BEFORE THE IOWA CIVIL RIGHTS COMMISSION

FRANK ROBINSON, Complainant, and IOWA CIVIL RIGHTS COMMISSION,
VS.
METRO PAVERS, Respondent.

CP # 08-86-15103

COURSE OF PROCEEDINGS

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Frank Robinson against the Respondent Metro Pavers alleging discrimination on the basis of race in employment.

Mr. Robinson alleges that the Respondent Metro Pavers denied him equal pay and constructively discharged him after subjecting him to an intolerable working environment because of his race.

A public hearing on this complaint was held on August 9, 1990 before the Honorable Donald W. Bohiken, Administrative Law Judge, at the Johnson County Courthouse in Iowa City, Iowa. The Complainant, Frank Robinson, was represented by James W. Affeldt, Attorney at Law. The Respondent was represented by William L. Meardon, Attorney at Law. The Iowa Civil Rights Commission was represented by Teresa Baustian, Assistant Attorney General.

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

The Iowa Civil Rights Act requires that the existence of race discrimination be determined in light of the record as a whole. See Iowa Code § 601 A.1 5(8) (1989). Therefore, all evidence in the record and matters officially noticed have been carefully reviewed. The use of supporting transcript and exhibit references should not be interpreted to mean that contrary evidence has been overlooked or ignored.

In considering witness credibility, the Administrative Law Judge has carefully scrutinized all testimony, the circumstances under which it was given, and the evidence bolstering or detracting from the believability of each witness. Due consideration has been given to the state of mind and demeanor of each witness while testifying, his or her opportunity to observe and accurately relate the matters discussed, the basis for any opinions given by the witness, whether the testimony has in any meaningful or significant way been supported or contradicted by other testimony or documentary evidence, any bias or prejudice of each witness toward the case, and the manner in which each witness will be affected by a particular decision in the case.

FINDINGS OF FACT

Jurisdictional and Procedural Facts:

1. On August 21, 1986, the Complainant, Frank Robinson, filed his complaint CP # 08-86-15103 with the Iowa Civil Rights Commission alleging race discrimination in employment which is prohibited by Iowa Code section 601A.6. (Complaint). The last date of alleged discrimination stated in the complaint is July 7, 1986. Official notice is taken that August 21, 1986 is forty-six days after July 7, 1986. Fairness to the parties does not require that they be given an opportunity to contest this fact.

2. The complaint was investigated. After probable cause was found, conciliation was attempted and failed. Notice of Hearing was issued on May 23,1990. (Notice of Hearing). The hearing was held on August 9, 1990.

Background:

3. Complainant Frank Robinson, a black male, was employed by Respondent Metro Pavers, Inc. as a laborer trainee from May 12, 1986 to July 25, 1986. (Tr. at 7, 11, 43-44, 46; CP. EX. # 2; 5; R. EX. A; Complaint). His duties included such manual tasks as shoveling, leveling out the ground, and setting up forms for concrete. (Tr. at 13). He initially worked for Metro Pavers on a worksite near a bridge spanning Interstate 80 in Coralville, Iowa. He also worked on other sites. (Tr. at 12-13).

4. Respondent Metro Pavers, Inc. is a privately held corporation, fifty percent of which is owned by Kenneth Albrecht, President of the corporation. The remaining fifty percent is owned by Wayne Kempf, the General Superintendent of the paving crew. (Tr. at 87, 119-20). The principal business of Metro Pavers is concrete paving, i.e. the construction of streets, highways, and parking lots from Portland cement concrete. (Tr. at 87, 120).

5. Mr. Albrecht and Mr. Kempf have held their respective positions as President and General Superintendent since the company was incorporated in 1966. (Tr. at 87, 119). As of 1986, Mr. Albrecht handled the office work, dealings with other contractors, the plant, the truck drivers and the rough grade crew. (Tr. at 91, 101, 103, 120). Mr. Albrecht's duties did not require him to be at the -.vorksite more than five or six times a week. Unlike Wayne Kempf, Mr. Albrecht would not usually be involved with direct contact with the crew. (Tr. at 13, 45, 101-02).

6. In addition to his duties involving the general supervision of the worksite, Wayne Kempf did hiring of paving crew employees, including Complainant Robinson. (Tr. at 11, 91). He also had the authority to discharge employees, i.e. he discharged Mark Stastny for fighting with a co-worker. (Tr. at 67). He was also Metro Pavers, Inc.'s equal employment opportunity (EEO) officer. (Tr. at 103). He had no training for his EEO duties other than reading EEO manuals. (Tr. at 103-04).

7. The immediate supervision of the paving crew, including Complainant Robinson, was usually handled by Wayne Kempf's son, Nick Kempf. (Tr. at 101-02). The paving crew consisted of approximately eight to twelve people, including laborers, laborer trainees, operators, form setters and cement finishers. (Tr. at 88, 92). Laborers' and laborer trainees' duties would include such

duties as unloading trucks. preparing the grade, setting forms, vibrating concrete, and striking off the concrete. (Tr. at 90).

8. Between May 1 and July 31, 1986 inclusive, Respondent Metro Pavers, Inc. employed twenty-nine white, three Black and two Hispanic employees. (Tr. at 14; CP. EX. # 5). The three Black employees during this period, consisting of Complainant Robinson, Edward Browning, and Robert Williams, were all employed as laborer trainees on the paving crew. (Tr. at 14; CP. EX. # 5). One white employee and one Hispanic employee were also employed as laborer trainees at this time. (Tr. at 121; CP. EX. # 5).

Equal Pay:

9. Complainant Robinson alleged that, because of his race, he was "paid less per hour than others doing similar work who had worked as many hours as I." (Complaint). Complainant was paid at the rate of $6.95 an hour when working near the bridge spanning Interstate 80. The record does not reflect how much he earned at other locations other than to indicate it was a "different" pay rate without specifying whether it was higher or lower. (Tr. at 1 1).

10. Complainant Robinson was paid less than "regular workers." (Response to Complainants' Allegations). This, however, Was because he was a trainee. (Tr.at 43-44,46,98). Trainees were employees who were hired under special Department of Transportation program requirements directed toward improving the employment opportunities of specified groups, e.g. minorities, persons with a low standard of living, or persons with a history of chemical dependency. (Tr. at 98,122). Trainees were given pay increases after 1050 hours of work. (Tr. at 98, 12324). Frank Robinson had not been employed for that length of time at the time he left the employment of Metro Pavers, Inc. (Tr. at 98; CP. EX. #2; #5; R. EX. A). There is no evidence in the record specifying the pay rate of any employee, whether a "regular worker" or a trainee, other than Complainant Robinson.

Racial Harassment:

11. Beginning with his first week of employment, Complainant Robinson heard Wayne Kempf and his co-workers repeatedly use racially derogatory names such as "buckwheat" and "nigger" in reference to Blacks, including himself. (Tr. at 17, 19, 37, 45-47, 68-71). In addition to using these names in the presence of Complainant Robinson and his coworkers, Mr. Kempf laughed when they were used by coworkers. (Fr. at 17, 19). The use of these names by co- workers continued on an almost daily basis regardless of whether or not Wayne Kempf was present. (Tr. at 23, 45-46).

12. On one occasion, when a company truck got stuck in a ditch, Wayne Kempf stated words to the effect of "[w]e'll ... have to go down and nigger it out." (Tr. at 30). On another occasion, approximately two months after Complainant Robinson began work, Wayne Kempf approached Mark Stastny, a coworker, and stated "Watch this." Kempf then said to Complainant Robinson, who was approximately thirty feet away, "Frank come over here and help Mark and me nigger these forms out." Complainant Robinson looked at the ground, slowly shook his head, came to Stastny and Kempf, and helped lift out the forms. (Tr. at 68-69). Wayne Kempf then told

Complainant Robinson "You know what 'nigger' means, don't you Frank? ... It means to get in there and work." (Tr. at 77). Wayne Kempf acknowledged he may have used the phrase "nigger head" in the presence of Complainant Robinson to refer to a small boulder. (Tr. at 106, 115-16). At least one employee heard him use this phrase outside of the presence of the Complainant. (Tr. at 165).

13. Racial jokes were also common at Respondent Metro Pavers'worksites. The frequency of these jokes increased as the hiring of minorities increased. (Tr. at 70, 72-73, 75, 78-79). It was not unusual for these jokes to be brought up by management or crew members when minority employees walked by. (Tr. at 76). These jokes were heard by Complainant Robinson. (Tr. at 70-71). Racial jokes were still tolerated at Metro Pavers, Inc. as of July of 1986, when Mark Stastny was terminated from his employment. (Tr. at 71-72; CP. EX. # 5).

14. Complainant Robinson tried to resolve this situation by individually asking each of his co-workers who used racially derogatory names in regard to him to quit doing so. (Tr. at 18-21, 47).

15. Within the last two weeks of his employment, Complainant Robinson brought the racial remarks and name calling to the attention of Beverly Burrell, an employee of Job Service of Iowa who had originally helped him obtain employment with Respondent Metro Pavers, Inc. (Tr. at 9, 49). Ms. Burrell then either talked to Wayne Kempf or Kenneth Albrecht or both of them about these complaints. She then called Complainant Robinson and told him that Wayne Kempf said to return to work. (Tr. at 15, 26-27, 9596,104).

16. On Complainant Robinson's return to work, he informed Wayne Kempf of his concerns in regard to the use of racial epithets by Mr. Kempf and his coworkers. (Tr. at 19, 26, 27). Nir. Kempf informed him that these statements had been made "in fun" and he would not hear them again. (Tr. at 19-20, 50).

17. Despite this assurance, Wayne Kempf still continued to use his previous racist references to Blacks although with less frequency. (Tr. at 30-31). He also began to apply a new appellation, "beanboiler," to Complainant Robinson and another Black employee Edward Browning. (Tr. at 22, 48-49). This appellation was only applied to Black employees. (Tr. at 22, 35, 37). Complainant Robinson interpreted this remark to mean that Blacks could only afford beans to eat. (Tr. at 35). It should be noted that Complainant Robinson had previously heard Mr. Kempf refer to an Hispanic employee as "bean dip." (Tr. at 37).

18. Beverly Burrell had provided Complainant Robinson with the names of two people from the Iowa Department of Transportation (IDOT) to contact in the event the racial harassment continued. (Tr. at 27). When the name calling and jokes continued, he contacted them and told them of his experiences. (Tr. at 27). James Ransom, an IDOT employee, spoke to Kenneth Albrecht and Wayne Kempf about Complainant Robinson's concerns. (Tr. at 96, 112, 132, 135). He visited the work site and talked with Wayne Kempf there. (Tr. at 96, 136). Kenneth Albrecht did not accompany him to the work site. (Tr. at 135-36). The record does not reflect whether or not he talked to co-workers while conducting his investigation or whether, if he did, he talked to them in the presence of Wayne Kempf. (Tr. at 92, 136, 152). After Ransom visited the worksite,

he stated that I DOT was not going to pursue the investigation further. (Tr. at 136). The record does not reflect the reason for this decision.

19. The greater weight of the evidence indicates that either no investigation of Complainant Robinson's allegations was done by Respondent Metro Pavers, (Tr. at 114), or that, if one was done, it consisted of interviews of coworkers conducted by and in the presence of Wayne Kempf, who was a perpetrator of racist remarks and comments, and an official with authority to discharge any coworkers interviewed. (Tr. at 116, 151). See Findings of Fact Nos. 6, 11, 12, 17. There was no meeting or other communication to employees to discourage the making of racial remarks or jokes. (Tr. at 1 16-17, 166).

20. Shortly after Complainant Robinson brought his concerns to the attention of Wayne Kempf, Beverly Burrell, and IDOT, Wayne Kempf required the Complainant and Edward Browning, both of whom were Black, to break up pavement with a jackhammer and load the chunks of pavement on to a truck by hand for two hours. (Tr.at 27-28).Although a breaking machine is normally used for this operation, the operator of that machine told Complainant Robinson that Wayne Kempf told him to take his time about arriving at the worksite on that day. (Tr. at 28, 15657).

21. The totality of the circumstances detailed above amply demonstrates that Complainant Robinson was subjected to racially discriminatory and abusive conduct by co-workers and management of Respondent Metro Pavers, Inc. which was so severe and pervasive as to result in a racially hostile working environment. Respondent Metro Pavers, Inc. knew or should have known of this harassment and, in fact, participated in the harassment through the actions of owner and general superintendent Wayne Kempf. No sufficient attempt to investigate or remedy this situation was made by Metro Pavers, Inc.

Constructive Discharge:

22. On July 25,1986, Complainant Robinson started to drive to work at Respondent Metro Pavers, Inc. (Tr. at 34). He did not make it to work. He returned to Cedar Rapids because he could no longer withstand, the name calling, jokes, and other racial abuse. (Tr. at 34-36, 50). He had repeatedly attempted, without success, to resolve the situation through a variety of means short of quitting his job, including talking to co-workers, Beverly Burrell, representatives of IDOT, and Wayne Kempf. (Tr. at 36-37). Complainant Robinson was subjected to a racially hostile working environment which any reasonable person would find so intolerable that he would feel compelled to resign. Complainant Robinson involuntarily quit his employment with Respondent Metro Pavers, Inc. because of those working conditions.

Credibility:

23. Complainant Robinson was a credible witness. He did show some nervousness which can be explained by his having testified on only one prior occasion. (Tr. at 7). His testimony was internally consistent and plausible with regard to all material facts. Although Complainant Robinson has a financial interest in the outcome of this case, the Commission does not believe

his testimony was affected by that fact. He was aware of the seriousness of these proceedings and of his oath to speak the truth.

24. Mark Stastny was a credible witness. Mr. Stastny acknowledged that he had been discharged by Wayne Kempf, but asserted he would not let this incident affect his testimony. Although his testimony was viewed with caution because of this incident, it was internally consistent and plausible with regard to all material facts. It was also consistent with the greater weight of the other credible evidence.

25. Max Bachman was a credible witness. He is Complainant Robinson's former father-in-law. Nonetheless, his testimony also was internally consistent and plausible with regard to all material facts. It was also consistent with the greater weight of the other credible evidence.

26. Wayne Kempf was not a credible witness. He originally denied making racial remarks or using the phrase "nigger-toe" or "nigger-head" in Complainant Robinson s presence. He was then successfully impeached with his deposition testimony acknowledging that he may have used "nigger head" in Complainant Robinson's presence. (Tr. at 95,105-06, 115-16). His testimony concerning whether or not he had met with the paving crew to discuss whether racial remarks had been made to Complainant Robinson was initially evasive. (Tr. at 112-114). He eventually answered that he had, and was then impeached by his deposition testimony which indicated he had not. (Tr. at 113-14). A possible explanation for this false and evasive testimony in regard to material facts may be found in Mr. Kempf's one-half ownership of Respondent Metro Pavers, Inc. See Finding of Fact No. 4.

27. In addition to this, Mr. Kempf behaved in an inappropriate manner during the hearing. During the course of Complainant Robinson's testimony, at a point after Complainant Robinson had testified he was nervous, Mr. Kempf persisted in loudly rapping his pencil against the top of the wooden conference table. It is the Administrative Law Judge's impression that this was not a nervous habit but was being deliberately done to disrupt Complainant Robinson's testimony. It became necessary to interrupt Complainant Robinson's direct examination in order to ask Mr. Kempf to cease this behavior. (Tr. at 34). Such behavior indicates a lack of appreciation of the serious nature of these proceedings and, by implication, of the oath to tell the truth which is an inherent part of the proceedings.

28. With some exceptions, the testimony of Wayne Kempf is cited in support of a finding of fact primarily when it constitutes an admission against the interest of the Respondent or when supported by other credible evidence.

29. Kenneth Albrecht's testimony on pay issues seemed credible. However, much of Kenneth Albrecht's testimony concerning Frank Robinson's complaints to Beverly Burrell and the Iowa Department of Transportation about racial remarks is inherently implausible. It may have been affected by his financial interest in this matter. See Finding of Fact No. 4. His testimony on this issue could be summarized as follows:

> a. Kenneth Albrecht never heard Wayne Kempf use the terms "beanboiler" or "beanpicker." These words are not in Wayne Kempf's vocabulary. (Tr. at 139).

b. Complainant Robinson complains to Bev Burrell about being called "beanboiler" or "beanpicker" by Wayne Kempf. She relays this complaint to the Iowa Department of Transportation ([DOT) by telephone. James Ransom, an employee with IDOT, calls Albrecht to report Ms. Burrell's phone call. (Tr. at 132). Neither Ms. Burrell nor Ms. Ransom indicate Complainant Robinson has complained about any other term or racial remark other than "beanboiler" or "beanpicker." (Tr. at 133).

c. James Ransom calls Albrecht and requests he investigate Robinson's complaint. (Tr. at 132). Albrecht informs Wayne Kempf, and, subsequently, Complainant Robinson, about what Ransom has said. Wayne Kempf, as EEO Officer, is placed in charge of the investigation of his own alleged actions. (Tr. at 133). Interviews with employees are conducted in Kempf's presence at IDOT's insistence. (Tr. at 151).

d. At a meeting with Kempf and Albrecht, Complainant Robinson apologizes to Kempf for having complained to Burrell. He states that the situation was "[B] lown all out of proportion, Ken. That lady misunderstood me. I'm having family problems." Robinson gives no explanation of what the misunderstanding was or how these "family problems" fit into his having complained to Ms. Burrell. (Tr. at 134). Mr. Albrecht then advises Complainant Robinson to see him if he feels this way and to say a few words to anyone who makes inappropriate remarks to "put them in their place." (Tr. at 134).

e. Mr. Albrecht writes to Mr. Ransom giving this explanation of what happened. No copy of this letter is introduced into evidence. (Tr. at 134).

f. After Kenneth Albrecht writes this letter, James Ransom visits the site.

30. It is simply not believable that Complainant Robinson would complain only about the "beanboiler" remarks, that he would apologize for having complained, that he would state the situation was "blown out of proportion," that he said Ms. Burrell had misunderstood his concerns, or that he would state unspecified "family problems" had anything to do with his bringing his concerns to Beverly Burrell or IDOT. It also seems unlikely that IDOT would insist that Kempf be present when employees are interviewed about statements Kempf allegedly made. Also, much of this testimony is contradicted by the more credible testimony of Complainant Robinson, e.g. that he complained about a variety of racist remarks he had heard, and that the "beanboiler" comments by Wayne Kempf did not begin until after he complained to Ms. Burrell and Wayne Kempf. See Finding of Fact No. 17. Finally, Kempf's admission that there was no investigation of Robinson's complaints effectively contradicts Albrecht's testimony to the contrary. (Tr. at 114).

31. The testimony of Charles Ford is credible, but entitled to little weight insofar as employment practices in 1986 as he was not employed by Respondent Metro Pavers, Inc. at that time and had not been employed there since the 1960's.

32. The testimonies of Jim Seelman and Bill Simon were viewed with some caution as both are still employed with Respondent Metro Pavers, Inc. and under the supervision of Wayne Kempf.

(Tr. at 153, 161-62). Although both testified that they worked at some time with Complainant Robinson or on the same crew during his employment, there is no evidence showing precisely what length of time they did work with him or in his presence. (Tr. at 154, 162-64). Mr. Simon, for example, would shift from crew to crew and specialized in sawing concrete as he moved from one crew to another. (Tr. at 155-56). An employee list for May 1986 through August 1986 gives his position title as "carpenter" as opposed to the "laborer" or "laborer-trainee" position titles assigned to Complainant Robinson and Mark Stastny. (CP. EX. #5).Although Mr.Seelman testified he was a "laborer" at that time, the same employee list indicates he was then a "paver operator." (CP. EX. # 5). This would be an important difference as paver operators operate paving equipment and would not be engaged in laborer duties. (Tr. at 90). All of these factors adversely affected the weight given to their testimony asserting that Wayne Kempf did not make racial remarks in the presence of Complainant Robinson.

Back Pay:

33. For at least part of his employment, Complainant Robinson was paid at the rate of $6.95 per hour. See Finding of Fact No. 9. An examination of his work record, as given in Respondent's Exhibit A, indicates that he worked an average of 39.75 hours per week computed as follows:

Week	Hours
1. 5/12-5/18/86	41.0
2. 5/19-5/25/86	46.25
3. 5/26-6/1/86	29.75
4. 6/2-6/8/86	56.25
5. 6/9-6/15/86	47.25
6. 6/16-6/22/86	32.25
7. 6/23-6/29/86	35.5
8. 6/30-7/6/86	29.25
9. 7/7-7/13/86	37.0
10. 7/14-7/20/86	37.0
11. 7/12-7/27/86	45.75
TOTAL HOURS	437.25

(Total Hours)/(11 weeks) = 437.25/11 = 39.75 hours per week. It should be noted that although Complainant Robinson's hours varied from week to week, with the exception of the time he missed work to talk to Ms. Burrell, the harassment he received did not result in him missing work. (Tr. at 31).

34. Complainant Robinson found another position in November or December of 1986. (Tr. at 52). There is no evidence which would indicate he failed to mitigate his damages by not seeking work. What evidence there is on this issue indicates that he did so. (Tr. at 52). There is also no evidence in the record indicating the amount of interim earnings Complainant Robinson had, if any.

35. Construction work normally ceases on or about November 15th of each year. (Tr. at 130). Using this date as an end date for Complainant Robinson's employment results in the following calculation of back pay for the sixteen weeks from July 25, 1986 to November 15, 1986: $6.95 per hour X 39.75 hours per week X 16 weeks = $4,420.20 gross back pay.

Emotional Distress:

36. Complainant Robinson suffered serious emotional distress and mental anguish as a result of the racial harassment he endured at Metro Pavers, Inc. He initially responded to racial slurs by shaking his head and continuing to do his job because he needed the job to care for his family and to make payments on his house, payments which were already in arrears at the time he took the job and remained so throughout his employment. (Tr. at 18, 50-51). As time went on, he had to weigh the cost of continuing to endure the harassment against the cost of losing his house and means of support for his family. (Tr. at 32, 33, 34). Although he was making "headway" in catching up with payments on his house during his employment at Respondent Metro Pavers, Inc., he lost the house once his employment there ended as he did not have another position lined up. (Tr. at 33, 34, 36, 54). It is clear that Complainant Robinson's constructive discharge from Respondent Metro Pavers, Inc. caused him substantial economic loss. See Findings of Fact Nos. 33-35.

37. Complainant Robinson was hurt, offended, and angered by the use of racial slurs such as "buckwheat" and "nigger" on the job sites by Wayne Kempf and others which caused him a great deal of stress. (Tr. at 23, 24, 31-32, 35, 37). He noticed how, once other employees saw Mr. Kempf using racial names, they would begin to use them. (Tr. at 37). Complainant had intended to stay with Respondent Metro Pavers, Inc. as he enjoyed learning new tasks such as cement finishing. (Tr. at 24). Nonetheless, once Wayne Kempf called him and Edward Browning "beanboilers," which Complainant viewed as a substitute for other more blatant racial terms, he began to seek other employment as it was clear the harassment wasn't going to end. (Tr. at 25, 27, 35, 36).

38. On July 25, 1986, after he returned to Cedar Rapids, Complainant Robinson went to his uncle, Charles Ray, who had raised him after his father died, and explained to him he could not continue working because of the harassment he suffered at Respondent Metro Pavers, Inc. (Tr. at 32, 33). During this conversation, Complainant Robinson cried. (Tr. at 32). Complainant Robinson discussed this situation with Mr. Ray for over an hour. (Tr. at 33).

39. When Complainant Robinson told his wife that he had left his employment, they got into an argument as she thought he should have stayed with the job. She eventually moved out and they were divorced. (Tr. at 35-36).

40. Complainant Robinson's despair was also visible to his father-in-law, Max Bachman. (Tr. at 60-61). Mr. Bachman could see Complainant Robinson was very upset by the use of racial terms at Respondent Metro Pavers, Inc. and by the loss of income he sustained when he left. (Tr. at 59-61). It also affected him in other ways. At one point, Complainant Robinson told his wife, "I can't talk to Max, I don't have a job." (Tr. at 63).

41. In light of the severity and duration of the distress suffered by Complainant Robinson due to the discriminatory actions of Respondent Metro Pavers, Inc., an award of ten thousand dollars ($10,000.00) would be full, reasonable, and appropriate compensation.

Attorney's Fees:

42. During the course of the hearing, Respondent Metro Pavers, Inc. conceded the reasonableness of the attorney fees, expenses and advances in the total amount of two thousand three hundred forty-four dollars and ninety cents ($2,344.90) sought by Complainant Robinson for the period ending on August 9, 1990 inclusive. Respondent also indicated it would not ask Complainant's counsel "to justify his hourly rate and his hours" in regard to that fee request. Therefore, that amount should be awarded.

43. Complainant Robinson has also asked for an additional five hundred dollars ($500.00) in fees for research and preparation of his brief. At this point it is unknown whether Respondent Metro Pavers, Inc. will stipulate to or dispute that amount.

CONCLUSIONS OF LAW

Jurisdiction:

1. Complainant Robinson's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code § 601A.15(12) (1985). See Finding of Fact No. 1. All the statutory prequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code § 601A.15 (1985). See Finding of Fact No. 2.

2. Mr. Robinson's complaint is also within the subject matter jurisdiction of the Commission as the allegations that the Respondent Metro Pavers, Inc. failed to provide him with equal pay, harassed him and constructively discharged him because of his race fall within the statutory prohibition against unfair employment practices. Iowa Code § 601A.6 (1985). "it shall be a ... discriminatory practice for any person ... to otherwise discriminate in employment against any . . . employee because of the race of such . employee." Id.

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

3. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of persuasion in this proceeding is on the complainant to persuade the finder of fact that he was denied equal pay, harassed, and constructively discharged due to his race. Linn Cooperative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981).

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

5. The 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).

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

7. 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 plaintiff 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).

8. 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). If Respondent does produce evidence of a legitimate non-discriminatory reason for its actions, the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154,156 (Iowa 1986).

9. 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)).

10. This burden of production may be met through the introduction of evidence or by cross-examination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981). The Complainant's initial evidence and inferences drawn therefrom may be considered on the issue of pretext. Id. at n.10. This burden of production merges with the Complainant's ultimate burden of persuasion, i.e. the burden of persuading the finder of fact that intentional discrimination occurred. Id. 450 U.S. at 256, 101 S. Ct. at , 67 L. Ed. 2d it-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).

Equal Pay:

11. Complainant Robinson's allegations of discrimination in pay rely on the "disparate treatment" theory of discrimination which focuses on whether the complainant has been "intentionally singled out for adverse treatment on the basis of a prohibited criterion." Henson v. City of Dundee, 682 F.2d at 903. Disparate treatment is shown when:

> The employer..... treats some people less favorably than others because of their race. Proof of discriminatory motive is critical, although it can *in some situations* be inferred from the mere fact of differences in treatment.

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

12.

> For example, a violation ... would be proved under the disparate treatment theory by evidence that a [Black] plaintiff was discharged for four unexcused absences in accordance with a company rule that all persons with four unexcused absences are discharged, but ***similarly situated*** [white] employees were not discharged after four unexcused absences. However, if ***similarly situated*** [white] employees were also discharged in such circumstances, there would be no violation... In both situations, it is irrelevant whether the plaintiff was a bad employee or a good employee. General conceptions of whether or not it is fair to discharge someone for four unexcused absences are similarly not determinative.

Schlei & Grossman, Employment Discrimination Law 13 (2nd ed. 1983)(emphasis added).

13. Under the facts of this case, Complainant Robinson could most properly be viewed as being similarly situated to other laborer trainees hired in accordance with Department of Transportation program requirements.There is,however,no evidence to indicate that Complainant Robinson or other Black laborer-trainees were paid less than non-Black laborer trainees. See Findings of Fact

Nos. 9, 10. Viewed in this manner, Complainant Robinson has failed to produce evidence sufficient to establish a prima facie case of racial discrimination in pay under the disparate treatment theory.

14. On the other hand, Complainant Robinson may be viewed as being similarly situated to all of Respondent's employees who perform substantially equal work under similar working conditions. This is a concept which is implicitly supported by Federal regulations governing equal pay sex discrimination cases. See 29 C.F.R. Section 1620.27(c). It is arguable that Complainant has established a prima facie case in light of Respondent's admission that he was paid less than "regular workers," all of whom at the time of Complainant Robinson's employment were white. See Findings of Facts Nos. 8-10.

15. Even if it were found that Complainant had established a prima facie case of race discrimination in pay, however, Respondent effectively rebutted it by producing evidence articulating a legitimate nondiscriminatory reason for the difference in pay, i.e. that Complainant Robinson and other employees were employed as laborer-trainees under Department of Transportation program requirements. See Finding of Fact No. 10. This reason was not shown to be a pretext for discrimination. Therefore, the allegation of race discrimination in pay must fail. See Conclusions of Law Nos. 8-10.

Racial Harassment:

16. To establish a valid claim of harassment on the basis of race, the Complainant must prove:

1) He is a member of a protected class.

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

3) The harassment was based upon his 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 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 (1 1 th Cir. 1982).

Participation In Harassment By Corporate Officer:

17. The fifth element need not be proven "where a proprietor, partner or corporate officer participates personally in the harassing behavior." Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983). Corporate officers include not only "[t]hose persons who fill the offices which are provided for in the charter such as president, treasurer etc., [but also] in a broader sense the term includes vice presidents, general manager, and other officials of the corporation." BLACK'S LAW DICTIONARY 307 (5th ed. 1979). In light of his position, authority, and fifty percent ownership of this privately held corporation, it is clear that Wayne Kempf was a corporate officer of Respondent Metro Pavers, Inc. He participated personally in the harassment. See Findings of Fact Nos. 4-6, 11-12, 17. Nevertheless, although Complainant Robinson is not required to prove this element, he has met his burden of persuasion in regard to all five elements. See Findings of Fact Nos. 3, 11-22.

Proper Order and Allocation of Proof:

18. "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. 5-10. In a case of racial harassment involving the repeated use of racial epithets, slurs, and jokes, 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 Complainant Robinson had proven, by a preponderance of the evidence, all five of the elements stated above.

Term, Condition or Privilege of Employment:

19. 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 [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 [racial] harassment affects a condition of employment." See Id.

Existence of A Hostile Working Environment:

20. The determination that a hostile or abusive working environment existed at Respondent Metro Pavers, Inc. was based on application of the following principles:

> The existence of hostile or abusive working environment must be established by the totality of the circumstances Whether use of [racial] slurs is continuous,

> severe and pervasive enough to rise to a violation of the Iowa Civil Rights Act is a question of fact . . .
>
> It is well established that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not affect the terms, conditions and privileges of employment to a significant degree Discriminatory comments that are "merely part of casual conversation, are accidental or are sporadic do not trigger sanctions.". . .
>
> On the other hand, the determination of whether defendant's conduct is sufficiently severe and pervasive to constitute [racial] harassment does not turn solely on the number of incidents alleged by plaintiff.. . . The totality of the circumstances requires the factfinder to examine the severity, as well as the number, of the incidents of harassment.... In some situations the severity of the offensive conduct may lessen the need for sustained exposure.. . . "The prima facie showing in a hostile environment case is likely to consist of evidence of many or very few acts or statements by the defendant which, taken together, constitute harassment."

Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 63334 (Iowa 1990)(citations omitted).

Employer Liability.,

21. Employers are not "always automatically liable for . . . harassment by their supervisors." Meritor Savings Bank v. Vinson, 477 U.S. 57, 72, 106 S.Ct. 2399, 2408, 91 L.Ed.2d 49 (1986). Here, however, Complainant Robinson has proven that Respondent Metro Pavers, Inc. knew or should have known of the harassment by coworkers and by Wayne Kempf. See Findings of Fact Nos. 11-13, 15-16, 18. Complainant Robinson has also proven that Respondent Metro Pavers, Inc. failed to take prompt remedial action. See Findings of Fact Nos. 19-21. Proof of these facts is one way to establish that an employer is liable for the discriminatory actions of coworkers and supervisors under the concept of respondeat superior. Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983). See Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632 (Iowa 1990) (harassment by supervisor), Lynch v. City of Des Moines, 454 N.W.2d 827, 833,835 (Iowa 1990)(harassment by coworkers).

22. "An employer cannot stand by and permit an employee to be harassed by his co-workers." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 634 (Iowa 1990). "Where, as here, the employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment [it is especially difficult for] the employer to avoid liability." Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983). The requirement for prompt remedial action imposes "a reasonable duty on an employer who is aware of discrimination in the workplace to take reasonable steps to remedy it." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 634 (Iowa 1990). Factors considered here in determining whether this duty was met were "the gravity of the harm, the nature of the work environment, and the resources available to the employer." Id.

23. Under some circumstances, an employer may be liable for the discriminatory actions of supervisors resulting in a hostile work environment despite the absence of notice to the employer. Meritor Savings Bank v. Vinson, 477 U.S. 57, 72, 106 S.Ct. 2399, 2408, 91 L.Ed.2d 49 (1986)(citing generally Restatement (Second) of Agency §§ 219-237 (1958)). It has been proven that Wayne Kempf had actual authority to discharge employees, including Complainant Robinson, and to supervise their work. He also handled EEO matters. The position and authority held by Wayne Kempf enabled him to engage in acts of racial harassment against Complainant Robinson with impunity. See Findings of Fact Nos. 4-6, 11- 12, 17, 19-21. These circumstances alone would be sufficient to impose liability on Respondent Metro Pavers, Inc. for his actions, even if there had been no notice to the Respondent. See Restatement (Second) of Agency §§ 219(2)(d) & comment e (1958).

Constructive Discharge:

24. "Constructive discharge exists when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." First Judicial District Department of Correctional Services v. Iowa Civil Rights Commission, 315 N.W.2d 83, 87 (Iowa 1982). The Iowa Supreme Court has adopted an objective standard for determining when a constructive discharge has occurred: "To find constructive discharge, the fact finder must conclude that, "working conditions would have been so difficult or so unpleasant" that a reasonable person in the employee's position would be compelled to resign." Id. (citing Bourque v. Powell Electrical Manufacturing Company, 617 F.2d 61, 65 (5th Cir. 1980)). It is not necessary to show that intolerable working conditions were imposed by the employer for the purpose of forcing the employee to quit. Bourque v. Powell Electrical Manufacturing Company, 617 F.2d 61, 22 Fair Empl. Prac. Cas. 1191, 1193 (5th Cir. 1980). It is sufficient to show that the employer knowingly allowed such intolerable conditions to occur. Goss v. Exxon Office Systems Co., 747 F.2d 885, 886-(3rd Cir. 1984).

25. In accordance with this objective standard, a complainant may establish a discriminatory constructive discharge by showing:

> (1) that a reasonable person in the [complainant's] position would have found the working conditions intolerable;
>
> (2) that conduct which constituted a[n] [Iowa Civil Rights Act] violation against the [complainant] created the intolerable working conditions; and
>
> (3) that [complainant's] involuntary resignation resulted from the intolerable working conditions.

Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 269 (2nd ed. 1989). All three of these factors have been established by a preponderance of the evidence. See Findings of Fact Nos. 21-22.

Credibility and Testimony:

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

Remedies:

27. Violation of Iowa Code section 601A.6 having been established, the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code § 601A.15(8) (1991). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. ' Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "An appropriate remedial order should close off 'untraveled roads' to the illicit end and not ,only the worn one."' Id. at 771. In addition to the illustrative examples of remedial action enumerated under Iowa Code section 601A.15(8)(a), the Commission has the authority to require Respondents to develop and implement an educational program to prevent future instances of harassment. Lynch v. City of Des Moines, 454 N.W.2d 827, 835-36 (Iowa 1990).

Compensation:

28. The Commission has the authority to make awards of backpay. Iowa Code § 601A.15(8)(a)(1) (1991). In making such awards, interim earnings and unemployment compensation received during the backpay period are to be deducted. Id, The Complainant bears the burden of proof in establishing his damages. Diane Humburd, CP # 03-85-12695, slip op. at 32-33, (Iowa Civil Rights Comm'n Sept. 28, 1989)(citing Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Id. at 34-35, 37 (citing e.g. EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.Y. 1976), *affd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977)). This the Complainant has done. See Findings of Fact 33-35.

29. The burden of proof for establishing either the interim earnings of the Complainant or any failure to mitigate damages rests with the Respondent. Diane Humburd, CP # 03-85-12695, slip op. at 35-37, (Iowa Civil Rights Comm'n Sept. 28,1989) (citing e.g. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). Neither interim earnings nor any failure to mitigate damages were shown here. See Finding of Fact No. 34.

30. The award of backpay in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a backpay award . . . provide[s] the spur or catalyst which causes employers and unions to self-examine and to self evaluate their employment practices and to

endeavor to eliminate [employment discrimination]." Albemarle Paper Company v. Mood_v, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975). Second, backpay serves to "make persons whole for injuries suffered on account of unlawful employment discrimination." Id. 422 U.S. at 419, 95 S.Ct. at 2372. Both of these purposes would be served by an award of backpay in the present case.

31. "Iowa Code section 601A.15(8) gives the Commission considerable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 531 (Iowa 1990). The Iowa Supreme Court has approved two basic principles to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Id. at 530-531. "It suffices for the [agency] to determine the amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. at 531 (Quoting with approval Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973)).

Termination of the Back Pay Period at November 15, 1986:

32. The determination that the back pay period should end on November 15, 1986 is based on the principle that the period ends "if the plaintiff ceases to suffer the adverse economic effects of discrimination." Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 529 (2nd ed. 1989).

Damages for Emotional Distress:

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

Proof of Emotional Distress:

34. "[A] civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990). "Humiliation can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d at 636 (quoted with approval in Blessum v. Howard County Board, 245 N.W.2d 836,845 (Iowa 1980)).

35. Even slight testimony of emotional distress, when combined with evidence of circumstances which would be expected to result in emotional distress, can be sufficient to show the existence of distress. See Dickerson v. Young, 332 N.W.2d 93,98-99 (Iowa 1983). Testimony of the complainant alone may be sufficient to prove emotional distress damages in discrimination

cases. See Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977; Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. 111. 1981).

36. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). Nonetheless, such evidence in the record may be considered when assessing the existence or extent of emotional distress. See Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988).

Determining the Amount of Damages for Emotional Distress:

37.

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

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

38. The two primary determinants of the amount awarded for damages for emotional distress are the severity of the distress and the duration of the distress. Bean v. Best, 93 N.W.2d 403, 408 (S.D. 1958)(citing Restatement of Facts § 905).

Interest:

39. The Iowa Civil Rights Act allows an award of actual damages to persons injured by discriminatory practices. Iowa Code § 601A.15(8)(a)(8) (1989). Prejudgment interest is a form of damages. Dobbs, Hornbook on Remedies 164 (1973). It "is allowed to repay the lost value of the use of the money awarded and to prevent persons obligated to pay money to another from profiting through delay in litigation." Landals v. Rolfes Company, 454 N.W.2d 891, 898 (Iowa 1990). Pre-judgment interest is properly awarded on an ascertainable claim. Dobbs, Hornbook on Remedies 166-67 (1973). The amount of back pay due Complainant at any given time has been

an ascertainable claim since the time of his resignation. See Findings of Fact No. 33-35. Emotional distress damages are not ascertainable before a final judgment. See Dobbs, Hornbook on Remedies 165 (1973).

40. Post-judgment interest is usually awarded upon almost all money judgments, including judgments for emotional distress damages. Dobbs, Hornbook on Remedies 164 (1973).

Attorneys Fees:

41. The Complainant having prevailed, he is entitled to an award of reasonable attorney's fees. Iowa Code § 601A.15(8)(1989). In this case, part of the requested fees have been stipulated to and they shall be awarded. See Findings of Fact No. 42-43. If the parties cannot stipulate to the amount of the remaining fees, they should be determined at a separate hearing. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987). The Commission must expressly retain jurisdiction of the case in order to determine the amount of the remaining attorney's fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees. City of Des Moines Police Department v. Iowa Civil Rights Commission, 343 N.W.2d 836,839 (Iowa 1984).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Frank Robinson, is entitled to judgment because he has established that the Respondent Metro Pavers, Inc. subjected him to an intolerable hostile working environment and constructively discharged him on the basis of his race in violation of Iowa Code Section 601A.6.

B. Complainant Robinson is entitled to a judgment of four thousand four hundred twenty dollars and twenty cents ($4,420.20) in back pay for the loss resulting from his being constructively discharged.

C. Complainant Robinson is entitled to a judgment of ten thousand dollars ($10,000.00) in compensatory damages against the Respondent for the emotional distress he sustained as a result of the discrimination practiced against him by the Respondent.

D. Interest at the rate of ten percent per annum shall be paid by the Respondent to Complainant Robinson on all back pay commencing on the date payment would have been made if Complainant had remained in his employment with the Respondent and continuing until date of payment.

E. Interest at the rate often percent per annum shall be paid by the Respondent to Complainant Robinson on the award of compensatory damages for emotional distress commencing on the date this decision becomes final, either by Commission decision or by operation of law, and continuing until date of payment.

F. Complainant Robinson is entitled to a judgment of two thousand three hundred forty-four dollars and ninety cents ($2,344.90) against the Respondent for attorneys fees, expenses, and advances for the period ending on August 9, 1990 inclusive.

G. Within 45 calendar days of the date of this order, provided that agreement can be reached between the parties on this issue, the parties shall submit a written stipulation stating the remaining 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.

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

I. The Respondent is hereby ordered to cease and desist from any further practices of racial harassment of its employees by supervisors or coworkers.

J. The Respondent shall post, within 60 days of the date of this order, in conspicuous places at its locations in areas readily accessible to and frequented by employees, the notice, entitled "Equal Employment Opportunity is the Law" which is available from the Commission.

K. The Respondent shall develop a written policy on racial harassment which shall include an effective grievance procedure. This policy shall be completed within 120 days of the date of this order. This policy 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. A copy of this policy shall be issued to each employee of the Respondent within 150 days of the date of this order. A copy of this policy shall be issued to each new employee hired within a period of two years after the date of this order.

L. The Respondent shall develop a proposed plan of Equal Employment Opportunity education and training for all management personnel of the Respondent, which will include education and training in the prevention, detection, and correction of racial harassment within 120 days of this order. This plan shall be subject to the review and approval of the Commission. The plan shall be implemented within 150 days of this order.

M. A copy of this decision shall be provided to the Iowa Department of Transportation.

N. The Respondent shall file a report with the Commission within 210 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs J through L inclusive of this order.

Signed this the 15th day of February 1991.

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

ADOPTION OF PROPOSED DECISION AND ORDER AND REMAND FOR DETERMINATION OF ATTORNEYS FEES

1. On March 29, 1991, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order, which is incorporated in its entirety in this order as if fully set forth herein. At that time, the case was also remanded back to the Administrative Law Judge so the attorneys fees issue may be resolved.

2. In accordance with paragraph G on page 41 of the proposed decision and order, **the parties are required. "provided that agreement can be reached . . . on this issue. . . to submit a written stipulation stating the remaining amouint of the 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 2nd day of April, 1991.

Abigail Pumroy, Chairperson
Iowa Civil Rights Commission

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SUPPLEMENTAL PROPOSED DECISION AND ORDER ON THE AWARD OF ATTORNEYS FEES

FINDINGS OF FACT

1. Paragraphs G and H of the Commission's Final Decision and Order in this case, which was adopted by the Commission on April 2,1991, provided:

> G. Within 45 calendar days of the date of this order, provided that agreement can be reached between the parties on this issue, the parties shall' submit a written stipulation stating the remaining amount of the 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.
>
> H. The Commission retains jurisdiction of this case in order to determine the remaining amount of attorneys fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees. This order is final in all respects except for the determination of the amount **of** the attorney's fees.

2. After 45 calendar days had passed from the date of the Commission's order, a telephone conference with counsel for all the parties was held on June 19, 1991 in order to "determine the status of the attorneys fees issue and to determine whether an evidentiary hearing on attorneys fees should be scheduled or other appropriate action taken for the period of time from August 10,

1990 to April 2, 1991." At this conference, it was agreed that counsel for complainant and respondent would submit a joint stipulation of fees to the Administrative Law Judge.

3. A joint stipulation of fees was received by the Administrative Law Judge. on July 15, 1991. This document, entitled "JOINT STIPULATION RE: ATTORNEY FEES," and the itemized statement of complainant's attorneys fee and costs, entitled "STATEMENT OF ACCOUNT," are attached to this Decision and Order and are hereby incorporated by this reference as if fully set forth herein.

4. In accordance with the joint stipulation, it is found that:

> a. The complainant's attorneys fees were billed at one hundred dollars ($100.00) per hour for 11.5 hours for a total of one thousand one hundred fifty dollars ($1,150.00). The hourly rate and number of hours expended are reasonable.
>
> b. The costs in the amount of thirty-nine dollars and twenty cents ($39.20) and the expenses in the amount of one hundred ninety dollars ($190.00) as set forth in the itemized statement of account are reasonable.
>
> c. The total sum for attorneys fees, advanced costs and expenses in the amount of one thousand three hundred seventy-nine dollars and twenty cents ($1379.20) is reasonable.

CONCLUSIONS OF LAW

1. The Iowa Civil Rights Act allows the award of damages which "shall include but are not limited to actual damages, court costs, and reasonable attorneys fees" as part of the remedial action which the Commission may take in response to the Respondent's discriminatory practice. Iowa Code 601A.15(8) (i 991).

2. An award of attorneys fees may be made in the absence of a separate evidentiary hearing where the opportunity for an attorneys fees hearing has been provided and all parties have elected to not take advantage of the opportunity. See Rouse v. Iowa Department of Transportation, 408 N.W.2d 767, 768 (Iowa 1987). In this case, the parties have elected to resolve the matter through stipulation rather than litigation.

3.

> [A] 'reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather the term must refer to a reasonable fee for the work product of the attorney. Thus the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take into account other expenses and profit.

Missouri v. Jenkins, 491 U.S. ____ , 105 L.Ed.2d 299, 241 (1989).

13. In accordance with the legal standards set forth above, and in light of the joint stipulation of fees, the Complainant should receive a fully compensatory attorney's fee award, including expenses and costs, of one thousand three hundred seventy-nine dollars and twenty cents ($1379.20) for the period from August 10, 1990 to April 2, 1991.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Frank Robinson, is entitled to a judgement of one thousand three hundred seventynine dollars and twenty cents (1379.20) in attorneys fees for the period from August 10, 1990 to April 2, 1991 against Respondent Metro Pavers.

Signed this the 18th day of July 1991.

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

JOINT STIPULATION RE: ATTORNEY FEES

COME NOW the Complainant Frank Robinson and the Respondent Metro Pavers and submit the following Joint Stipulation pursuant to the Order of Administrative Law Judge Donald W. Bohlken dated June 19,1991:

1. Attached to this Joint Stipulation is an itemized statement of attorney fees and costs for Complainant's attorney for the period of time from August 10, 1990 to April 2, 1991.

2. The attorney fees for Complainant's attorney James W. Affeldt were billed at $100.00 per hour for 11.5 hours for total of $1,150.00 for attorney fees. The parties stipulate that the hourly rate and number of hours expended are reasonable.

3. In addition, the parties stipulate that the costs in the amount of $39.20 and the expenses in the amount of $190.00 as set forth on the attached itemization are reasonable.

4. The parties stipulate that the total sum for attorney fees, advanced costs and expenses in the amount of $1,379.20 is reasonable.

5. The parties further stipulate that this Joint Stipulation does not waive any of Respondent's rights on judicial review.

ELDERKIN & PIRNIE

By: James W. Affeldt
Suite 700 Higley Building
118 3rd Avenue S.E.
P.O. Box 1968
Cedar Rapids, Iowa 52406
(319) 362-2137
ATTORNEYS FOR RESPONDENT, FRANK ROBINSON
MEARDON, SUEPPEL, DOWNER & HAYES

By: William L. Meardon

By: Timothy J. Krumm
122 South Linn Street
Iowa City, Iowa 52240
(319) 338-9222
ATTORNEYS FOR RESPONDENT

Copy to:

Teresa Baustian
Assistant Attorney General
Civil Rights Section
211 East Maple Street, Second Floor
Des Moines, Iowa 50319

STATEMENT OF ACCOUNT

Frank Robinson
1713 Third Avenue S.E.
Cedar Rapids, Iowa 52403
Civil Rights Commission
Account No. 8981

09/14/90 Prepared Brief.
02/20/91 Letter to Client.
03/05/91 Letter to client.

03/18/91 Reviewed Briefs filed by Iowa Civil Rights Commissioner and Metro Pavers; researched procedural law.

03/20/91 Letter to client.

03/28/91 Prepared for oral argument; reviewed decision of Administrative Hearing Officer; reviewed Metro Pavers' Brief; reviewed Brief of Iowa Civil Rights Commission; reviewed prior research and our trial Brief; reviewed hearing notes.

03/29/91 Conference with client; traveled to Des Moines: attended hearing; returned to Cedar Rapids.

FEES FROM AUGUST 10, 1990 TO April 2,1991
$1,150.00

09/21/90 Photocopy costs 9.00
09/21/90 Postage 2.15
10/02/90 Photocopy costs 6.00
10/02/90 Postage 1.05
02/20/91 Photocopy costs 21.00

EXPENSES FROM AUGUST 10, 1990 TO APRIL 2,1991 39.20

09/21/90 Paid to Angela K. Layden for work on Brief. 125.00
03/29/91 Mileage expense to Des Moines for Civil Rights hearing (260 miles @ $.25). 65.00

ADVANCES FROM AUGUST 10, 1990 TO April 2,1991 190.00

TOTAL FEES AND COSTS FROM AUGUST 10, 1990 TO APRIL 2,1991 $1,379.20