change clothes or be fired. Ms. Webb indicated the salesmen would not be discharged as they "bring in the money." (Tr. 373, 380-81).

74. James Sherman, who was a salesman at Friedman's from mid-July to mid-August of 1990, left partly because of the sexist and racist attitude of many of the salespersons. (Tr. at 396-97). On one occasion, Mike Friedman, who was not a sales manager at that time, commented on a female customer by stating, "Boy, I'd like to bend that over and drive it home." (Tr. at 398). Such comments were made daily. (Tr. at 399). Mr. Sherman heard more discussions on sex and violence at Friedman's than at any prior employer, including two car dealerships. (Tr. at 400). He did not, however, hear Scott Henry or Tim Manning make such remarks. (Tr. at 41 1).

75. Throughout the period when Mike Friedman was employed as sales manager, and after, the basic attitude of management below Gary Friedman, including that of Respondents Scott Henry and Pat Sullivan, toward Mike Friedman was that they did not like him, but would have to tolerate his behavior because he was Gary Friedman's brother. (Tr. at 14444, 220-21, 232, 334, 347, 398-99).

Adverse Conduct Concerning Cristen Harms Which Was Based on Her Sex and Regarded by Her as Unwelcome and Reasonably Considered to Be Offensive:

76. Complainant Cristen Harms was the subject of sexual remarks and actions by Mike Friedman. On her first day of employment, Mike Friedman went to a chair Ms. Harms had just left, sniffed the seat and made some remark. (Tr. at 107). On a daily basis, Friedman would ask other employees, in the presence of Scott Henry and Pat Sullivan, "Wouldn't you like to screw her [Cristen Harms]?" (Tr. at 220). Based on these and similar remarks, Ms. Koch and Mike DeVoider warned Complainant Harms that Mike Friedman was after her. (Tr. at 286-87).

77. On or about July 7,1989, as Complainant Harms walked into a meeting room with Toyota representatives, she overheard Mike Friedman tell Cathy Koch and Dodd Cook that she was voluptuous and he'd like to spend a couple of hours with her. (CP. EX. # 4; Tr. at 288). Cathy Koch yelled at Friedman to leave Harms alone. Cristen Harms felt humiliated by this remark, as if she were only "one inch tall." (Tr. at 288).

78. On this same or another occasion, he told Cathy Koch that if Complainant Harms spent one night with him she would kick her "old man" (her fiance) out. Friedman said to Ms. Koch that he'd be willing to divorce his wife for Ms. Harms. (Tr. at 224, 288). On July 13th, he again stated to an employee, as he had several times before, that he would like to spend a couple of hours with the Complainant and that he bet he could sexually satisfy her. On July 18, 1989, Mike Friedman told another employee in regard to Cristen Harms' fiance, "He's a big guy, she really likes them big and I bet that's not the only place he's big." He also stated, in the words of Complainant Harms' notes of the incident, "he'd like to spend a couple of hours upstairs with that blonde and if [she] was any good, it would be worth dumping his wife over." (CP. EX. # 4).

79. On one occasion, Mike Friedman talked to Cathy Koch about sex in Cristen Harms' presence. Complainant Harms remarked to him, "You know, you are really a pervert." Friedman responded by looking at her, laughing, and saying "I know." He then walked away laughing. (Tr. at 288-89).

80. Cristen Harms was often subjected to incidents where Mike Friedman would stare or leer at her. (Tr. at 226, 290, 311-12, 370, 379, 746-47, 772). When she was first interviewed for her position, she noticed a man standing very close to her, looking her up and down and front and back. She later learned that man was Mike Friedman. He continued to do this during the first few days she worked there. (Tr. at 284). When she walked out of the showroom, he would stay right behind her and watch her walk the entire distance. (CP EX. # 4; Tr. at 266). On June 26,1989, for example, Complainant Harms noticed Mike Friedman staring at her twice in the morning. In the afternoon he, "embarassed (sic) me by turning completely around on the showroom floor to look

me up and down as I walked away. I turned around and saw him do it. In the office area, staring at me." On July 10th, Mike Friedman "looked at me from Tim's (Manning) window, totally turned around as I walked by so he could look me up and down." (CP. EX. # 4).

81. On July 13,1989, Complainant Harms was bent over while getting a drink from a water fountain. There was no one else in the hallway which would make it necessary for any one passing through to come close to her in order to get by. Mike Friedman brushed up against Ms. Harms backside with his groin as he passed by. (CP. EX. # 4; Tr. at 106, 290- 91).

82. On July 19, 1989, Mike Friedman put his arm around - Complainant Harms' back and touched the sleeve of her dress on the side opposite where he was standing, while commenting how much he liked the dress. (CP. EX. # 4; Tr. at 290).

83. Respondent Mike Friedman's behavior toward Complainant Cristen Harms was obviously based on her sex. Mike Friedman's words and actions upset, angered, and frightened Complainant Harms. (Tr. at 106-108, 222, 226, 288, 291, 312; CP. EX. # 4). It made her feel dehumanized, as if she did not matter at all. (Tr. at 291). This behavior was not in any way welcomed or encouraged by her. It was clearly unwelcome. Mike Friedman's unwelcome conduct was offensive to her as it would be to any reasonable member of her sex.

The Effect of Mike Friedman's Conduct on Complainant Harms' Working Environment:

84. Some of the actions of Mike Friedman which engendered embarrassment, fear, anger and humiliation in Complainant Harms has already been discussed. See Findings of Fact Nos. 76-83. Cristen Harms complained about and discussed this behavior with Cathy Koch, Laura Farran, and Mike DeVolder. (Tr. at 106, 225, 286-87, 320, 369). The incident where Mike Friedman brushed up against her was repulsive to Cristen Harms. She told DeVoider, "I almost had to go home and take a shower. I just feel terrible." (Tr. at 107). She told Cathy Koch that Mike Friedman was constantly back at her desk. She complained to Ms. Koch that "He doesn't have any reason to be back there. He's driving me crazy. He just keeps hanging around." (Tr. at 222). She also complained about his staring at her. (Tr. at 226).

85. The extent of the impact of Mike Friedman's behavior on Cristen Harms' working environment is also demonstrated by an incident involving her and Mike DeVolder. Mr. DeVoider went to a back office, where Cristen Harms was doing some work, in order to look for some license plates. Ms. Harms' back was turned toward DeVolder and she, therefore, did not know who was behind her. At some point, Mr. DeVolder stopped what he was doing. After a period, Complainant Harms turned around and yelled "Mike Friedman, get the fuck away from me." She then saw that Friedman was not in the room. She told DeVoider, "Mike, that idiot has been following me around and pestering me so much that I thought you were him. I've had it with him chasing me around. I'm at my wits end." (Tr. at 107-08).

86. The staring and the comments Mike Friedman had made about her also affected Complainant Harms' working environment in another way. Complainant Harms came to believe that, whenever Mike Friedman and other male salespersons were looking at her and talking and

laughing, they were talking about her, although she could not hear what they said. (Tr. at 289-90, 314).

Respondents Cheryl Ruble, Gary Friedman, and Friedman Motorcars, Ltd. Knew or Should Have Known of the Harassment of Complainant Harms:

87. Complainant Harms first complained to her supervisor, Respondent Cheryl Ruble, about Mike Friedman's behavior after three or four days of employment. The day before, Ms. Ruble had pointed out to Ms. Harms that it was not professional to slip off her shoes while sifting behind her desk. (Tr. at 283). The next day, Complainant Harms told Respondent Ruble that she did not think the office was very professional due to the conduct toward her of Mike Friedman. At that time, Harms mentioned only Friedman's standing very close to her and looking her up and down, front and back, at her first. interview and during her first days of employment. (Tr. at 284). Respondent Ruble's only response was that she would keep an eye on Mike Friedman. (Tr. at 285). After this, Mike Friedman's conduct got worse. (Tr. at 286). Respondent Ruble did not tell Gary Friedman of this complaint. (Tr. at 812). Essentially nothing was done to curtail Mike Friedman's behavior. (Tr. at 226).

88. Complainant Harms made a list of some of the incidents of Mike Friedman's behavior. These notes were originally handwritten on a yellow sheet of paper. She also typed the list, which is now in the record as Complainant's Exhibit # 4. (Tr. at 224, 291-92, 309, 788-89, 796, 813).

89. On Friday, July 28, 1989, Complainant Harms handed the handwritten list to Cheryl Ruble and asked her if she would tolerate this kind of behavior. Respondent Ruble answered that she would not. (Tr. at 224, 291, 788-89). Cristen Harms said she thought she was going to quit because Mike Friedman's harassing behavior wasn't going to stop. (Tr. at 292). Ms. Ruble indicated she would bring the list to Gary Friedman's attention, but did not do so until after Ms. Harms'employment ended. (Tr. at 291, 764, 789, 794, 813). She also asked Ms. Harms not to quit and to think it over during the weekend. (Tr. at 293-94). Ms. Harms did not resign on that day. (Tr. at 293).

89A. Although they did not do so, Pat Sullivan and Scott Henry could have informed Gary Friedman of earlier incidents of Mike Friedman's inappropriate behavior toward previous female employees and, in light of that behavior, alerted him concerning his frequent sexual comments on Ms. Harms. See Findings of Fact Nos. 75-76. In light of the frequency and recurring nature of this behavior with regard to Complainant Harms, Cathy Koch, and Angie Whetro, at least some of which she was aware, Ms. Ruble should also have informed Gary Friedman of Complainant Harms' allegations, prior to the end of her employment. (Tr. at 796-97, 803). See Findings of Fact No. 87, 89.

Constructive Discharge of Complainant Harms:

90. On Monday, July 31st, Cristen Harms' next working day, Respondent Ruble indicated that she would have to give Mike Friedman every option to change his behavior. (Tr. at 293-94,305). Complainant Harms suggested that she be permitted to work only part-time, in the hope that

Mike Friedman would cease his harassing behavior. Ms. Ruble responded that it would take months to determine whether that could be done. (Tr. at 294, 306).

91. On Tuesday, August lst, because she did not want to wait months for this situation to be resolved, Complainant Harms stated she would quit. Ms. Ruble asked if she were quitting due to Mike Friedman and Ms. Harms replied, "yes." (Tr. at 294-95). Ms. Harms also indicated she would be willing to work one and one-half to two weeks more. Ms. Ruble said that would be fine. On either August 1 or 2, 1989, Respondent Ruble called Complainant Harms' home and informed her mother that Friedman's did not need Ms. Harms anymore. By this communication, Respondent Ruble ended the Complainant's employment at Friedman's one and one-half to two weeks earlier than Complainant Harms desired. (Tr. at 295).

92. It is clear that Mike Friedman's behavior and the failure to remedy this behavior were the only reasons for Complainant Harms leaving her employment at Friedman's. (Tr. at 226, 292, 294-95, 788-89). This behavior resulted in working conditions that were so unpleasant that any reasonable person, including any reasonable member of Complainant Harms' sex, would feel compelled to resign. See Findings of Fact Nos. 76-86. Friedman's was aware of this behavior. See Findings of Facts Nos. 87-90.

93. An effort was made at hearing and on brief by Respondents to suggest that either Complainant Harm's graduation from Iowa State University on August 5, 1989, or her marriage on September 16, 1989, or her interest in a career in communications or her moves to Colfax, Iowa and Nevada, Iowa due to her lease terminating and her marriage were the true reasons for her leaving Friedman's. (Respondent's Brief at 45). This conclusion is not supported by the greater weight of the evidence. The customer relations position at Friedman's was not inconsistent with Ms. Harms' ultimate goal of a position in communications. (Tr. at 280). The move to Nevada, Iowa would mean that Ms. Harms commute would be only a few miles longer than it was when she commuted from Ames, Iowa at the beginning of her employment with Friedman's. (Tr. at 303).

94. The Complainant's initial job after Friedman's, at Staff Temps in West Des Moines, Iowa, where she was assigned most of the time, was a longer commute, from either Colfax or Nevada, Iowa, than the commute to Friedman's from either of those two respective locations. (Tr. at 297).

95. It is a matter of common knowledge, readily verifiable through examination of street maps of the greater Des Moines area and highway maps of the state of Iowa that the distance from Nevada, Iowa to Friedman's place of business, at 4475 Merle Hay Road in Des Moines, Iowa, is only a few miles (approximately seven miles) longer than the distance from Ames, Iowa to that location. Common knowledge and maps also show that it is a greater distance from any location in West Des Moines, Iowa to, respectively, Colfax, Iowa and Nevada, Iowa, than it is from Friedman's to those locations. Official notice is therefore taken of those facts. Fairness to the parties does not require they be given an opportunity to contest notice of these facts.

Once Respondents Cheryl Ruble, Gary Friedman and Friedman Motorcars, Ltd. had Knowledge of the Sexual Harassment of Complainant Harms, They Failed to Take Prompt and Effective Remedial Action:

96. **At some time after Complainant Harms' employment was terminated, Ms. Ruble gave the handwritten list to Respondent Gary Friedman,** who indicated he would talk to Mike Friedman about it. (Tr. at 224, 764, 792, 813).

97. Prior to the end of Complainant's employment, Cathy Koch had also informed Respondent Ruble of Mike Friedman's behavior toward her. (Tr. at 223, 797). Ms. Ruble told Ms. Koch to arrange her work so any work that had to be done in Mike Friedman's office could be done when he wasn't there. Ms. Koch did make such arrangements. (Tr. at 223). Other than this, Respondent Ruble had taken no action on Ms. Koch's complaints. (Tr. at 797). After Complainant Harms' list of harassing incidents was given to Cheryl Ruble, Ruble asked Koch if she believed Mike Friedman was harassing Complainant Harms. Ms. Koch responded, "Yes, he is." When Cheryl Ruble gave Complainant Harms' list to Gary Friedman she also informed him of the harassment of Ms. Koch. She told him that she was uncomfortable with bringing in anymore female employees under these circumstances. Gary Friedman became angry and indicated he would hire who he wanted when he wanted. (Tr. at 224). Gary Friedman gave Ms. Ruble no further response to Ms. Harms' complaints after Ms. Ruble took the list to hin, (Tr. at 800).

98. Gary Friedman did talk to Mike Friedman about the list of incidents compiled by Cristen Harms. Gary Friedman suggested that, if these things were a possibility, he should "give some consideration to looking for other work." (Tr. at 764, 813-14). Mike Friedman indicated he would do so. (Tr. at 813-14). Mike Friedman was demoted, along with Pat Sullivan, to salesperson in late 1989 for reasons which had nothing to do with the sexual harassment of Complainant Harms. See Finding of Fact No. 12. He stayed employed with Friedman's until January of 1991, one year and five months after Ms. Harms left employment with Friedman's. (Tr. at 827). At that point, apparently as part of discovery procedures undertaken in preparation for this hearing, Friedman's had received some statements by persons other than Ms. Harms from the Commission's investigation file. The content of those statements is not reflected in the record. Gary Friedman terminated Mike Friedman because of the information contained in those statements. (Tr. at 826-28).

99. In the period between his receipt of Ms. Harms' list and January of 1991, Gary Friedman adopted essentially a wait and see policy toward Complainant Harms' allegations, i.e. to wait and see whether any further evidence would independently arise to support the allegations as opposed to actively investigating these allegations. (Tr. at 815-18). The reason for this reactive attitude was because "blood is thicker than water" i.e. because Mike Friedman was Gary Friedman's brother. (Tr. at 816-17). No effort was made to have Cheryl Ruble make further inquiries. (Tr. at 800). There is no evidence in the record to indicate that any effort was made by Gary Friedman or on his behalf to discuss with Cathy Koch the problems she had with Mike Friedman, which he had been informed of by Cheryl Ruble. See Finding of Fact No. 97. There is no evidence in the record of any effort by Gary Friedman or on his behalf to contact Cristen Harms in order to obtain further information on her complaints, to inform her of his discussion and admonition to Mike Friedman, or to determine whether and under what conditions she would be interested in returning to work at Friedman's. Nor did he inform Cheryl Ruble of his discussion with Mike Friedman. (Tr. at 800). Nor did he, or anyone in management, contact Laura Farran, Angie Whetro or other past or present female employees, who would spend time in

the showroom area, to ascertain whether there were similar incidents involving other female employees. There is, at most, a vague suggestion that Gary Friedman had some type of discussion "with all my people" and "several discussions at the work place" after receipt of Cristen Harms' civil rights complaint on November 22, 1989, over two months after her termination. (Admissions; Tr. at 826-27).

100. Despite the failure to conduct any meaningful investigation of Ms. Harms' or Ms. Koch's allegations of sexual harassment, Gary Friedman held fast to the belief that the allegations were false. (Tr. at 827). Respondent Ruble, once she had informed Gary Friedman of Ms. Harms' and Ms. Koch's allegations, took no further action other than to terminate Ms. Harms' employment one and one-half to two weeks earlier than she desired. See Finding of Fact No. 91. All of the steps of investigation and communication outlined above were reasonable steps that Friedman's could have undertaken in light of the gravity of the harm alleged, the nature of the working environment, and the resources available to the company.

101. The combination, of an early termination of the Complainant, the non-communication of her and Ms. Koch's allegations to higher management prior to her termination, the admonition by higher management to the alleged perpetrator that he should consider looking for another job if there was a possibility that the allegations were true, the simultaneous maintenance of the belief that the allegations were false, and the absence of any reasonable steps to actively investigate or resolve them; represents a total failure to take prompt and effective action to investigate, resolve, and remedy, when appropriate, allegations of sexual harassment. That the discovery process eventually yielded information of an unspecified nature, gathered during the Commission's investigation, which resulted in the termination of Mike Friedman almost one and one-half years after Gary Friedman was informed of the Complainant's allegations, and approximately one month before the originally scheduled date of this hearing, serves to reinforce, and not to rebut, this finding. (Notice of Hearing). See Finding of Fact No. 98.

The Effect of the Sexually and Racially Hostile Working Environment at Friedman's on Mike DeVoider:

102. As previously noted, Complainant Mike DeVoider observed at first hand the sex and race discrimination in hiring, the race discrimination in the offering and providing of services, the racist statements about Black customers, Black applicants and Blacks in general, the sexist statements about female applicants, employees, and customers, and the sexual harassment of Cristen Harms. See Findings of Fact Nos. 8, 30, 64, 66-67, 76. In regard to the latter, it should be noted that he witnessed the seat sniffing incident in addition to other incidents previously described. See Finding of Fact No. 76. In regard to the treatment of Black. customers, he not only observed the discrimination, he was told, by Mike Friedman, to forget about selling a car to the McCiendons, and was required by him to deny them a test drive and, subsequently, to deliver their new car with unrepaired dents solely because they were Black. See Findings of Fact Nos. 57-61.

103. Mike DeVolder actively protested and argued against this treatment of Blacks and females. Friedman's hiring practices effectively denied him the benefits of professional interaction with Black and female salespersons. He objected to and foiled Mike Friedman's desire to deny service

to the McCiendons because they were Black. Indeed, if he had complied with Mike Friedman's wishes, he would have suffered the economic loss of the commission for the sale of that car. He also circumvented Mike Friedman's plan to inform the McClendons that they, not the dealership, were responsible for the dents in their new Saab. (Tr. at 234). See Finding of Fact Nos. 58-61. He repeatedly told Scott Henry and Mike Friedman that Mike Friedman's comments on Blacks and females were wrong and that Friedman's attitude was "incredible" and "impossible". He would roll his eyes and walk away from Mike Friedman when he began to comment on women and Blacks. (Tr. at 101-02, 227, 841-42). He would suggest to Mike Friedman, without success, that various female applicants, who he had a chance to talk to when business was slow, would be good candidates. (Tr. at 109).

104. Complainant DeVoider told Cristen Harms and Cathy Koch of his concerns about the racially and sexually hostile working environment and that he felt degraded by it. (Tr. at 227-28, 321-22). He would go home and complain about the racist and sexist statements he heard every day. (Tr. at 118). He was upset by this working environment and told Cathy Koch that it was so bad that he wanted to leave his employment. (Tr. at 234). There is no question that the sexually and racially discriminatory atmosphere at Friedman's caused Mike DeVoider substantial emotional distress.

105. After three or four days of experiencing the working environment at Friedman's, Complainant DeVolder decided to look for another job. He applied at Stew Hanson Dodge. Somehow, Friedman's management found out and he was called in to meet with Mike Friedman, Scott Henry, Pat Sullivan and Tim Manning. They asked him and he told them where he had been. He told them that he thought he would be happier somewhere else. They could not understand that, but indicated they would not discharge him at that time because he had promise as a salesperson. When this discussion was over, DeVoider had the clear understanding that, if Friedman's found out about a further search for work, his employment would be terminated. (Tr. at 103).

Retaliation By Means of Verbal and Physical Abuse:

106. Management did not care for Mike DeVoider's complaints about the working environment. They thought these complaints were odd and that DeVoider was, in the words of Cathy Koch, "kind of a Boy Scout [who] didn't fit in." (Tr. at 228).

107. Once the investigation Of Commissioner Dial's complaint began, the atmosphere became very tense at Friedman's. (Tr. at 114). As previously noted, this complaint was based, in part, on information provided by Mike DeVoider. Although that was not stated in the complaint, the complaint twice indicated it was based on "test results and other collected information." (Dial Complaint)(emphasis added). See Findings of Fact Nos. 8, 30, 36-37, 40. There were many rumors throughout the dealership about Mike DeVoider being involved in the complaint and the investigation. (Tr. at 338). This is understandable in light of DeVolder's continuous expression to management of his opposition to race and sex discrimination at Friedman's. Also, the afternoon before he called the Iowa Civil Rights Commission, he had been present at a conversation where Pat Sullivan and Scott Henry were discussing Mike Friedman's treatment of the McCiendons and laughing about what a joke it would be to give Mike Friedman a telephone call and say they were

from the Civil Rights Commission. This conversation gave DeVoider the impetus to actually call the Commission. (Tr. at 97).

108. Several salespersons, including Jeffrey Rich and Curt Peters, held Mike DeVolder responsible for the initiation of the civil rights investigation at Friedman's. (Tr. at 339). When Mike DeVolder came in on his day off to attend a sales meeting, he was confronted by an angry Curt Peters, who told him that he had been "talking way too much." All of the salespersons followed Mr. Peters while he interrogated DeVolder. Peters said he had been interviewed for hours by civil rights commission investigators asking questions about himself and about his statements concerning his father being a member of the Klan. DeVolder did not want it known that he had taken action which ultimately resulted in the investigation. Therefore, DeVolder denied that he had anything to do with the Dial complaint other than being interviewed by the Commission. (Tr. at 114-15).

109. Management, including Respondents Mike Friedman, Scott Henry, and Pat Sullivan, were also upset because they believed that DeVoider was behind the investigation resulting from the Dial complaint. (Tr. at 339). Beginning after DeVoider's objections to sex and race discrimination, and continuing after management came to believe that he was responsible for the investigation, Mike DeVolder was subjected to a constant barrage of verbal and physical abuse. (Tr. at 110). Despite the fact that he did a good job for Friedman's, he was degraded, called "stupid", and referred to as a "meathead." (Tr. at 151, 237, 321). DeVolder did not refer to management by derogatory names. (Tr. at 151). Although other sales personnel had nicknames, his treatment was different in kind and degree to that afforded these personnel. (Tr. at 152, 321).

Physical Abuse:

110. It is undisputed that some of the salesmen and sales managers, including Mike DeVolder, had engaged in horseplay wherein one of them would jab the other in the arm. (Tr. at 150-51, 350, 490-91, 600, 714, 761). A person might hit or be hit a maximum of once or twice a week. (Tr. at 151, 736). The jab would usually be a light punch, not a full swing, and would rarely result in a bruise. (Tr. at 518, 600, 62628, 715, 735-36).

111. After Mike. DeVolder began expressing his opposition to the treatment of Blacks and women by Friedman's, however, this horseplay became something entirely different with respect to him. (Tr. at 110-13, 228, 351). Respondents Scott Henry, Tim Manning and Pat Sullivan began to hit Complainant DeVolder as hard as they could, with full swings to them arm or chest. (Tr. at 111-12, 228-29). In addition, Tim Manning would squeeze DeVolder's hand so hard that indentations from his ring would show on his hand. (Tr. at 1 1 1). Both Cathy Koch and Jeffrey Rich observed that DeVolder was being hit, not as a part of horseplay, but out of anger at him. (Tr. at 228-29, 351).

112. Mike DeVolder would be hit several times a day over approximately a three month period. (Tr. at 112, 228- 29). For DeVolder "to be hit and to be hit right and to have to step back was not uncommon at all." (Tr. at 843). The hitting would result in black and blue marks from DeVolder's elbows to his shoulders and on his upper chest which lasted for months after he left Friedman's. (Tr. at 113). Cathy Koch saw some of these bruises. (Tr. at 228). The bruises would

change to yellow marks after that. Family members and others would ask him where he got these bruises. (Tr. at 113).

113. Given the timing of this increase in severity and frequency of the hitting in relation to the internal complaints made by Complainant DeVolder, the fact that this intensified hitting was directed only to him, and the observations of Ms. Koch and Mr. Rich to the effect that this hitting was due to anger and not horseplay, it is reasonable to infer that this abusive conduct resulted because of DeVolder's lawful opposition to discriminatory practices at Friedman's.

Effect of Retaliatory Physical and Verbal Abuse on Mike DeVoider:

114. Complainant DeVolder suffered substantial and continuing physical pain as a result of being repeatedly hit. In addition to the initial physical pain of being struck, DeVolder's chest and arms were sore to the touch for up to six months after his employment at Friedman's had ended. (Tr. at 113, 117-18). Of course, it may be reasonably inferred that the repeated infliction and the continuous presence of bruise marks and physical pain over a lengthy period of time will result in emotional distress.

115. DeVolder went home every night and complained about all the abuse he had to endure. He came to hate his job as the abuse made it unbearable. (Tr. at 118). The physical and verbal retaliatory abuse, in combination with the discriminatory working environment, caused DeVolder substantial and serious emotional distress throughout his employment and for several months thereafter.

Retaliatory and Discriminatory Discharge:

116. Due to the physical and verbal retaliatory abuse and the sexually and racially discriminatory working environment, Complainant DeVolder continued the search for other employment which had originally initiated with his application to Stew Hanson Dodge. (Tr. at 103, 115-16, 234). He went to the Des Moines airport and applied for a job with America West. After passing their initial screening requirements, he went to Phoenix, Arizona for a full day for a physical examination by America West. (Tr. at 116). In order to have that day off, he told Scott Henry that he would be attending a court proceeding in Omaha, Nebraska. Respondent Henry approved this absence. (Tr. at 116, 493, 708).

117. Apparently, the date agreed on for Complainant DeVolder to go to Omaha was a different date than the date on which he went to Phoenix. (Tr. at 599, 710). When DeVolder did not come in to work on the day he went to Phoenix, Scott Henry called his wife who said she had no idea what was going on. Personnel with a car rental company at the airport, owned by Friedman's, saw DeVolder's car, which was a Friedman's demonstrator, at the airport and called to inquire why it was there. (Tr. at 493, 599, 709-710). Also, DeVolder was scheduled to handle the delivery of a car to a customer. This task had to be performed by a different salesperson. These events caused Scott Henry to wonder about DeVolder's whereabouts. (Tr. at 71 0).

118. The day after his trip to Phoenix, Scott Henry asked DeVolder where he had been on the previous day. (Tr. at 116, 598-99, 710). Tim Manning was also present during this conversation.

(Tr. at 598). DeVolder falsely stated two or three times that he had been in Omaha due to his lawsuit. (Tr. at 116, 131, 131). Scott Henry pointed out that the day on which he was gone was different from the day he had indicated he would need to travel to Omaha. (Tr. at 710). Finally, DeVolder stated that he had gone to Phoenix as part of the application process for a job with America West. Complainant DeVolder was immediately discharged for lying to Scott Henry. (Tr. at 131, 493, 599-600, 71 0-1 1).

119. It should be noted that, in his testimony, Scott Henry indicated that Complainant DeVolder's discharge was not necessarily solely for lying. (Tr. at 711). He also articulated two additional reasons for the termination. These were, first, that he started coming in ten minutes late; second, that he did not spend two hours, in addition to his regular shift, contacting prospective customers by telephone or in person. (Tr. at 708, 71 1). Mr. Henry's testimony setting forth these additional reasons is not credible because (1) Complainant DeVolder, Mike Friedman, and Pat Sullivan were informed only of the "lying" reason, (2) Tim Manning was present when DeVolder was terminated and the only reason he heard Scott Henry give for the discharge was "lying to us," and (3) the discharge occurred immediately after DeVolder told Scott Henry he had actually been in Phoenix, and not Omaha. (Tr. at 131, 493, 599-600, 71 1).

120. The only reason relied on by Respondents in their arguments on brief for the DeVolder termination is that "he actually lied to his employer and was not in Omaha, Nebraska during that time. Rather, he was off seeking employment elsewhere. He was terminated for being dishonest to his employer." Respondents Brief at 47.

121. It is undisputed that, although DeVolder told Friedman's that he was in Omaha, Nebraska on the day he was absent, he was actually seeking employment in Phoenix, Arizona. This lie, however, grew directly out of the discriminatory and retaliatory working environment experienced by and inflicted on DeVolder. But for this environment, DeVolder would have had no reason to search for other employment and would not have done so. After the Stew Hanson Dodge incident, he knew that he would be terminated if Friedman's became aware of his continued search for employment. If DeVolder had told Friedman's that he was going to Phoenix for a physical with America West, he would have been terminated. The "reward" for honesty to his employer would have been discharge. See Finding of Fact No. 105.

122. The alternatives facing Complainant DeVolder were (a) to continue to work in an increasingly intolerable environment of race and sex discrimination and verbal and physical retaliatory abuse, (b) to quit his employment without alternative employment, (c) to openly search for other work and be discharged for doing so without alternative employment, or (d) to try, secretly, to obtain other employment. On the surface, the termination of DeVolder was the product of his lie. But the lie was undertaken to preserve the secrecy of the work search. The secret work search was undertaken to escape a discriminatory and retaliatory work environment inflicted by the employer. Therefore, DeVolder's discharge was ultimately the product of the retaliation and discrimination inflicted on him by his employer.

Job Service Decision:

123. After his termination, Complainant DeVolder filed an unemployment insurance claim. (R. Ex. A; Tr. at 132). Complainant DeVolder participated in a telephone fact finding interview which resulted in a denial of his claim for dishonesty with his employer. (R. Ex. A-Notice of Fact Finding Interview; Tr. at 132, 150). He then appealed the decision which resulted in a hearing before an Administrative Law Judge of the Job Service of Iowa Appeals Bureau. Although he was given due notice of the hearing, he did not participate in it. Friedman's was represented by Scott Henry. The decision affirmed the Job Service representative's decision finding and held Complainant DeVoider was discharged due to "misconduct in connection with his employment." (R. EX. A - Decision of the ALJ).

Continuing Violations:

124. It is more likely than not that the practice of failing to consider or hire females or Blacks at Friedman's continued for at least the period during which Mike Friedman was a sales manager with responsibility for hiring, i.e. from shortly after the fall of 1987 to the fall of 1989. See Findings of Facts No. 18-19, 23-48, 49-54.

125. The practice of failing to provide equal service to Black customers and of racial hostility in the showroom, sales offices, and on the lot towards Blacks continued through at least the period of Mike DeVoider's employment, from April 12 to July 3l,1989 See Findings of Facts No. 8, 55-65.

126. The sexually harassing environment in the showroom, sales offices, and on the lot continued throughout at least the entire year of 1989. See Findings of Fact Nos. 66-83. Retaliatory conduct towards Mike DeVoider continued throughout his employment from the time he first started arguing against racist and sexist remarks, shortly after his hire on April 12, 1989, to the date of his discharge on July 31, 1989. See Findings of Fact Nos. 8, 102-122.

Damages for Cristen Harms:

Harms' Annual Earnings at Friedman Motorcars, Ltd:

127. During the course of the hearing, Cristen Harms waived any claim for emotional distress damages. (Tr. at 278). However, she did not waive back pay damages. During her employment at Friedman's, Cristen Harms worked from 8:00 a.m. to 5:00 p.m. Monday through Friday at a pay rate of $7.00 per hour. (Tr. at 281, 296). See Findings of Fact Nos. 89, 90. Given an hour off for lunch, this would be a 40 hour week. (Tr. at 225, 282)

128. In 1989, Complainant Harms' annual earnings at Respondent Friedman Motorcars Ltd. were: ($7.00 per hour X 40 hours per week X 52 weeks per year) = ($280 X 52) = $14,560 per year. There is no evidence in the record demonstrating what her increases in pay, if any, would have been.

Gross Back Pay to November 1, 1991:

129. Complainant Harms gross back pay to November 1, 1991 would be calculated as follows:

A. Gross Back Pay for the Two Year Period from August 2, 1989 to August 2, 1991: $14560 per year X 2 years = $29120.00.
B. Gross Back Pay for the Period of August 2, 1991 to November 1, 1991 = 13 weeks X $280 per week = $3640.00.

Total Gross Back Pay to November 1, 1991 = A + B = $29,120.00 3640.00 = $32760.00.

Mitigation of Damages:

130. The Respondents did not introduce any evidence which would demonstrate Complainant Harms failed to mitigate her damages. The evidence in the record demonstrates that Complainant Harms exercised reasonable care and diligence in seeking out employment. She received a call from Staff Temps, a temporary office help service, offering her employment on August 1, 1989 the day she informed Cheryl Ruble that she would quit. (Tr. at 294-95). She worked part-time at Staff Temps for approximately three weeks at $5.00 per hour. She worked approximately 40 hours during her last week there. Since she asked for as many hours as she could get, 35 hours per week is a reasonable estimate of the time worked during her first two weeks. (Tr. at 296-297). She then worked full time at the Edith Hale day care center in Nevada, Iowa at $4.00 per hour for three months. (Tr. at 297-98).

131. She left Edith Hale after three months because it was in bad financial shape (it closed one month after she left) and in order to pursue a teaching certificate at Iowa State University in order to make herself more marketable. Once she found out that she could only acquire nine hours of the classes she needed, she withdrew as it was not worth the tuition costs. (Tr. at 299). Throughout this entire period from her constructive discharge at Friedman's to her attempt to take classes at Iowa State, she continued to seek employment in the communications. (Tr. at 297-98, 300). She applied and interviewed, for example, for an information specialist position at the McFarland Clinic. (Tr. at 298).

132. She was next employed as a part-time information specialist with Iowa Public Television for twelve to twenty- four hours a week at $5.00 per hour and no benefits. (Tr. at 300). At the same time, she worked at KASI-KCCQ as a part-time radio announcer working twenty to forty hours a week at $4.00 per hour without benefits. (Tr. at 301). She then left KASI-KCCQ to become news director at Twin Lakes, Iowa full-time for one month at a salary of $13,000 per year. (Tr. at 301-02). She left that job for the position she had at the time of hearing, reporter, anchor, and producer at KIMT-TV in Mason City, Iowa. This position also has a salary of $13,000 per year. (Tr. at 302-03). The record does not reflect the length of her periods of employment at Iowa Public Television, KASI-KCCQ, or her specific dates of employment at Iowa Public Television, KASI-KCCQ, Twin Lakes, or when her employment began at KIMT-TV.

Interim Earnings:

133. With the exception of bringing out on crossexamination that Complainant Harms earned a salary of $13,000 per year at KIMT-TV, Respondents introduced no evidence on interim

earnings. (Tr. at 303). Evidence introduced by the Commission demonstrates the following interim earnings from August 2,1989 to November 1, 1991:

A. Staff Temps: $5.00 per hour X 1 1 0 hours = $550.00.
B. Edith Hale: $4.00 per hour X 40 hours X 12 weeks = $1920.00.
C. Twin Lakes: $13,000 / 12 = $1083.33.
D. KIMT-TV: (From April 1, 1991) ($13,000 /12) X 6 months = $1083.33 X 6 = $6499.98.
E. No reasonable estimate can be made of the amounts earned at Iowa Public Television or KASI-KCCO, or at KIMT-TV prior to the hearing on April 1, 1991, as neither Harms' dates of employment nor length of employment at these employers is reflected in the record.
F. There is no evidence in the record of Complainant Harms receiving any unemployment compensation.

Total Interim Earnings to November 1, 1991 = A + B + C + D = $550.00 + $1920.00 + $1083.33 + $6499.98 = $10053.31.

Net Back Pay:

134. The net amount of back pay which Complainant Harms is due is reflected in the formula: Gross Back Pay -[interim earned income and unemployment compensation] = Total Net Back Pay. **Total Net Back Pay +** $32760.00 - $10053.31 = **$22706.69.**

Damages for Mike DeVolder:

Lost Earnings from Friedman Motorcars, Ltd:

135. Based on the number of cars he sold there, Complainant DeVoider estimated he lost approximately $2500.00 in income during the six week period of unemployment after his termination from Friedman's. (Tr. at 117). His earnings at his new employment at Vernon Company were equivalent to those at Friedman's. (Tr. at 117, 128-29). His earnings have been higher than that since his current employment at the Meredith Company began in April 1, 1990. (Tr. at 128). There is no evidence in the record of Complainant DeVoider receiving any earned income or unemployment insurance during the period of his unemployment. Therefore, the **total net back pay** for Complainant DeVolder is $2500.00.

Damages for Physical Pain and Suffering and for Emotional Distress:

136. The emotional distress caused Complainant DeVolder due to the racially and sexually discriminatory working environment at Friedman's, the retaliatory verbal and physical abuse he sustained there have previously been discussed. See Findings of Facts Nos. It may also be reasonably inferred that being unjustifiably discharged will cause emotional distress. Complainant DeVoider is seeking $15,000 in damages for physical and emotional pain. (Tr.at ll8). This is a reasonable amount, perhaps even conservative in the light of the presence of physical pain, a rare circumstance in discrimination cases. Nonetheless, in light of the severity and duration of the physical and emotional pain and distress suffered, an award of fifteen thousand dollars ($15,000) would be full, reasonable and appropriate compensation.

Credibility Findings:

137. Cathy Koch, who had been employed at Friedman's for over two years as of the date of the hearing, was the receptionist there in the Spring of 1989. (Tr. at 204). Ms. Koch was a highly credible witness. She made the decision to cooperate with the investigation of this case and to testify for the Commission, Mike DeVolder and Cristen Harms despite the fact she could have easily chosen not to. Since she was not a party, she had no material gain to achieve through her testimony. Given her lack of bias, her knowledge of racial and sex discrimination at Friedman's, and, specifically, her observation of the treatment of Complainants DeVolder and Harms, she may be the most important witness in this case. In her own words:

> [I]t's been a very difficult decision because I have a job that pays well and that for the most part I enjoyed.
>
> But every time I thought that I was going to walk away, that it wasn't my job to be responsible for correcting the things that I saw that were very wrong, I had trouble with my conscience every time, and I finally decided to be able to live with myself I had to be able to speak up and say that I saw it and it was wrong.

(Tr. at 831).

138. Ms. Koch's demeanor was that of a calm and credible witness. Her testimony was internally consistent and consistent with the greater weight of the credible evidence produced at hearing. Ms. Koch testified despite receiving three anonymous telephone threats warning her not to testify at this hearing. (Tr. at 233-34, 832).

139. Complainant Mike DeVoider is also a highly credible witness. DeVolder's demeanor was appropriate. His testimony was internally consistent and consistent with the greater weight of the credible evidence produced at hearing. Although Complainant DeVolder is a party in this case, his original involvement was as a secret informant. As previously noted, he telephoned the Commission's offices in order to tell the Commission about racial discrimination in hiring and in the treatment of customers and prospective customers at Friedman's.At that time, he had no monetary interest in proving discrimination existed at Friedman's and no desire to personally file a complaint. Obviously, he told the Commission about these events because he felt it was the right thing to do.

140. Respondents have argued that Complainant DeVolder is not credible because of two incidents: (1) When DeVolder made the trip to Phoenix, Arizona, he lied about being in Omaha, Nebraska. See Findings of Facts Nos. 116-22. (2) DeVolder failed to list his claim for damages in this case as a contingent asset in his petition for bankruptcy filed in the U.S. Bankruptcy Court for the Southern District of Iowa. (R. Ex. B -Schedule B-2; Tr. at 135-40). Respondent's Brief at 5.

141. As previously noted, Complainant DeVolder's lie about the trip to Phoenix occurred as a direct result of the discriminatory atmosphere and the retaliation experienced by and inflicted

upon DeVolder. See Findings of Fact Nos. 121- 22. It would be absurd and unjust under these circumstances to allow this incident to adversely affect an evaluation of DeVolder's credibility.
142. Complainant DeVolder's petition in bankruptcy, which is sworn to by him under penalty of perjury, indicates that an Exhibit B is "attached to and made a part of this petition." Exhibit B includes schedule B-2, a listing of personal property. Item "q" on schedule B-2, asks the debtor to list "Contingent and unliquidated claims of every nature including counter claims of the debtor (give estimated value of each)." Complainant DeVoider responded "none" to this inquiry. (R. Ex. B). However, although he did not list potential damages from this case as c contingent claim, he was given permission to omit the damages in this case, as well as a small inheritance, from the listing of assets by the bankruptcy trustee. (Tr. at 140). Therefore, the failure to list those assets is not perjury and does not affect the credibility of Complainant DeVolder.

143. It should further be noted that Respondent's Exhibit B is only one document out of the complete bankruptcy record. Neither Complainant DeVolder nor his counsel were notified of this document in advance of the hearing. Therefore, they did not have the opportunity to obtain other documents from the bankruptcy file reflecting the trustee's permission to forego listing this claim. The complainant's counsel objected to the introduction of this exhibit on this basis. (Tr. at 136).

144. Respondent also suggests that DeVolder's testimony that he was struck by Scott Henry is questionable because Scott Henry is six inches shorter than DeVoider. (Respondent's Brief at 4). The problem with this analysis is that it ignores Scott Henry's position as a supervisor of DeVoider and the other salesmen. He had the power to discharge DeVolder and eventually exercised it. See Findings of Fact Nos. 8, 118-19. The supervisor's power to discharge may well lead an employee to endure abuse which he would not tolerate from a co-worker of similar physical characteristics.

145. Complainant Cristen Harms was a credible witness. Her testimony **was** internally consistent and consistent with the greater weight of the credible evidence produced at hearing. Her demeanor was calm and appropriate.

146. Respondents assert that there are discrepancies in the testimony of Harms and DeVoider in relation to the water fountain incident. See Finding of Fact No. 81. Respondents assert that, while DeVolder testified he was informed by Harms that Mike Friedman brushed against her with his groin and said "Oh excuse me"; while Harms testified that Mike Friedman was walking briskly by her, brushed against her, and said nothing. Respondents' Brief at 4. In fact, the essence of Harms' testimony is that Mike Friedman brushed up against her backside, in an unobstructed hallway where there was no reason to touch her in order to get by, and after he had passed her, walked briskly by her. (CP. EX. i-4; Tr. at 290-91, 317). There is no discrepancy there. Although their testimonies do differ on whether Mike Friedman asked to be excused, under these facts, that is not a material discrepancy.

147. Mike Friedman's testimony was highly unreliable, willfully.false, and, with few exceptions, is cited in support of a finding of fact only when it constitutes an admission against the interest of the Respondents, background information, or when supported by credible evidence or other indicia of reliability. For the reasons previously set forth, his testimony in regards to his reasons

for his treatment of Bill Edwards and his application were found to not be credible. See Findings of Fact Nos. 42-46.

148. For example, Mike Friedman's testimony that the race of job applicants made no difference to him and that he did not hear the word "nigger" at Friedman's is patently and willfully false. (Tr. at 743, 779). See Findings of Fact Nos. 23-25, 37, 46). This is also true of his testimony implying that he did not make remarks about Cristen Harms beyond saying she was good looking and had a nice figure. (Tr. at 745-46). See Findings of Fact Nos. 76-79.

149. In Mike Friedman's testimony, he confused Bill Edwards and another Black applicant. This first Black applicant, according to Friedman, rudely bumped into him and indicated that he was "here for the sales position." Friedman testified he indicated that they were not hiring, to which this applicant replied, "I wouldn't work in this fucking place anyway," and left. (Tr. at 752). Friedman then testified concerning Mr. Edwards, who he described as being the nicely dressed applicant who he later found out was from the Civil Rights Commission. (Tr. at 753-54). He also mentioned being tied up on a car deal when Edwards was there. (Tr. at 754).

150. At a later point in his testimony, again describing the nicely dressed Black applicant who came in while he was tied up with a car deal, (i.e. Edwards), Friedman referred to this applicant as rudely bumping into him, being interested in "the sales job," and then, upon being informed the position. was filled, stating "I won't work in this fucking place," and leaving. (Tr. at 769, 780).

151. A possible explanation for this confusion may lie in the conversation between Gary Friedman and Mike Friedman overheard by Mike DeVolder wherein Gary Friedman told Mike Friedman, "This is what you've got to do Mike..... Just lie. It's their word against our word.... Tell them the Black applicant got mad and you were just defending yourself, that you were responding to his temper." (Tr. at 100-01).

152. For reasons previously set forth, Respondent Scott Henry's testimony concerning the application of Judy Borgman and the additional reasons for the termination of Mike DeVolder was found to not be credible. See Findings of Fact Nos. 53, 118. In light of more credible evidence to the contrary, his testimony to the effect that Mike DeVolder never complained about Mike Friedman's behavior; that he never heard any report that Mike Friedman said not to waste time on potential Black customers; that he did not make such a statement; that he made no sexual comments to Angie Whetro; that he was unaware of sexual comments of Mike Friedman; and that the hitting of DeVolder was "all in fun" is not credible and is, in many aspects, willfully false. (Tr. at 70507, 715, 734-35). See Findings of Fact Nos. 61-62, 6970, 75-76, 103, 106, 109, 111. It should be noted that Henry made $67,000 at Friedman's in 1991. (Tr. at 729).

153. Respondent Pat Sullivan's testimony is not credible to the extent it implies DeVolder did not complain to other management personnel about Mike Friedman's racist and sexist behavior; that Sullivan was not aware of sexist or racist jokes and remarks; that he was not informed of the treatment of the McC[endons; that he had not discussed telephoning Mike Friedman and identifying the caller as being with the Commission; and that the hitting of DeVolder was not in

anger, (Tr. at 494-95, 517, 520-21, 491). See Findings of Fact Nos. 65, 71, 76, 103, 107, 109, 11113.

154. Respondent Cheryl Ruble's testimony is essentially credible with exceptions that are due to the clearer and more detailed memories of other witnesses such as Cathy Koch, Angie Whetro, and Cristen Harms. These exceptions include discrepancies between these witnesses' and Ruble's accounts of Cristen Harms', Cathy Koch's, and Angie Whetro's complaints about Mike Friedman and the events leading up to and including Cristen Harms constructive discharge. (Tr. at 788-90, 794, 796-97). See Findings of Fact Nos. 68, 69-70, 87-91, 97.

155. During the week prior to the hearing, Respondent Tim Manning, Cathy Koch, and some other Friedman's employees were talking when the subject of this hearing came up. Manning stated "When it happens, it will be us against them and we're smooth." (Tr. at 835-36). Tim Manning's testimony, which suggests that he did not hear racist jokes or epithets on the showroom floor, when he actually participated in such remarks, is, in this and other respects, not credible. (Tr. at 622-23). See Finding of Fact No. 65.

156. Respondent Gary Friedman's testimony is largely credible. He did not know, prior to receiving the Dial complaint, about Mike Friedman's practices with respect to the consideration and hiring Blacks and females, nor about the treatment of Black customers or a racially hostile working environment, nor about retaliation toward DeVolder; nor did he know in a timely manner about the harassment of Cristen Harms. His managers, who are his and Friedman Motorcars Ltd.'s agents, either did not tell him at all or, in the case of Ms. Harms, discharged her before telling him. These managers, however, acted out of the understandable and reasonably accurate belief that nothing would be done because Mike Friedman is Gary Friedman's brother. (Tr. at 809, 811, 818-20, 823). See Findings of Fact Nos. 7, 9-15, 75, 98-99. Moreover, in light of Mike DeVolder's testimony to the contrary, Gary Friedman's assertion that he did not tell Mike Friedman to lie is not believable. (Tr. at 818). See Finding of Fact No. 151.

157. Jeffrey Rich's testimony must be viewed with caution as he was obviously hesitant and fearful that his testimony would jeopardize his employment. He acknowledged that "you have to feel a little nervous that-concerned about if you say anything bad about your employer." (Tr. at 337). Some of his testimony is shaded to please his employer. Despite his hesitancy, however, his testimony is clear on the issues of Mike Friedman's attitude toward Blacks in hiring and the reluctance of salespersons to wait on Blacks. See Findings of Fact Nos. 23, 56.

158. Curtis Peters was not a credible witness. His fantastic account explaining his pro-Ku Klux Klan remarks is simply not credible in light of Cathy Koch's and Mike DeVoider's testimony. See Finding of Fact No. 65. Peters asserted that, after he sold a car to an "Oriental person," DeVolder walked up to him and stated, "Why did you sell a guy like that a car for? Well, aren't all you guys from small towns racist?" At this point, Peters testifies, he made sarcastic remarks to the effect that "[A]II of us people from small towns, my father, my grandfather, are all card carrying members of the KKK. What do you think?," and then walked away. (Tr. at 646-47). Ms. Koch's testimony is that these remarks were made directly to her by Peters. There is nothing in her testimony to indicate the remarks were provoked by DeVolder. (Tr. at 216-17). It is not necessary to believe Peters' remarks in order to believe they were said. In addition, it is obvious,

based on DeVoider's responses and attitudes toward discrimination, as reflected in the record, that it is very doubtful that he would make such a provocative statement.

159. Tina Wilson's testimony concerning the number of Black salesmen employed at Friedman's is confused as she admittedly had difficulty remembering the number of Black salesmen there, when they were hired, and whether they made certain statements. (Tr. at 681, 693-94). Other than this, her testimony is basically credible.

160. The following witnesses were also credible: Don Grove, Bill Edwards, Karl Schilling, Jody Borgman, Janet Adams, Angie Whetro, Laura Farran, Mark Boyd, Gary Cooksey, Tonja McClendon, Van Clark, Raymond E. Jackson, Rosemary Jackson, Richard Lyle, Rodney Wright, Jacqueline Rice, Harold McFeders, and Clair Conway. The testimony of James Sherman, with the possible exception of his testimony on a statement by Pat Sullivan concerning Rodney Wright, where his memory is not clear, is credible. (Tr. at 398, 409-410, 413).

RULING ON OBJECTIONS

1. Further testimony on rebuttal was offered by the Commission by Mike DeVolder and Catherine Koch. Some of this testimony was objected to as being cumulative by the Respondents. (Tr. at 833, 841). The testimony was taken subject to the objection with the understanding that the objection would be ruled on in this decision. Unduly repetitious evidence should be excluded from the record of administrative hearings. Iowa Code § 17A.14. In this case, although there was some repetition, the material sought to be excluded was brief and not unduly repetitious. The objection is overruled.

2. Complainant's Exhibits 5 and 6, tape recordings of an investigative interview with Jeffrey Rich, were also objected to as being cumulative and taken subject to the objection. (Tr. at 431). The exhibits were offered only for the purpose of impeaching the testimony of Mr. Rich. (Tr. at 421-22). These are not unduly repetitious and are admitted for the limited purpose for which they were offered. It should be noted however, they are given little weight because approximately the last one-half of side one of Exhibit 5 is blank.

CONCLUSIONS OF LAW

Jurisdiction:

1. Commissioner Dial's, Cristen Harms' and Mike DeVolder's complaints were timely filed within one hundred eighty days of the discriminatory practices alleged therein. Iowa Code § 601A.15(12). See Findings of Fact Nos. 1-3, 7, 76-82, 124-26. All of Cristen Harms' employment, and therefore, all of her allegations, fell within one hundred eighty days of the filing of her complaint. See Findings of Fact Nos. 2, 7.

2. A discriminatory policy or system, which is continued into the limitations period, constitutes a continuing violation. Hy-Vee Food Stores v. Iowa Civil Rights Commission, 483 N.W.2d 512,529 (Iowa 1990). Under the reasoning set forth in Hy-Vee, Respondents' policies of not

considering or hiring Blacks or females for salespersons positions, or of providing Blacks unequal service constitute continuing violations.

3.

> A systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against employees [or the Commission or other aggrieved parties] and violates his or her rights right up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of **placements** or promotions.
>
> ...
>
> Under this theory, the attack is upon the system rather than just its application to the complainant personally. So an employee [or the Commission or other aggrieved parties] may challenge the discriminatory policy even though the employee was not denied a particular . . . benefit within the limitations period. Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 759-61 (9th Cir. 1980); accord Roberts v. North Am. Rockwell Corp., 650 F.2d 823, 828 (9th Cir. 1981) **(hiring system would not consider** women.)(emphasis added)(further citations omitted).

Id.

4. The Respondents' maintenance of a racially and sexually hostile working environment, as well as the continued retaliatory abuse of Complainant DeVolder, are also violations over time which constituted continuing violations into the charge filing period. See Lynch v. City of Des Moines, 454 N.W.2d 827, 832 (Iowa 1990). See Finding of Fact No. 125.

5. 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 § 601A.15. See Findings of Fact No. 5. See Ruling on Partial Motion to Dismiss.

6. Dial's, Harms' and DeVolder's complaints are also within the subject matter jurisdiction of the Commission as the allegations, that the Respondents engaged in race, sex, and disability discrimination in employment, race discrimination in public accommodations, and retaliation, all fall within the statutory prohibitions against unfair practices in employment, accommodations or services, and retaliation. Iowa Code § 601A.6, .7, and .11 (1 985).

7. "It shall be a ... discriminatory practice for any: a. person to refuse to hire . . . or to otherwise discriminate in employment against any applicant . . or employee because of the race. . . . sex, . . or disability of such applicant or employee. . . . c. Employer ... or the employees, agents, or members thereof to directly or indirectly ... in any ... manner indicate ... that individuals of any particular ... race . . . [or] sex . . . are unwelcome, objectionable, not acceptable, or not solicited for employment ... unless based on the nature of the occupation." Iowa Code § 601A.6. "It shall

be a . . . discriminatory practice for any owner . . . proprietor, manager . . . of any public accommodation or any agent or employee thereof: a. To refuse or deny to any person because of race . . . the . . . advantages . . . [or] services . . . thereof, or to otherwise discriminate against any person because of race ... in the furnishing of such advantages . . . [or] services. Iowa Code § 601A.7. "It shall be a discriminatory practice for: ... 2. Any person to discriminate against another person in any of the rights protected against discrimination ... by this chapter because such person has **lawfully opposed any practice forbidden under this chapter, obeys the provisions of this chapter,** or has filed a complaint, testified, **or assisted** in **any proceeding under this chapter."** Iowa Code § 601 A. 1 1. (emphasis added).

Standing of Complainant Mike DeVolder to Complain About Race and Sex Discrimination Against Others:

8. Respondent urges that Complainant Mike DeVolder lacks standing in regard to that portion of his complaint where he complains about sex discrimination against female applicants, employees, and customers or racial discrimination against Black applicants and customers. Respondent argues that, in order for a complainant to be aggrieved by such discrimination, he must establish membership in the disadvantaged group, i.e. that he is Black or female. The Iowa Civil Rights Act, in the Respondents' view, "does not allow a person to complain of discriminatory conduct to others." Respondents place their reliance on federal-cases concerning standing to sue under Title VII of the Civil Rights Act of 1964, Iowa cases on standing to sue in court, and Iowa Rules of Civil Procedure relating to real parties in interest and standing. Respondents Brief at 22-24.

9. "Standing" or the "stand in g to sue" doctrine refers to the concept that a party must be "sufficiently affected so as to insure that a justiciable controversy is presented to the court. The requirement of' standing' is satisfied if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation." BLACK'S LAW DICTIONARY 1260 (5th ed. 1979)(emphasis added). See Hawkeye Bancorporation v. Iowa College Aid Commission, 360 N.W.2d T9-8, 801 (Iowa 1985)(plaintiff in court must have specific, personal, and legal interest in litigation and be injuriously affected in order to have standing to sue).

10. In Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758 (Iowa 1971), the Iowa Supreme Court rejected the proposition that "[a] complainant must show a personal right of his-not to be discriminated against because of his race, creed, color, sex, national origin or religion-was infringed upon in order to foundation a charge under chapter [601 A]." Id. at 766-67.

11. The Court went on to note that Respondents relied "on federal cases concerning standing of plaintiff to sue..... Of course federal rules of civil procedure are there applicable, including those relating to real party in interest, standing, and class actions. These cases are not pertinent here, where the charge is litigated before the state commission." Id. at 766.

12. State cases defining standing to sue in district court and the Iowa Rules of Civil Procedure concerning standing and real parties in interest also do not apply here. See Id. ("We hold strict procedural rules in this area are not applicable"). "The functions of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable

to administrative agencies unless made so by statute." Id. at 769. There is no statute providing that Iowa Rules of Civil Procedure 2 and 104, the rules relied on by Respondents, apply in contested cases before this Commission.

13. The Act allows "any person claiming to be aggrieved by a discriminatory or unfair practice" to file a complaint. Iowa Code § 601A.15. An aggrieved person is one who has "suffered loss or injury; . . . one who is injured in a legal sense, one who has suffered an injury to person or property," In Re Vetter's Estate, 297 N.W. 554, 556 (Neb. 1941)(cited in lronworkers at 767); or whose "legal right is invaded by the act complained of." American Surety Co. v. Jones, 51 N.E.2d 122, 125 (111. 1943)(cited in Ironworkers at 767).

14. In Ironworkers, the complaint against a union, lronworkers Local No. 67, was filed on behalf of a corporate employer, The Weitz Company, Inc.. Id. at 766-67. The union had actively interfered, through "sick-outs" and other means, with the company's attempts to hire Blacks through an affirmative action hiring program required by Weitz's construction contract with the federal government. Id. at 761-63. The company was found to have sustained enough loss and damage through the Respondents' actions so as to be an "aggrieved person." Id. at 766-67.

15. On its face, DeVolder's complaint demonstrates that he claims to be aggrieved by Friedman's discriminatory conduct towards Blacks and females:

> Throughout my employment at Friedman Motorcars, Ltd . . . my work environment was pervaded by sexual harassment of female employees and customers and racial harassment of Black customers. Albeit not the intended victim of the harassment, I was a victim nevertheless. The harassment by Sales Managers Mike Friedman, Scott Henry, and Pat Sullivan substantially interfered with my work performance, my peace of mind, and my life away from work.

DeVolder Complaint (emphasis added).

16. The evidence in the record demonstrates that Mike DeVolder sustained enough loss and damages to meet the legal definition of "aggrieved person." See Findings of Fact Nos. 64, 66-67, 102-105. 115.

17. Assuming that it is appropriate to refer to federal discrimination cases as analogous authority for determining whether complainants are "aggrieved persons" with respect to injuries they have suffered due to discrimination against others not of their sex or race, the greater weight of authority supports the proposition that they are. See Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 209, 212 (1972)(housing-aggrieved by loss of important benefits from interracial associations); Clayton v. White Hall School District, 875 F.2d 676, 679-80 (8th Cir. **1989) (employee has right to work in environment free of unlawful discrimination-harm is lost benefits of associating with members of other races);** Stewart v. Hannon, 675 F.2d 846, 850 (7th Cir. 1982)(employment-aggrieved by loss of important benefits from interracial associations); EEOC v. Mississippi College, 626 F.2d 477, 483 (5th Cir. 1980)(same); EEOC v. Bailey Co., Inc., 563 F.2d 439, 453 (6th Cir. 1977)(same); Waters v. Heublein, Inc., 547 F.2d

466, 469-70 (9th Cir. 1976)(same); Bartelson v. Dean Witter & Co., 86 F.R.D. 657, 665 (E.D. Penn. 1980)(same).

Order and Allocation of Proof - The Burden of Persuasion:

18. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding was on the complainants to persuade the finder of fact that the elements of each allegation of discrimination and retaliation have been proven. Linn Co-operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981). Of course, in discrimination cases **(including sexual harassment cases),** as in all civil cases, the burden of persuasion is "measured by the test of preponderance of the evidence," Iowa R. App. Pro. 14(f)(6), and not by proof beyond a reasonable doubt or other standards.

19. 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).

Federal Court Decisions As Precedent:

20. Although Federal court decisions applying Federal anti-discrimination laws are not controlling in cases under the Iowa Civil Rights Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978), they are often relied on as persuasive authority in these cases. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Opinions of the Supreme Court of the United States are entitled to particular deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866 (Iowa 1978).

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

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

22. Examples of direct evidence that a protected class status, such as race or sex, is a motivating factor in an employment decision include comments by decision makers expressing a preference for employees who are members of a particular protected class or comments indicating that stereotypes of members of a particular protected class played a role in the challenged decision or practice. See e.g. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 288 (1989)(promotion) ; Barbano v. Madison County, ____ F.2d ____ 54 Fair Empl. Prac. Cas. 1287, 1290, 1292 (2nd Cir. 1990)(hiring); Buckley v. Hospital Corporation of America, 758

F.2d 1525, 1530 (llth Cir. 1985)(discharge); Storey v. City of Sparta Police Department, 667 F. Supp. 1164, 45 Fair Empl. Prac. Cas. 1546, 1551 (M.D. Tenn. 1987) (hiring). By analogy, the same reasoning applies in public accommodations cases. Diane Humburd, 10 Iowa Civil Rights Commission Case Reports 1, 6-7 (1989)(denial of child care services).

23. The proper analytical approach in a case with direct evidence of discrimination is, first, to note the presence of such evidence; second, to make the finding, if the evidence is sufficiently probative, that the challenged practice discriminates against the complainant because of the prohibited basis; third, to consider any affirmative defenses of the respondent; and, fourth, to then conclude whether or not illegal discrimination has occurred. See Trans World Airlines v. Thurston, 469 U.S. 111, 121-22, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533, 535 (1985)(Age Discrimination in Employment Act). **With the presence of such direct evidence, the.analytical framework, involving shifting burdens of production, which was originally set forth in** McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), **and subsequently adopted by the Iowa Supreme Court,** e.g. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293,296 (Iowa 1982); Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522,530 (Iowa 1985), **is inapplicable. Landals** v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1 989) (O'Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 11 1, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985); Schlei & Grossman, .Employment Discrimination Law: Five Year Cumulative Supplement 473, 476 (2nd ed. 1989).

24. 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. Hop'', 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring). See also Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990).

25. In this. case, there is direct evidence in the record that race and sex were motivating factors in Respondents Friedman Motorcars, Ltd.'s and Mike Friedman's failure to hire or consider for hire Blacks and females for salesperson positions. There is also direct evidence of their policy and practice of avoiding Black customers based on the stereotype that Blacks cannot financially qualify for car purchases and of the discriminatory treatment given to the McCiendons. See Findings of Fact Nos. 23, 36, 49-50, 56, 58-59, 62. The inquiry, however, does not end there, for the affirmative defenses of the Respondent must be examined. Trans World Airlines v. Thurston, 469 U.S. 1 1 1, 1 21, 1 24-25, 1 05 S. Ct. 613, 83 L. Ed. 2d 523, 533 (1985). The 'Respondents'

failed to meet their burden of persuasion with regard to establishing any affirmative defenses to these allegations. See Findings of Facts Nos. 41-48, 53.

26. There is some authority suggesting that "direct evidence" in the context of discrimination law "means evidence that shows that the impermissible criterion played some part in the decision-making process, not 'direct evidence' as opposed to circumstantial evidence." 2 Employment Discrimination Coordinator § 19469 (1991)(citing Barbano v. Madison County, ___ F.2d, ___ 54 Fair Empl. Prac. Cas. 1287 (2nd Cir. 1990)). This is a more liberal approach than that followed in the paragraphs above as the commentator suggests that the burden of persuasion can be shifted to the Respondent if the Complainant has established that the impermissible criterion played some part in the decision-making process with any admissible 'direct' or 'circumstantial' evidence. Under either analysis, there is direct evidence of discrimination in this case. The more conservative analysis, however, has been followed.

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

27. In the typical discrimination case, in which the complainant uses circumstantial evidence to prove disparate treatment on a prohibited basis, the burdens of production, but not of persuasion, shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 443, 448 (Iowa Ct. App. 1981). **These shifting burdens of production "are designed 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).

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

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

30. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089,1095, 67 L. Ed. 2d 207, 216 & n.10 (1981)).

31. 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 1 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).

Application of Order and Allocation of Proof Relying on Circumstantial Evidence of Discrimination to Allegations of Failure to Hire On the Basis of Disability, Race, or Sex.

32. No evidence was produced on the allegations of failure to hire or consider for employment as salespersons on the basis of disability. Therefore, the Commission has failed to establish that allegation.

33. The allegations that Respondents Mike Friedman's and Friedman Motorcars, Ltd. failed to hire or consider females and Blacks on the basis of, respectively, their sex and race were sufficiently established through direct evidence. Nonetheless, these violations can also be shown, and particularly with respect to the failures to hire Bill Edwards and the failure by Respondents Scott Henry and Friedman Motorcars, Ltd. to hire Jody Borgman, through circumstantial evidence.

34. Under the McDonnell Douglas analysis, the Commission has established prima facie cases in these failures to hire by showing:

1 .Each was a member of a protected class.

2. Each applied for an available position.

3. Each possessed the minimum objective qualifications for the position.

4. Each was rejected for the position.

5. Respondent either continued to seek other applicants or to have positions open for which they would consider new applicants after rejecting each of them.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed. 2d 668, 677 (1973); Woodbury County v. Iowa Civil Rights Commission, 335 N.W.2d 161, 165 (Iowa 1983)(citing United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed 2d 403). See Findings of Fact Nos. 21, 33, 35, 38, 52-53.

35. With respect to the failure to hire Jody Borgman, Respondents failed to produce evidence of any legitimate, non-discriminatory reason for failing to hire her other than non-credible testimony to the effect that she was not qualified for the position. See Findings of Fact Nos. 52-53. In light of the fact that it was established that she was, in fact, qualified, this may be viewed either as an unrebutted prima facie case or as a case where Respondents' legitimate nondiscriminatory reason was shown to not be credible. In either event, discrimination on the basis of sex is established. See Conclusions of Law Nos. 29-30.

36. With respect to the failure to hire tester Bill Edwards, Respondent articulated legitimate, nondiscriminatory reasons for their actions which were found to not be credible. See Findings of Fact Nos. 41-46. Discrimination on the basis of race is established. See Conclusion of Law No. 30. Although there have been post-complaint hirings of Blacks as salespersons; substantial changes in hiring policies "in the face of litigation are equivocal in purpose, motive, and performance." Reed v. Arlington Hotel, 476 F.2d 721, 724 (8th Cir. 1973)(quoting Jenkins v. United Gas Corporation, 400 F.2d 28,33 (5th Cir. 1968) and citing PARAM v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970). See also Teamsters v. United States, 431 U.S. 324, 341-42 (1977)("The company's later changes in its hiring . . . policies could be little comfort to the victims of its earlier discrimination and could not erase its previous illegal conduct").

Sexual and Racial Harassment: Hostile Working Environment Theory:

37. One means by which a Complainant, such as Cristen Harms, may establish a valid claim of harassment on the basis of sex, is by proving:

1) She is a member of a protected class.

2) She was subjected to harassment, i.e. adverse conduct regarded by her as unwelcome and reasonably considered to be undesirable or offensive.

3) The harassment was based upon her protected class status.

4) The harassment affected a term, condition, or privilege of employment;

5) The employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.

See Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632 (Iowa 1990)(requirements for religious harassment case); Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 834 (Iowa 1990)(requirements for sexual harassment case and comments on unwelcomeness); Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 378 (Iowa 1986)(requirements for racial harassment case); Henson v. City of Dundee, 682 F.2d 897, 90305 (llth Cir. 1982).

38. The requirement that a term, condition or privilege of employment be affected by the harassment does not require that the harassment result in "the loss of a tangible job benefit." ' Lynch v. City of Des Moines, 454 N.W.2d 827,834 (Iowa 1990). "Where sexual [or racial) harassment in the workplace is so pervasive and severe that it creates a hostile or abusive work environment, so that the [complainant] must endure an unreasonably offensive environment or quit working, the sexual [or racial] harassment affects a condition of employment." See Id.

39. In the event that a Complainant, such as Mike DeVolder, is alleging a sexually or racially hostile working environment, which is directed at persons of a different race or sex, these elements should be modified as follows:

> 1) Employees are subjected to a working environment which is hostile to other employees or customers.
>
> 2) The hostility is based upon the protected class status of these other employees or customers.
>
> 3) The hostile working environment affected a term, condition, or privilege of employment of the complainant;
>
> 4) The employer knew or should have known of the hostile working environment and failed to take prompt and appropriate remedial action.

Cf. Teamsters v. United States, 431 U.S. 324, 358 (1977)('facts necessarily will vary in cases, and the specification . . . of the . . . proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations); Clayton v. White Hall School District, 875 F.2d 676, 679-80 (8th Cir. 1989)(employee has right to work in environment free of unlawful discrimination against persons of a different race-harm to employee is lost benefits of interracial associations). When the Commission proves that any employee was the victim of a racially or sexually hostile working environment under either of the sets of elements above, it has established a violation of the Act.

Proper Order and Allocation of Proof:

40. "It is questionable whether the traditional burden- shifting analysis is appropriate or necessary in hostile work environment cases where the alleged discrimination does not involve deprivation of a tangible job benefit." Lynch v. City of Des Moines, 454 N.W.2d 827, 834 n.6 (Iowa 1990)(citing Henson v. City of Dundee, 682 F.2d at 905 n.11 and Katz v. Dole, 709 F.2d at 255-56). This is so because the burden shifting analysis, utilized in disparate treatment cases

relying primarily on circumstantial evidence as the means of proof, "serves to 'progressively sharpen the inquiry into the elusive factual question of intentional discrimination,' . . . in . . . case[s] where prohibited criteria and legitimate job related criteria often blend in the employment decision." Henson v. City of Dundee, 682 F.2d at 905 n.11. See Conclusions of Law Nos. 27-31. In cases of sexual or racial harassment involving the repeated use of sexist or racist epithets, slurs, and jokes; or, in cases of sexual harassment, repeated sexual remarks, verbal, or physical sexual advances, or other obviously sexual conduct, the factual question of intentional discrimination is not at all elusive. Cf. Henson v. City of Dundee, 682 F.2d at 905 n.1 1 (sexual harassment creating offensive environment does not present elusive factual question of intentional discrimination). In this case, all of the evidence in the record was reviewed in order to determine whether Complainants Harms, DeVolder and the Commission had proven, by a preponderance of the evidence, all of the elements required to meet their respective burdens of persuasion. Complainants Harms and DeVolder, and the Commission have met their required burdens of persuasion.

Protected Class Status of Cristen Harms:

41. It is established in the record that Ms. Harms is a female and is protected against discrimination in employment on the basis of sex. Iowa Code § 601A.6.See Finding of Fact No.7. Harassment Based on Harms' Protected Class Status:

42. It is established in the record that the harassment sustained by Ms. Harms was directed toward her because she a female. See Finding of Fact No. 83. See Conclusion of Law No. 40. This.element may be met by proof of either:

> [1] [H]arassing behavior lacking a sexually explicit content but directed at women and motivated by animus against women. . . [or];
>
> [2] [S]exual behavior directed at women ... [or];
>
> [3] [B]ehavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex. (Citations omitted). This third category describes behavior that creates a barrier to the progress of women in the workplace because it creates a message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual -stereotypes prevalent in that environment.

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 55 Empl. Prac. Dec. § 40535 at 65759 (M.D. Fla. 1 991).

Complainant Harms was Subjected to Unwelcome Harassment Reasonably Considered to be Undesirable or Offensive:

43. It is established in the record that Cristen Harms did not welcome the conduct of Respondent Mike Friedman and, in fact, complained to her supervisor and co-workers concerning it. See

Findings of Fact No. 77, 80, 83-87, 89. The behavior was found to be as offensive to her as it would be to any reasonable, member of her sex. See Finding of Fact No. 83.

44. In considering the proper standard to apply in regard to determining what behavior is reasonably considered to be offensive, the Respondents urged reliance on the standards set forth in Rabidue v. Osceola Refining Co., 805 F.2d 611, 620-21 (6th Cir. 1986). As noted in the dissent, the majority held that "a court considering hostile environment claims should adopt the perspective of the reasonable person's reaction to a similar environment." Rabidue at 626 (Keith, J., dissenting). The majority (and the Respondents on Brief at 32) also would require the consideration of the:

> prevailing work environment,' 'the lexicon of obscenity that pervaded the environment both before and after plaintiff's introduction into its environs,'and plaintiff's reasonable expectations upon 'voluntarily' entering that environment..... . The majority suggests through these factors that a woman assumes the risk of working in an abusive, anti-female environment. Moreover, the majority contends that such work environments somehow have an innate right to perpetuation and are not addressed by Title VII.
>
> ...
>
> In my view, Title VII's precise purpose is to prevent [sexist and other discriminatory] behavior and attitudes from poisoning the work environment of classes protected under the Act. To condone the majority's notion of the 'prevailing workplace' I would also have to agree that if an employer maintains an anti-semitic workforce and tolerates a workplace in which 'kike' jokes, displays of nazi literature and anti-Jewish conversation 'may abound,' a Jewish employee assumes the risk of working there, and a court must consider such a work environment as I prevailing.' I cannot.

Id.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The allegations of disability discrimination in employment are dismissed.

B. The Commission, through the complaint of Commissioner Dial, is entitled to judgment because:

> (1) it has established the failure to consider or hire Blacks and females, direct and indirect indications that they were not acceptable for employment, and other forms of race and sex discrimination in the hiring for salesperson positions by Respondents Mike Friedman, Scott Henry (on the basis of sex only), and through the agents of Respondent Friedman Motorcars, Ltd. in violation of Iowa Code § 601A.6;

(2) it has proven the establishment and/or maintenance of a racially hostile work environment by Respondents Mike Friedman, Tim Manning, Scott Henry, Pat Sullivan, and through the agents of Respondent Friedman Motorcars, Ltd. in violation of Iowa Code § 601A.6.

(3) it has proven the establishment and/or maintenance of a sexually hostile work environment by Respondents Mike Friedman, Tim Manning, Scott Henry, Pat Sullivan, and through the agents of Respondent Friedman Motorcars, Ltd. in violation of Iowa Code § 601 A.6.

(4) it has proven the denial of advantages and services and/or the provision of unequal advantages and services to Black customers and potential customers, as well as direct and indirect indications that their patronage is objectionable on the basis of their race, by Respondent Mike Friedman and through the agents of Respondent Friedman Motorcars, Ltd. in violation of Iowa Code § 601A.7.

C. Complainant Cristen Harms, and through her complaint the Commission, are entitled to judgment because:

(1) they have proven that she was subjected to illegal sexual harassment by Respondent Mike Friedman, which was allowed to be maintained by Respondent Cheryl Ruble, and through the agents of Respondents Gary Friedman and Friedman Motorcars, Ltd., and for which no prompt and effective remedial action was taken by Respondents Friedman Motorcars, Ltd., Gary Friedman.or their agents, in violation of Iowa Code § 601 A.6.

(2) they have proven that she was constructively discharged, by Respondent Cheryl Ruble and by and through Respondents Gary Friedman, Friedman Motorcars, Ltd. and their agents, and as a direct result of the harassment by Respondent Mike Friedman in violation of Iowa Code 601A.6.

D. Complainant Mike DeVolder, and through his complaint, the Commission, are entitled to judgment because:

(1) they have proven the establishment and/or maintenance of a racially hostile work environment by Respondents Mike Friedman, Scott Henry, Pat Sullivan, and through the agents of Respondent Friedman Motorcars, Ltd. in violation of Iowa Code § 601A.6.

(2) they have proven the establishment and/or maintenance of a sexually hostile work environment by Respondents Mike Friedman, Scott Henry, Pat Sullivan, and through the agents of Respondent Friedman Motorcars, Ltd. in violation of Iowa Code § 601 A.6.

(3) they have proven that Complainant DeVolder was subjected to verbal and physical abuse in retaliation for his lawful opposition to discrimination by Respondents Mike Friedman (with regard to verbal abuse only), Scott Henry and Pat Sullivan and through

the agents of Respondent Friedman Motorcars, Ltd. in violation of Iowa Code § 601 A.11.

(4) they have proven that Complainant DeVoider was subjected to a retaliatory and discriminatory discharge by Respondent Scott Henry and through the agents of Respondent Friedman Motorcars, Ltd. in violation of Iowa Code § 601 A.6 and 601 A.11.

E. Complainant Cristen Harms is entitled to a judgment of twenty-two thousand seven hundred six dollars and sixty- nine cents ($22,706.69) in back pay for the loss resulting from her constructive discharge at Friedman Motorcars, Ltd.

F. Complainant Mike DeVoider is entitled to a judgment of two thousand five hundred dollars ($2,500.00) in back pay for the loss resulting from his discharge at Friedman Motorcars, Ltd.

G. Complainant Mike DeVolder is entitled to a judgment of fifteen thousand dollars ($15,000.00) in compensatory damages for the emotional distress he sustained as a result of the discrimination and retaliation practiced by the Respondents.

H. Interest at the rate of ten percent per annum shall be paid by the Respondents to Complainants Harms and DeVoider on their respective awards of back pay commencing on the date payment would have been made if Complainants had remained in their respective employments and continuing until date of payment.

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

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

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

L. Respondents Friedman Motorcars, Ltd., Gary Friedman, Scott Henry, Pat Sullivan, Tim Manning and Cheryl Ruble are hereby ordered to cease and desist from any further practices of race and sex discrimination in employment; race discrimination in public accommodations; or retaliation.

M. Respondent Friedman Motorcars, Ltd. shall post, within 60 days of the date of this order, in a conspicuous place at its location at 4475 Merle Hay Road, Des Moines, Iowa, in areas readily accessible to and frequented by employees, at least two copies of the poster, entitled "Equal Employment Opportunity is the Law" which is available from the commission.

N. Respondent Friedman Motorcars, Ltd. shall develop, and revise as necessary, a written job description for the salesperson position, setting forth in detail the job title, duties, responsibilities, and the minimum qualifications, both subjective and objective, which are required for the positions. Neither race nor sex shall be a qualification. The qualifications stated shall be the ones utilized for filling vacancies. This job description shall be completed within 180 days of the date of this order.

O. All of Respondent Friedman Motorcars, Ltd.'s future job advertising, whether print or otherwise, for a two year period commencing with the date of this order, shall state the Respondent is "An Equal Opportunity Employer". At any time during this two year period when job advertising of any nature is placed, Respondent shall also notify the Job Service of Iowa of the openings.

P. Respondent Friedman Motorcars, Ltd. shall establish and adhere to written procedures for filling salesperson positions. These procedures shall include the procedures set forth in paragraphs N and 0 of this order. These written procedures shall be completed within 180 days of the date of this order.

Q. Respondent Friedman Motorcars, Ltd. shall provide for the next two years, commencing one year from the date of this order, an annual written report to the Commission, indicating the name, sex, race, address, telephone number and position of each employee hired, and the date of hire. For each position filled, the report shall indicate the name, sex, race, address and telephone number of each other applicant for the job, and whether an offer was extended to such person. The Respondent shall maintain all applications considered or received over this two year period until three years from the date of this order, and shall make these and all other application materials available to the Commission's representatives for inspection and copying upon request until the end of the three year period.

R. All of Respondent Friedman Motorcars, Ltd. management personnel, including Respondent Gary Friedman as well as all present incumbents of those positions identified in Findings of Fact Nos. 10-11, shall be directed to read, and shall read, within 90 days of the date of this order, the publications Successfully Interviewing Job Applicants and Sexual Harassment in the Workplace, both of which are available from the Commission. In addition, all salespersons and sales managers shall be provided with and directed to read the publication Sexual Harassment in the Workplace.

S. Respondent Friedman Motorcars, Ltd. shall, within 180 days of this order, develop a proposed plan of education and training for all management personnel, including Respondent Gary Friedman as well as all present incumbents of those positions identified in Findings of Fact Nos. 10-11, in the prevention, detection, and correction of racial and sexual harassment; pertinent grievance procedures in regard to such harassment; the legal prohibitions against discrimination in public accommodations applicable to an automobile dealership; and nondiscriminatory hiring procedures. This plan shall be subject to the review and approval of the Commission's representative. The plan shall be implemented within 210 days of this order unless an extension is approved by the Commission's representative.

T. Respondent Friedman Motorcars, Ltd. shall, within 180 days of this order, develop a proposed plan of education and training for all sales and office personnel, informing them about what behavior constitutes sexual and racial harassment and discrimination in public accommodations and that this behavior is prohibited. During this education and training, employees will be informed of appropriate grievance procedures to follow in the event they become aware of such harassment. This plan shall be subject to the review and approval of the Commission's representative. The plan shall be implemented within 210 days of this order unless an extension is approved by the Commission's representative.

U. Respondent Friedman Motorcars, Ltd. shall develop, within 120 days of the date of this order, written policies on sexual and racial harassment which shall include an effective grievance procedure. These policies shall be subject to the approval of the Commission. In the event, in the sole judgment of the Commission's representative, agreement cannot be reached on the language of such policy, the version drafted by the Commission shall be adopted by the Respondent.

V. Respondent Friedman Motorcars, Ltd. shall within 60 days of the date of this order, at its own, expense, have produced two posters, measuring eleven by fourteen inches or larger, which will be copies of the front side of the Iowa Civil Rights Commission's public accommodations mini-poster which states, in part "WELCOME . . . The Iowa Civil Rights Act of 1965 requires that every person receive full and equal service in public accommodations." These two posters shall be placed in two separate but conspicuous positions in the showroom at Respondent's location at 4475 Merle Hay Road, Des Moines, Iowa, where they will be readily visible to and easily read by customers and potential customers visiting the showroom.

W. Respondent Friedman Motorcars, Ltd. shall file a report with the Commission within 2lO calendar days of the date of this order detailing what steps it has taken to comply with paragraphs M through V inclusive of this order.

Signed this the 4th day of November 1991.

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

515-281-4480

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

1. On February 28, 1992, the Iowa Civil Rights Commission, at its regular meeting, unanimously adopted the Administrative Law Judge's proposed decision and order which is hereby incorporated in its entirety in this order as if fully set forth herein.

2. In accordance with paragraph J on page 166 of the proposed decision and order, Complainant Mike Devolder and the Respondents Mike Friedman, Scott Henry, Pat Sullivan and Friedman Motorcars, Ltd. are required, provided that agreement can be reached . . . on this issue..... [to] submit a written stipulation stating the amount of attorneys fees to be awarded Complainant's attorney" within 45 calendar days of the date of this order. "If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Administrative Law Judge in writing and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of determining the proper amount of fees to be awarded."

IT IS SO ORDERED.

SIGNED THIS THE 29TH DAY OF FEBRUARY, 1992.

Orlando Ray Dial
Chairperson
Iowa Civil Rights Commission

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Note: The Commission's final decision in this case was appealed to Polk County District Court by the respondents but was settled prior to any decision by that court.