BEFORE THE IOWA CIVIL RIGHTS COMMISSION

ROYD JACKMAN, Complainant, and IOWA CIVIL RIGHTS COMMISSION,

VS.

JENSEN CONSTRUCTION COMPANY, Respondent.

CP # 08-89-19079

COURSE OF PROCEEDINGS

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Royd Jackman against the Respondent Jensen Construction Company alleging discrimination on the basis of race in employment.

Complainant Jackman alleges that the Respondent Jensen Construction Company allowed a coworker to subject him to racial harassment and constructively discharged him because **of** his race.

A public hearing on this complaint was held on September 25-26, 1990 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, Royd Jackman, was represented by Mark W. Bennett, Attorney at Law. The Respondent was represented by John R. Phillips and Joan Fletcher, Attorneys at Law. The Iowa Civil Rights Commission was represented by Rick Autry, 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) (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 racial discrimination be determined in light of the record as a whole. See Iowa Code § 601 A.1 5(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.

FINDINGS OF FACT:

Jurisdictional and Procedural Facts:

1. On July 15, 1989, the Complainant, Royd Jackman, filed his complaint CP # 08-89-19079 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 June 2,1989. Official notice is taken that July 15, 1989 is forty-three days after June 2, 1989. Fairness to the parties does not require that they be given an opportunity to contest this fact.

2. The parties stipulated that Respondent Jensen Construction Company is an "employer" and a "person" within the meaning of Iowa Code Chapter 601A. (J. EX. # 1) The Complaint was investigated. After probable cause was found, conciliation was attempted and failed. Notice of Hearing was issued on June 25, 1990. (Notice of Hearing). The hearing was held on September 25-26,1990.

Background:

3. Complainant Jackman, a black male, worked for Respondent Jensen Construction as a water truck driver from April 17, 1989 through June 2, 1989. (J. EX. # 1; Tr. at 202). He also performed other duties including operating the sweeper, which is a power broom, and the profilometer, a device for measuring the smoothness of a highway. (Tr. at 221, 222, 407). The Complainant began working for the Respondent on a highway project near Nevada, Iowa. He was employed there from April 17 to early May, 1989. (J. EX. # 1). Upon completion of the Nevada project, Complainant and the other crew members moved to another project in Tama County, near Traer. (J. EX. # 1). Complainant Jackman was the only black crew member on the Nevada or Traer projects. (R. EX. 8).

4. During Complainant Jackman's employment with Respondent, Keith Burnett and Steve Olson were supervisors. (Tr. at 368, 406). Specifically, they were superintendents in Respondent Jensen Construction's grinding division. Mr. Burnett was not present at either the Nevada or Tama County projects on a full-time basis. Steve Olson, Burnett's assistant, was the project superintendent on both of these jobs. He supervised the crew consisting of 12 to 15 employees. (J. EX. # 1). Chuck O'Gorman was also a supervisor on the Traer job. (Tr. at 107, 369). He also performed maintenance work on the equipment. (Tr. at 1 1 2, 369).

5. Steve Olson was Complainant's immediate supervisor. He originally hired Complainant Jackman for the Nevada project. However, because he was pleased with Complainant's work, he asked him to come with the crew to the project near Traer. (J. EX. # 1).

6. The project that Respondent Jensen Construction Company's undertook near Traer was to grind a fourteen mile stretch of Highway 63 between Traer and Hudson, Iowa. (Tr. at 411). The

company used three tractor trailers with water tanks, a semitanker truck, and a tandem axle with a 4OOO gallon water tank to supply water for the three grinders required for the project. (Tr. at 41 1). At the Traer site, both Complainant Jackman and Sheldon Naab, a coworker known by the nickname "Bear," drove tanker trucks to fill up from water supplies in Traer and Hudson and then used their trucks to supply water for the stationary tankers which serviced the grinding machines. (J. EX. # 1; Tr. at 143, 219, 321, 371).

7. At the beginning and end of each day, Respondent Jensen Construction Company's construction equipment would be parked and stored in an area known as "the yard". (Tr. at 78). The yard measured approximately 200 feet by 300 feet. (Tr. at 111). It was located off of Highway 63 near the north edge of Traer, Iowa. (R. EX. # 1; Tr. at 372).

Incidents of Racial Harassment:

The Hat Incident:

8. Complainant Jackman was subjected to no racial harassment during his employment at Respondent Jensen Construction Company until an incident occurred in the yard at the Traer job site. (Tr. at 148, 152, 213). This first incident happened at the end of the work day on a date approximately one and one half weeks into the Traer job, which began in early May 1989. (Tr. at 85, 231). In other words, the approximate date of the incident is somewhere between May 1 1 and May 15, 1989.

9. On that occasion, Complainant Jackman asked Steve Olson if he could have a hat with the Jensen Construction Company logo on it. (Tr. at 84-85, 152). Mr. Olson indicated that he could, took a hat out of the truck, and gave it to Complainant Jackman. (Tr. at 85, 152). Sheldon Naab, who was standing 10 or 15 feet from Steve Olson, was clearly offended and angered by the fact that Olson had given the Complainant a hat. (Tr. at 85-86, 92,152-54). Mr. Naab made his displeasure known by stating "Just because he's a nigger, does that mean he gets a hat?" or words to that effect. The word "nigger" was definitely used in his remarks. (Tr. at 86, 152, 234-35). Steve Olson's only response was to state "He (referring to Complainant Jackman) does what I tell him to do." (Tr. at 152, 234). Mr. Olson then drove away in a truck with Mr. Naab. (Tr. at 153).

10. This incident and all other subsequent incidents of clearly identifiable racial harassment were committed solely by Sheldon Naab and occurred in the yard. (Tr. at 62, 85, 106, 231). All of these incidents occurred either in the morning, when employees first arrived at the yard, or in the evening, when employees came back to the yard. (Tr. at 62, 85, 88, 109, 241). During the eight to twelve hour period away from the yard, when Complainant Jackman was involved in hauling water or performing other duties, no acts of racial harassment occurred, with the possible exception of Mr. Naab thumbing his nose at Complainant Jackman when they passed on the highway. (Tr. at 62, 85, 88, 109, 157, 215, 219).

Repeated Use of Racist Epithets Toward Complainant Jackman:

11. After the hat incident, relations between Complainant Jackman and Sheldon Naab deteriorated. (Tr. at 92, 155). The next morning, Mr. Naab told Complainant Jackman, "All you

niggers are alike. You're a brown nose nigger." (Tr. at 155, 157, 235). This and other racist appellations were applied to the Complainant by Mr. Naab almost every day of his employment. (Tr. at 81-82, 113, 120-21, 124, 158, 160, 241, 247, 359, 402-04, 459; R. EX. # 8; CP. EX. # 5). Mr. Naab told Complainant Jackman to "Get your black ass over here, Blackbird!". (Tr. at 81). At the end of the day, Sheldon Naab would state "Here's the brown nosing nigger, the blackbird nigger getting out of his truck." (Tr. at 158).

12. Naab would repeatedly make comments, some of which were within the presence and hearing of coworkers and supervisors Olson, Burnett, and/or O'Gorman wherein he would refer to Complainant Jackman as a "blackbird nigger", "blackbird," "black ass," "black ass nigger," "nigger," "anything with 'nigger' on the end of it," or make statements with "nigger" within them such as "You niggers are all alike. You're no different than any other nigger." (Tr. at 8083, 86-88, 90, 91, 113, 122, 124, 128-29, 157-58, 160, 162, 166-67, 168-69, 171, 185, 236-38, 340, 359-60, 402-03; CP. EX. # 5). With the exception of those actions noted elsewhere in this decision, the supervisors took no action in response to these remarks. (Tr. at 80-83, 90, 128-29, 158, 160, 166-67, 168-69, 185, 236-38). On June 2, 1989, the last day of Complainant's employment, Mr. Naab referred to him as "Blackbird" and "nigger". (Tr. at 124, 251).

13. It is undisputed that Sheldon Naab referred to both Complainant Jackman and white employees as "boy". (Tr. at 87, 120-21, 247, 348, 380, 422, 456). At times, this occurred in the presence and hearing of Steve Olson and Keith Burnett, who regarded it as normal behavior by Naab. (Tr. at 380, 422). On one or more occasions, Craig Garrey, a co-worker, heard Naab use "boy" combined with other racist language toward Complainant Jackman, i.e. "Hey blackbird; hey, you, boy; hey black man." (Tr. at 87).

14. It is a matter of common knowledge, and certainly a matter within the specialized knowledge of this agency, that (1) the word "boy" has long been applied to adult black males as a racial epithet; and (2) the racist implication of the use of this epithet is that black males are incapable of acting as adults, i.e. as men, and therefore need not be addressed as men. Official notice is taken of these two enumerated facts. Fairness to the parties does not require that they be given the opportunity to contest these facts.

The "Kybo" Incident.,

15. In the yard stood a portable toilet known as a "Kybo," which was near the trailer with an office in it. (Tr. at 87, 166-67, 431). On one occasion, Complainant Jackman was heading toward the Kybo when Sheldon Naab stated "You can't use that restroom. That's for white people. You can't use that. Niggers aren't allowed in white people's bathrooms." (Tr. at 87, 166). The Complainant stopped, looked at Mr. Naab, and then went to a nearby gas station to use the bathroom there. (Tr. at 88, 167).

16. Chuck O'Gorman was present when this happened and said "Bear, anybody can use that bathroom." (Tr. at 89, 167). Steve Olson was within 10 yards of Sheldon Naab and close enough to hear his remarks. (Tr. at 88, 90, 128).

The "Southern Nigger" and Ku Klux Klan Remarks:

17. On at least one occasion, Sheldon Naab told Complainant Jackman that "You northern niggers ain't no different than southern niggers, and they'll kill you.... if you're from the north or south it wouldn't make any difference. They'll hang you or kill you just alike. You're still a nigger." (Tr. at 89, 171). Mr. Naab talked about the Ku Klux Klan and about how they would kill the Complainant if he went south. "You can't go down there, we'll get you." (Tr. at 89, 93, 171, 245). "Down south we put our niggers in their place." (Tr. at 93; CP. EX. # 5). Steve Olson was within 10 yards of Sheldon Naab when he made these statements. (Tr. at 90, 93). There is no evidence in the record to suggest he took any action to compel Naab to cease this behavior.

18. On another occasion, Mr. Naab told Complainant Jackman, "Well, if you 'were down in Arkansas, they'd killed you, or they'd hurt you or hung you." (Tr. at 166). Chuck O'Gorman, who overheard this statement, gave a disgusted look and told Complainant Jackman, "Tell him you're not from there." (Tr. at 116-17,166).

Other Harassment:

19. On one occasion, Sheldon Naab made the remark to Complainant Jackman, while in the presence of Julie Rungie, a white female co-worker, and Steve Rummington, a white male co-worker known as "Rummy," that he "was black and wasn't getting any of that white pussy." (Tr. at 2?2-33, 433). On another occasion, Naab grabbed Complainant Jackman, who threw him off. (Tr. at 126, 238-39). Sheldon Naab also told racist jokes to other employees which Complainant Jackman heard about from them. (Tr. at 80, 232, 361-62).

Complainant Jackman's Responses to Sheldon Naab's Harassment:

20. Complainant Jackman would often walk away and try to ignore Sheldon Naab's harassment. (Tr. at 88, 94, 239). He would try to hide his anger by pretending to be happy. (Tr. at 163-64). On other occasions Complainant Jackman would respond by calling Naab a "redneck" or "buffalo head" or, on one occasion, a "honky." (Tr. at 94, 116, 242, 341, 361). On one occasion, in response to Naab stating "You, nigger, go on home," Complainant Jackman dropped his pants, "mooned" Naab, and said "Kiss my ass." (Tr. at 116,173, 238, 340). Naab responded by saying "You are a black ass nigger." (Tr. at 238, 340). Although bystanders laughed at Complainant Jackman's "mooning" of Mr. Naab, Complainant Jackman intended for his actions to express his anger and offense at Naab's continued harassment. (Tr. at 173, 174).

21. During the course of Sheldon Naab's harassment of Complainant Jackman, Naab asked Jackman if he were Black. (Tr. at 202-03, 345, 356). In the hope of ending this destructive harassment, Jackman responded that he was Cuban. (Tr. at 202-03, 345).

22. At times, at Traer, Sheldon Naab and Complainant Jackman, both of whom drove water trucks, referred to each other as "salt" and "pepper" to refer to a white person and a black person working together on a team. (Tr. at 81, 173-74, 242, 341). Other employees, including supervisor Steve Olson, also used these phrases to refer to Complainant Jackman and Sheldon Naab. (Tr. at 113-14, 434). Neither Naab nor Complainant Jackman were angered or offended by this terminology. (Tr. at 174 341).

23. Neither the mooning incident, Complainant Jackman's statement that he was Cuban, the phrases he used in response to Sheldon Naab's racial harassment, nor the use of the phrases "salt" and ..pepper" demonstrates that Complainant Jackman welcomed or accepted the racial name calling and harassment inflicted by Sheldon Naab. On the contrary, Complainant Jackman was hurt, angered, and offended by this unwelcome treatment and by the failure of Jensen Construction Company to do anything about it. (Tr. at 23-27, 94, 102,105, 126, 152154, 162-63, 170, 174, 189, 201). The harassment, which was obviously racial, was of a nature which any reasonable person would find to be undesirable or offensive. See Findings of Fact Nos. 9, 11-19. The racial harassment endured by Complainant Jackman was neither isolated, accidental, sporadic nor simply part of casual conversation. Viewed as a whole, it was sufficiently continuous, severe and pervasive so as to create a hostile working environment for him. See Findings of Fact Nos. 8-19.

Respondent Jensen Construction's Knowledge of and Response to Racial Harassment:

Employer Knowledge:

24. It has already been established that Steve Olson, Keith Burnett, and Chuck O'Gorman knew or should have known of several incidents of racial harassment of Complainant Jackman by Sheldon Naab. See Findings of Fact Nos. 9,12,13,16,17,18. Keith Burnett acknowledged that it was not uncommon for construction workers to tell jokes about blacks and that he may have heard Sheldon Naab tell such jokes at the job site. (Tr. at 393-94). He also acknowledged that, on deposition, he remembered Sheldon Naab telling Complainant Jackman "to get his ass over there" and that it was possible Naab may have said "get your black ass over here." (Tr. at 402-03). Although the incidents of racial harassment were limited to the mornings and evenings in the yard, they were sufficiently numerous that it could reasonably be expected that the supervisors should have known about them. See Findings of Facts Nos. 8-19.

Employer Response:

25. It has already been established that, on some occasions where the supervisors were aware that Naab harassed Complainant Jackman, the supervisors took no action to stop it. See Findings of Fact Nos. 12,13,17. Keith Burnett also acknowledged that, on deposition, he had testified that as a supervisor he had done nothing to discourage the telling of racial jokes on the jobsite because "it doesn't do much good, you're not going to stop them." (Tr. at 395).

26. In the three instances where supervisors Steve Olson and Chuck O'Gorman did make responses to acts of racial harassment, their responses were inadequate to address the issue. In none of these instances did supervisors Olson or O'Gorman identify racist comments as being contrary to company policy, or direct the perpetrator to cease such comments, or warn him that he would be subject to discipline if he failed to do so. See Findings of Facts Nos. 9, 16,18.Although the working environment at the traer construction site involved the use of crude language, jokes, and nicknames, none of these factors would have prevented Respondent's supervisors from taking the steps outlined above or provides a rationale for their failure to do so. (Tr. at 241-42, 244, 329, 341, 346-48, 354-55, 394-96).

Respondent Jensen Construction Company's Internal Complaint Procedure:

27. Respondent Jensen Construction Company had posted at the Nevada and Traer worksites an Equal Employment Opportunity policy which provided in part:

> It is the policy of this company to ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which our employees are assigned to work. This policy will be rigidly adhered to at all times by any supervisor or the company EEO officer.
>
> . . .
>
> Any complaint of alleged discrimination by this company, its supervisors or employees, or any person or organization acting on behalf of the company should be immediately called to the attention of the company EEO Officer.

Respondent's Exhibit # 3. (Tr. at 129, 165-66, 21011, 426, 446). The EEO policy statement also provided the company EEO Officer's name, address, and telephone number in Des Moines, Iowa. (R. EX. # 3). An abbreviated EEO statement, which makes no mention of the complaint procedure, is also included in employment applications and the backs of paychecks. (R. Ex. # 6; Tr. at 130, 245, 426). The EEO complaint procedure had been utilized by others in the past at other worksites to resolve EEO complaints, but there is no evidence in the record to indicate that Complainant Jackman was aware of this. (Tr. at " 377-80, 447).

28. Complaint Jackman was aware of both the EEO policies indicated on his paycheck and application and of the posted EEO policy. (R. Ex. # 6; Tr. at 165-66, 210-11, 245). There is no evidence in the record directly indicating Complainant Jackman was aware of the complaint procedure quoted above. All that can be said with any certainty is that he had posted the policy, along with other documents, and had examined it long enough to allow him to confirm its identity. (Tr. at 1 65-66, 21 0).

29. Complainant Jackman never complained to the EEO Officer or to any supervisor about Sheldon Naab's behavior although he had the opportunity to do so. (Tr. at 155, 164, 240, 245, 247, 248-49). He did not complain because his supervisors were already aware of the harassment and he felt it would be futile to notify them of activity of which they were already aware and had not taken steps to remedy. (Tr. at 155, 164). It is important to note that, although the supervisors did not participate in the racial harassment, they took no or insufficient action to terminate it. See Findings of Fact Nos. 9, 10, 12-13, 16-18, 2526.

Constructive Discharge:

30. Complainant Jackman left his employment because the racial harassment, and Respondent Jensen Construction Company's failure to end it, had made the environment so stressful for him at work that he felt he had to quit or he would resort to violence against Sheldon Naab. (Tr. at

102, 165, 178, 183-84). The harassment endured by Complainant Jackman was severe enough to compel a reasonable person to resign. See Findings of Fact Nos. 8-19.

31. It should be noted that there was a rumor that circulated to the effect that Complainant Jackman quit because he was embarrassed due to having been arrested for public intoxication in the early morning hours following his last day of work. (Tr. at 100, 177, 381-82, 457). This rumor was initiated by Craig Garrey who, along with Complainant Jackman and coworkers Bobby Prater and Jerry Freeman went out drinking until 1:00 a.m. on June 3, 1989. (Tr. at 95-97, 100, 176-178). Mr. Garrey, when asked by Steve Olson why Complainant Jackman quit stated he was not sure why, but thought Complainant Jackman quit over embarrassment over the arrest. (Tr. at 100) At that time, Mr. Garrey had not talked to the Complainant about why he had left his employment at Respondent Jensen Construction Company. (Tr. at 100).

32. The arrest for public intoxication played no role in Complainant Jackman's decision to leave his employment at Respondent's. He had already made up his mind to leave earlier in the week. (Tr. at 178). Even the Respondent's supervisor, Keith Burnett, gave no credence to the report that Complainant Jackman quit due to the arrest or embarrassment over it. (Tr. at 386).

Credibility:

33. Complainant Jackman was a credible witness. His testimony was internally consistent with regard to all material facts. His recollection of events seemed to be quite clear and distinct due to the emotional impact these events had on him. During his initial direct testimony, Complainant Jackman had some difficulty in confining his testimony to the precise questions asked. It was apparent, however, that this difficulty was due to his eagerness to tell his story, and not through any attempt to be evasive in his answers. Although Complainant Jackman has a financial interest in the outcome of this case, the Commission does not believe the truthfulness of his testimony was affected by that fact.

34. Craig Garrey was also a credible witness. Mr. Garrey is a friend of Complainant Jackman's, and has known him since 1968 or 1969. (Tr. at 73-75, 10405, 110). On the other hand, Mr. Garrey, who was subpoenaed to testify, was concerned about the possibility that he would be retaliated against either by employers in the construction industry or the Ku Klux Klan because of his appearance at the hearing. (Tr. at 103-04). Nonetheless, his testimony appeared to be truthful and not unduly influenced either by his friendship with Complainant Jackman or his fear of retaliation.

35. On brief, Respondent Jensen Construction Company argued that the testimony of Complainant Jackman and of Craig Garrey was not credible because both had testified that, at times, Sheldon Naab had yelled his racial insults. Respondent noted that both Sheldon Naab and Steve Olson testified that Naab could not yell because of surgery on his vocal cords in the 1970s. (Respondents Brief at 7-8; Tr. at 90, 158, 169, 323, 418). There was no medical testimony or evidence to verify either the surgery or the inability to shout.

36. This conflict in testimony might be material if the evidence indicated that the distance from Sheldon Naab to management officials when Naab made racist statements was always great

enough to have required Naab to shout in order to be heard by the management. That, however, was often not the case. See Findings of Fact Nos. 9, 12, 13, 16, 17, 18, 24. Also, the Complainant and Garrey also described Naab's voice as being "growly and gruff," "a deep diaphragm voice" or "low," which would correspond to the nature of his voice at hearing, while still being able to be heard over a distance. (Tr. at 82, 90, 160). Supervisor Keith Burnett, when asked if it would be possible to hear Naab yell or scream at somebody from a distance of 50 feet, did not say it would be impossible to hear him at that distance, but that he would be able to hear him, "not very clearly, not very good" because of his voice problem. (Tr. at 373).

37. Respondent also argues, on brief, that Complainant Jackman's testimony is not credible because he testified that, on one occasion, Sheldon Naab stated "in front of co- workers Julie [a white female] and Rummy [a white male] that '[Jackman] was black and [he] wasn't getting any of that white pussy.' (Tr p. 233)." Naab denied the statement. Respondent argues that, as Naab testified that Julie and Rummy were living together, it is doubtful Naab would make such a statement in the presence of Rummy. Respondents Brief at 8.

38. This conclusion has three problems. First, it assumes that Rummy would understand the remark to refer specifically to Julie and not to white females in general. Second, it assumes that Mr. Naab believed Rummy is the kind of individual who would be sufficiently offended by the remark so as to create problems for him. The third problem with this conclusion is demonstrated by the following exchange, which occurred during the crossexamination of Mr. Naab on this very incident:

Q. (By attorney Mark Bennett): Would you use the phrase "pussy," is that correct, but you won't use the phrase "white pussy," is that right?

A. (By Sheldon Naab): **When you get a piece of pussy, it don't make no difference what color it is on the outside. It's the same color on the inside,** so I just say "pussy."

(Tr. at 353) (emphasis added). If Mr. Naab would make this crude, extraneous remark while under oath in a public hearing, as he did, then it is quite believable, despite his denial, that he made the "white pussy" remark, which was attributed to him by Complainant Jackman, in the presence of Julie and Rummy.

39. Amy Welch was also a credible witness. Her testimony was internally consistent, straightforward, and consistent with the other credible evidence on the matters to which she testified. It should be noted that she was not retained as an expert witness and was not paid for her testimony. (Tr. at 71).

40. Sheldon Naab was not a credible witness. In addition to his incredible denial of the "white pussy" remark, Mr. Naab was successfully impeached on two points in his testimony. On the first occasion, Mr. Naab testified that he asked Complainant Jackman what nationality he was, and had not asked him if he was black. (Tr. at 356). He was then confronted with and acknowledged an affidavit of September 11, 1989 wherein he had stated, "I asked him if he was black." (Tr. at 357-58). Of much greater significance is the second impeachment. Mr. Naab testified that he only called Complainant Jackman a "nigger" on one occasion, i.e. the mooning

incident. (Tr. at 359). He was again confronted with and acknowledged the same affidavit wherein he stated, in reference to Jackman "I did on occasions call him a nigger." (Tr. at 359-60). His explanation that he meant to say "on that occasion" was unconvincing. (Tr. at 359). With few exceptions, Mr. Naab's testimony is only relied on when it is supported by credible evidence or other indicia of reliability.

41. Keith Burnett and Steve Olson gave the appearance of being credible witnesses. However, Keith Burnett was successfully impeached in regard to his testimony to the effect that he had, as supervisor, disciplined employees for telling racial jokes and had discussed this matter with other employees. (Tr. at 394). On deposition, he had stated that he had not done anything to discourage the telling of racial jokes on the jobsite because "it doesn't do much good. You're not going to stop them." (Tr. at 395).

42. Burnett went on to testify that he tried to stay out of employees' taunting each other because it would take time from the job. He was aware that Sheldon Naab enjoyed picking on people. (Tr. at 39697). Burnett's deposition, together with the testimony of other witnesses to the effect that management would often ignore or inadequately respond to the racial remarks directed toward Complainant Jackman by Sheldon Naab, helps demonstrate why Burnett's and Olson's denials of knowledge of racial remarks directed toward Jackman are not credible. (Tr. at 83, 86, 152, 376, 383, 424). See Findings of Fact Nos. 9, 10, 12-13, 16-18, 25-26.

43. It is more likely than not that Olson and Burnett did not remember some of these incidents because they chose to ignore them at the time they happened. They failed to distinguish racial harassment from jokes, personality conflicts, and other nonracial jobsite disputes. In regard to other areas, their testimony is more credible. Some of their testimony actually bolsters Complainant Jackman's credibility. Keith Burnett testified that he had no indication that Complainant Jackman was anything less than honest with Respondent Jensen Construction Company. (Tr. at 389). He also testified that he had no reason or knowledge to believe that Complainant Jackman fabricated or lied about what happened to him at Respondent Jensen Construction. (Tr. at 397).

44. Burnett and Olson also acknowledged that Complainant Jackman was a hardworking, reliable employee. (Tr. at 389-90, 436-37). Olson noted that Jackman did his assignments promptly and was not a complainer. Up to the date he left, Complainant Jackman's attendance was good and he arrived to work on time. (Tr. at 437-38). Burnett stated that Complainant Jackman was an "excellent worker" whom he rated a "B". (Tr. at 388-89). Steve Olson told Bobby Prater, one of the individuals Complainant Jackman usually rode to work with that, if he saw Jackman to ask him call Olson at home or collect. (CP. EX. # 8; Tr. at 423). This evidence of Complainant Jackman's work performance and attitude tends to buttress the plausibility of his story. It would be highly unlikely that a hard working, reliable employee, such as the Complainant, would leave his employment without good cause.

Back Pay:

Average Weekly Earnings:

45. At the time that Complainant Jackman was constructively discharged, he was earning $7.25 per hour in regular time pay and $10.88 per hour for overtime, i.e. time in excess of 40 hours per week. (Joint EX. 1; CP. EX. 4; Tr. at 147). During his employment with Respondent Jensen Construction Company, his overtime hours were as follows:

Week Ending Date	Number of Hours of Overtime
Nevada Worksite	
4/21/89	8.5
4/28/89	9.5
Traer Worksite	
5/05/89	14.0
5/12/89	9.5
5/19/89	7.0
5/26/89	14.0
6/02/98	9.0

(CP. EX. # 4).

46. Complainant Jackman worked an average of 10.21 hours of overtime per week during his employment with Respondent. [(8.5 + 9.5 + 14.0 + 9.5 + 7.0 + 14.0 + 9.0) / 7 weeks] = 71.5 / 7 weeks = 10.21 hours of overtime per week]. Based on the experience of Sheldon Naab, who also drove water trucks for the Respondent, it is unlikely that Complainant Jackman's overtime would have decreased if he had continued on the Traer job. (Tr. at 351).

47. If Complainant Jackman had continued his employment at Respondent Jensen Construction Company, his average weekly earnings would have been $401.08. [Average weekly regular time earnings + Average weekly overtime earnings = average weekly earnings] = [(40 hours X $7.25 per hour) + (10.21 hours X $10.88 per hour)) = [($290.00) + ($111.08)] = $401.08 average weekly earnings.

Gross Back Pay for the Remainder of the Traer Job:

48. Jensen Construction Company moved its grinding crew from Traer, Iowa to Lincoln, Nebraska for a grinding project which lasted from July 5, 1989 to September 8, 1989. (Joint EX. # 1). Keith Barnett testified that the Traer grinding project ended during the first week of July 1989. (Tr. at ":)99). Official notice is taken of four facts. The first fact noticed is that June 30, 1989 was a Friday. The second fact noticed is that July 3, 1989 was a Monday. The third fact noticed is that July 4, 1989 was a national holiday, Independence Day. The fourth fact noticed is that the distance from Traer, Iowa to Lincoln, Nebraska is of sufficient length that it would have been very difficult, if not impossible, for Jensen Construction Company to have still been conducting grinding operations in Traer on July 3, 1989 and then to have moved its operation to Lincoln by July 5, 1989. Fairness to the parties does not, require that they be given an opportunity to contest these facts. Given the above facts, it is more likely than not that the grinding operations in Traer ended on June 30, 1989.

49. Complainant Jackman's back pay for the remaining four weeks of the Traer operations from June 5 through June 30, 1989 would have been $1604.32. [$401.08 average weekly earnings X 4 weeks = $1604.32].

Gross Back Pay for the Lincoln, Nebraska Job:

50. It is more likely than not that, if Complainant Jackman had not been constructively discharged, he would have continued his employment with Respondent Jensen Construction Company through the completion of the project in Lincoln, Nebraska. It is undisputed that Keith Burnett and Steve Olson had talked to him about his continuing with the company at their next job in Lincoln, Nebraska. (Tr. at 17980, 382- 83, 389, 430-31). Complainant Jackman told Burnett that he was interested in going to Lincoln. (Tr. at 180, 382-83).

51. Although no final arrangements had been made at the time Complainant left, Steve Olson had indicated to the Complainant that he would see if the company could get him a wage increase to offset the costs imposed on Complainant Jackman due to distance away from his home. (Tr. at 431). This procedure was sometimes followed with regard to workers who had to travel out of state. (Tr. at 388). Whatever doubts may be raised by Complainant's testimony that he had turned down another job prior to his employment with Respondent due to transportation problems or Naab's testimony that Complainant indicated he did not think he would go to Lincoln because of transportation costs are resolved by the probable availability of the extra expense money. (Tr. at 140-41, 209-10). Although the home office would make the final determination on the availability of this expense money, both Olson and Burnett would have input on approving the expense. (Tr. at 388). As previously noted, both testified that Complainant Jackman was a highly reliable employee. See Finding of Fact No. 44.

52. Complainant Jackman's back pay for the nine and one-half weeks of operations at Lincoln, Nebraska would have been $3810.26. [$401.08 average weekly earnings X 9 1/2 weeks = $3810.26]. Therefore, his gross I back pay prior to subtraction of interim earnings would be $5414.58, which is the total of what would have been his pay for the completion of the Traer project ($1604.32) and his pay at the Lincoln, Nebraska project ($3810.26).

Absence of Interim Earnings:

53. There is no evidence in the record of Complainant Jackman receiving earnings from post discharge employment prior to approximately September 17, 1989. This date is two months after he began his treatment by Amy Welch. (CP. EX. # 3; Tr. at 19). On that date, he began employment with Ames Story Tree Service. (Tr. at 195). September 17,1989 is nine days after the project at Lincoln, Nebraska ended and is outside of the period for which back pay is being awarded. Given the absence of evidence of interim earnings during this period, Complainant Jackman should be awarded his full gross back pay amount of $5414.58.

Emotional Distress:

54. Complainant Jackman suffered severe emotional distress as a result of the racial harassment he sustained at Respondent Jensen Construction Company, the Respondent's failure to adequately respond to the harassment, and his constructive discharge. This distress began with the "hat incident" described above. See Findings of Fact No. 8-9. Sheldon Naab's statement "Just because he's a nigger, does that mean he gets a hat" hit Complainant Jackson "like a ton of bricks." (Tr. at 152). Complainant credibly testified that the use of the word "nigger" by Naab "caught my eye, caught my ears, caught my heart and my soul, my mind, everything." (Tr. at 153). This, when combined with the failure of Steve Olson to reprimand Naab for his language, had a double effect which left Complainant Jackman "dumbfounded." (Tr. at 154). Complainant Jackman had never been called "nigger" at a worksite before. (Tr. at 175).

55. The repeated, continued harassment by Sheldon Naab, the Respondent's failure to correct it, and his constructive discharge angered, offended and distressed Complainant Jackman. (CP. EX. # 1, 3; Tr. at 20-21, 25, 94, 102-03, 105, 162-64, 174, 185-86, 189, 201). He felt betrayed by Respondent's failure to correct the situation. (CP. EX. # 3; Tr. at 25, 172, 185, 189). These events deprived Complainant Jackman of the enjoyment of the work which he had previously had. (Tr. at 149, 157, 164, 172, 189).

56. At times, Complainant Jackman felt he wanted to shoot Sheldon Naab. (Tr. at 162). He tried to redirect his anger by turning away from Naab or trying to joke about it. (Tr. at 163). At one time he started to pick up a piece of three-quarter inch rerod to open Naab's head up, but decided not to do it "because I'm a Christian." (Tr. at 164). By the time he had left, his employment he felt the only alternatives he had were violence or getting out. (CP. EX. # 3; Tr. at 165).

57. Complainant Jackman's feelings of anger, frustration and betrayal over these events continued long after he left his employment. (Tr. at 19-25, 105, 187-192). He took his anger out on his family. (Tr. at 187). For example, when his father would tell him to pick something off the floor, Complainant responded by cursing him. (Tr. at 187). On another occasion, he threw his sister across a room. (CP. EX. # 3). It was these events that led Complainant Jackman to seek professional counseling. (Tr. at 188). Complainant Jackman continued to have violent thoughts about Sheldon Naab. He wanted him to be in physical pain. (Tr. at 188-89).

58. The sense of betrayal experienced by Jackman, and the effect these events had on his enjoyment of the job, is best expressed by his own words:

> I lost interest in my job. I lost interest in people, because Steve bison was the type of person I was really getting to get a grasp a hold of. I was liking him and everything, you know, and I lost interest because it was like I was a nobody, yet I was somebody. I was a good worker, but I'm still nothing. I'm a piece of dirt trash.... I was doing a good job for the man, but he couldn't . . . discipline him. I couldn't understand that, so I lost interest in my job.
>
> I still did a hard job. I still worked, but not with the same enthusiasm I had. I was thinking about Bear. The thing I was thinking about was getting back at the yard. That was on my mind.

> After eight hours was gone, it was like I was to go back to the yard, and I know what is going to happen. I know I had to get prepared to . . . get out of my truck and hear something.
>
> All I thought about when I got up, you're going to be a nigger today, but you're going to be a good worker. When you get with Steve, you'll be a good worker, but you'll be a nigger in about ten hours, and it was in front of everybody. That's what got to me, because it wasn't solo. I was with everybody there, the whole group.

(Tr. at 172-73, 189).

59. The distress caused the Complainant by the events at Jensen Construction Company manifested itself in a variety of ways even after he left Respondent's employment. He became "totally obsessed" with these events. (CP. EX. # 1, 2, 3; Tr. at 20, 61-62, 126). He had violent impulses which were related to his elevated state of agitation resulting from the harassment, i.e. he was less in control due to the effects of the harassment than he otherwise would have been. (CP. EX # 1, 3; Tr. at 20, 63) He had difficulty in eating or sleeping. (CP. EX. # 1, 3; Tr. at 20, 33-34, 192). He had an upset stomach. (Tr. at 192). He isolated himself from his family and friends and could not, at first, bring himself to talk to them about these events. (Tr. at 192). When he did finally tell them or his social worker, he would become "extremely manic" and agitated with rapid speech, shaking his head, flailing his arms, clenching his fists, and stomping his feet. (CP. EX. # 1, 3; Tr. at 20, 26, 37, 102, 105). Then, he might simply sit, stare, and say nothing. (Tr. at 105). He would go to a bar, buy a beer, and not drink it. (Tr. at 192-93). At other times, he would get drunk. (R. EX. # 4; Tr. at 20, 22, 63, 200).

60. In mid-July 1989, Complainant Jackman sought professional counseling for his emotional distress by contacting Dr. Dodd, a practicing psychiatrist at the McFarland Clinic. (Tr. at 18-19). Dr. Dodd prescribed Mellaril, an anti-depressant drug which is used when an individual has violent impulses which are out of control. (CP. EX. # 3; Tr. at 19, 191). Because Complainant Jackman could not afford private treatment, and because he required further counseling, he was referred to Amy Welch, a social worker at the Central Iowa Mental Health Center. (CP. EX. # 3; Tr. at 18-19,191).

61. Ms. Welch first saw Complainant Jackman on July 17, 1989. (CP. EX. # 3; Tr. at 19). At that time she counseled him for one and one-half hours. (CP EX. # 3). Ms. Welch's clinical impression at the end, of this session suggested that Complainant Jackman, suffered from an adjustment disorder with mixed disturbance of emotions and conduct. (CP. EX. # 3; Tr. at 22. This clinical impression was made pursuant to the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM III R), a standard handbook of psychiatric diagnosis that contains the criteria and descriptions which need to be met for each diagnosis. (Tr. at 22-23).

62. An "'adjustment disorder' is a reaction to a particular identifiable stressor that occurs within a reasonable period of time, three months of that stressor, and results in a diminished functioning or impairment on the part of an individual, and is thought to be above and beyond what a normal reaction would be." (Tr. at 53).

63. Ms. Welch's expert opinion was that the stressor which was the underlying cause of the adjustment disorder was the "series of events at his former place of employment," a phrase which referred to the racial discrimination against Complainant Jackman. (Tr. at 23-24, 33). She also offered the opinions (a) that Jackman's difficulty with eating and sleeping were caused by events at Jensen Construction Company which he perceived to be racial discrimination, and (b) that the racial discrimination at Jensen Construction Company resulted in a lowering of his self-esteem. (CP. EX. # 2; Tr. at 33-35).

64. Ms. Welch consulted with Dr. Dodd and it was determined to increase Complainant's dosage of Mellaril. (CP. EX. 3; Tr. at 26). Complainant Jackman was also informed that, if the increased dosage of Mellarif did not calm him down, voluntary hospitalization might be necessary in order to protect himself and others. (Tr. at 27-28).

65. Ms. Welch continued to counsel Complainant Jackman through November 1989, when she closed his file. (CP. EX. # 1; Tr. at 38). She had last spoken with Complainant on October 18,1989, at which time he appeared to be much improved and had found another job. (CP. EX. # 1).

66. Complainant Jackman, however, experienced a reaction to a movie, "Mississippi Burning," which dealt with racial violence. (Tr. at 196-200). The movie revived his feelings and anger resulting from the events at Respondent Jensen Construction Company. He became upset and began drinking heavily. (Tr. at 1 99).

67. He went to see Dr. Dodd again and was counseled by Ms. Welch on January 22, 1990. (CP. EX. # 1; Tr. at 39-40). He was angry and depressed, but less agitated than he had been in July of 1989. (CP. EX. # 1; Tr. at 40). Dr. Dodd had prescribed Haidol for complainant. Haidol is an anti psychotic prescribed for those who are.experiencing violent impulses or paranoia or who are otherwise out of control. (CP. EX. # 1; Tr. at 41). Dr. Dodd also prescribed Imipramine, a medication which helps persons get control of themselves and to deal with depression and anxiety. (CP. EX. # 1; Tr. at 41). Complainant Jackman had calmed down by the end of the session on January 22, 1990. (CP. EX. # 1). Ms. Welch has not counseled him since that time. (Tr. at 41).

68. It should be noted that Complainant Jackman also had other stressors in his life. These included his marital and family life, social life, and substance (alcohol) abuse. (Tr. at 28). At the times Ms. Welch saw Complainant Jackman, however, none of these stressors seemed to cause Complainant Jackman any particular anxiety. (Tr. at 28). Craig Garrey and Complainant Jackman both noted that he had resolved his emotional distress resulting from his marital problems about three to four months after their separation in 1986. (Tr. at 110-11, 204). During his counseling with Ms. Welch, the Complainant's concerns were focused at all times solely on the events at Jensen Construction Company. (Tr. at 28).

69. Ms. Welch did suspect an underlying personality disorder as both of Complainant Jackman's parents were alcoholics and he had an unhappy childhood. (Tr. at 56-57). Alcohol abuse was found because Jackman drank 3 to 4 beers each night. This abuse had caused dysfunction in his

life. (Tr. at 57). Complainant Jackman had a history of participating in bar fights prior to his employment at Jensen Construction Company. (Tr. at 64).

70. Complainant Jackman had also been separated from his wife from a time prior to his job at Jensen Construction. (Tr. at 204, 212). He had received counseling for his marital problems. (Tr. at 211). The petition for dissolution of the marriage was served on him on July 28, 1989 and the decree issued on November 9,1989. (Tr. at 204- 05; R. EX. # 5).

71. As a result of these other problems, Complainant Jackman did not have the highest level of functioning prior to the events at Jensen Construction Company. (Tr. at 59- 60). But, these events resulted in a substantial diminishment of his functioning and decrease in his emotional health. (Tr. at 60). They precipitated a crisis that was severe enough to interfere with Complainant's ability to eat, sleep, or properly care for himself. (CP. EX. 3; Tr. at 18, 38). There is other evidence to suggest that Complainant Jackman was more sensitive than the average individual and thus more vulnerable to distressing events. (R. EX. # 4).

72. In light of the severity and duration of the distress suffered by Complainant Jackman due to the racial harassment he sustained at Respondent Jensen Construction Company, the Respondent's failure to adequately respond to the harassment, and his constructive discharge, an award of twenty-five thousand dollars ($25,000) would be full, reasonable and appropriate compensation. In making this award, care has been taken to ensure that no award is made for damage caused solely by other sources of distress.

CONCLUSIONS OF LAW

Jurisdiction:

1. Complainant Jackman's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code § 601A.15(11) (1989). 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 (1989). See Finding of Fact No. 2.

2. Mr.Jackman's complaint is also within the subject matter jurisdiction of the Commission as the allegations that he was subjected to racial harassment by a coworker, that the Respondent Jensen Construction Company failed to remedy the harassment, and that the Respondent constructively discharged him fall within the statutory prohibition against unfair employment practices. Iowa Code § 601A.6 (1987). "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.

Applicability of Federal Case Law:

3. 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).

"Burden of Persuasion" and "Burden of Production":

4. 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 is on the complainant to persuade the finder of fact that he was subjected to racial harassment and constructively discharged. Linn Co-operative Oil Company v. Mary Quigity, 305 N.W.2d 728,733 (Iowa 1981).

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).

Harassment:

6. 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 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 (11th Cir. 1982).

Proper Order and Allocation of Proof.

7. "It is questionable whether the traditional burden shifting analysis [involving shifting burdens of production] 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. 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.11 (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 Jackman had proven, by a preponderance of the evidence, all five of the elements stated above. Complainant Jackman has met his burden of persuasion in regard to all five of these elements.

Term, Condition or Privilege of Employment:

8. 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.

9. The determination that a hostile or abusive working environment existed at Respondent Jensen Construction Company 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).

10. In the Vaughn case, the plaintiff and other employees were subjected to generally abusive remarks by one Mueller, a supervisor, on a daily basis. Id. at 630, 631, 633. In addition, plaintiff was subjected to the following anti-Catholic remarks and actions by the supervisor on four separate days during the three month period from March to May of 1986:

> a. On one day in March 1986, plaintiff "asked Mueller for some time off to go to church. Mueller initially refused but then allowed plaintiff to leave about four hours later." Id. at 631.
>
> b. "A day or so after this occurred ... Mueller called him a 'goddamn stupid fuckin' Catholic' and referred to another employee as'[a]nother dumb Catholic.' He then turned to plaintiff and said: 'I know you're Catholic, but I haven't seen one yet that had any fuckin' brains." Id.
>
> c. "A couple of days later Mueller asked plaintiff, 'Is that all you people do is have kids?' when discussing a Catholic coworker whose wife just had a baby." Id.
>
> d. "in May Mueller referred to another employee in plaintiff's presence as a'pus-gutted Catholic.' He made the following additional comments: 'You people like fish don't you?' and 'I suppose you're going to raise [your son] Catholic." Id.

11. The Court also noted that the trial court "could have found that much of the [generally] offensive behavior was directed at plaintiff because he was Catholic." Id. at 633.

12. After setting forth the principles quoted in Conclusion of Law Number 9 above, the Court stated, "While we believe the question of whether Mueller's behavior was sufficiently severe and pervasive to alter a condition of plaintiff's employment [by creating a hostile or abusive working environment] is a close one, we need not decide the issue. We base our decision instead on a determination of [the employer's] liability." Id. at 634 (emphasis added). The Court went on the find the employer was not liable because it took prompt and appropriate remedial action to end the harassment. Id. at 634-35.

13. In the instant case, the racial harassment involved numerous instances of blatantly racist remarks all concentrated within a two and one half to three week period of time and occurring in the mornings and evenings of virtually every working day of that period. See Findings of Fact Nos. 3, 8-13, 15, 17-18. Some of these remarks strongly implied that Complainant Jackman would or should be killed because of his race. See Findings of Fact Nos. 1718. In addition, on one occasion, the harassing coworker physically grabbed Complainant Jackman, Who had to throw him off. See Finding of Fact No. 19. Physical harassment will usually have a more severe impact on the victim's working environment than verbal harassment. Cf. Ruth Miller, CP # 04-86-14561,Slip.op.at 92-93(lowa Civil Rights Commission October 29, 1990)(citing Fair

Employment Practices (BNA) 405:6681,405:6690-91 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990) and Commission Decision No. 83-1, CCH EEOC Decisions § 6634 (1983)(discussing physical and verbal sexual harassment)). In light of the principles set forth above, the finding that the this racial harassment generated a hostile working environment for Complainant Jackman is well justified.

Employer Liability:

14. "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). Here Complainant Jackman has proven that Respondent Jensen Construction Company knew or should have known of the harassment by coworker Sheldon Naab. See Finding of Fact No. 24. Complainant Jackman has also proven that the Respondent failed to take prompt and appropriate remedial action. See Finding of Fact No. 25. Proof of these facts is one way to establish that an employer is liable for the discriminatory actions of coworkers. 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).

15. It is important to note that the presence of Respondent Jensen Construction Company's internal EEO complaint procedure does not exonerate it from responsibility for racial harassment by coworkers when the company had actual or constructive knowledge of the harassment by means other than the filing of an internal complaint. In Lynch v. City of Des Moines, the employer argued that it was not liable for sexual harassment by coworkers because it took prompt and appropriate remedial action once the plaintiff filed a formal internal complaint. Lynch v. City of Des Moines, 454 N.W.2d 827,835 (Iowa 1990). This argument was rejected by the Court because it overlooked the fact that the employer had known about the harassment prior to plaintiff's filing of the complaint and had done nothing to end it. Id.

16. 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. See Findings of Fact Nos. 2526.

Constructive Discharge:

17. "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)(citing e.g. Young v. Southwestern Savings and Loan Association, 509 F.2d 140, 144 (5th Cir. 1975)). 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, 1193-94 (5th Cir. 1980)(explaining Young v. Southwestern Savings and Loan Association, 509 F.2d 140, 144 (5th Cir. 1975)). 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, 888 (3rd Cir. 1984).

18. 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.

See 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. 30-32.

Credibility and Testimony:

19. 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:

20. 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 Cod,- 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:

21. 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)). See Children's Home v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Diane Humburd at 34-35, 37 (citing e.g. EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.Y. 1976), aff *'d mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977)). This the Complainant has done for the period ending with the termination of the Lincoln, Nebraska project. See Findings of Fact No. 45-52.

22. The burden of proof for establishing the interim earnings, including unemployment insurance payments, of the Complainant 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)). The Respondent also bears the burden of proof for establishing any failure of the Complainant to mitigate damages. Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may, as the Complainant has done here, choose to provide evidence of interim earnings he is willing to concede. Diane Humburd at 35-37 (citing e.g. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). See Finding of Fact No. 53.

23. 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 selfevaluate their employment practices and to endeavor to eliminate [employment discrimination]." Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975). Second, 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.

24. "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)).

Damages for Emotional Distress:

25. 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. Iowa 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:

26. "[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)).

27. 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. 19T7; 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).

28. 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:

29.

> 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)).

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

31. A wrongdoer takes the person he injures as he finds him. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975). A previously disabled person injured by the acts of a wrongdoer "is entitled to such increased damages as are the natural and proximate result of the wrongful act." Id. at 46; Keeton, Prosser and Keeton on the Law of Torts 292 (1984). This principle applies to psychological and emotional injuries. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975).

32. On the other hand, the wrongdoer is not required to pay damages for emotional distress resulting from sources completely independent of its conduct. See Keeton, Prosser and Keeton on the Law of Torts 292, 345, 348-50 (1984). Cf. Lynch v. City of Des Moines, 454 N.W.2d 827, 836 (Iowa 1990)(upholding award of emotional distress damages in sexual harassment case against appeal of damages as inadequate-noting some distress due to other turmoil in complainant's life unrelated to discriminatory actions of employer). With items such as pain and suffering, where the extent of the harm is almost incapable of definite proof, the factfinder is granted wide latitude in determining what amount of damage is attributable to the wrongdoer despite the absence of specific proof. Keeton, Prosser and Keeton on the Law of Torts 348- 350 & nn.47, 49 (1984).

Interest:

Pre-judgment Interest:

33. 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). Because the amount of back pay due Complainant at any given time has been an ascertainable claim since the time his employment ended, pre-judgment interest should be awarded on his back pay. Such interest should run from the date on which back pay would have been paid had there been no discrimination. Hunter v. Allis Chalmers Corp., 797 F.2d 1417,1425-26 (7th Cir. 1986)(common law rule). No pre-judgment interest is awarded on emotional distress damages because these are not ascertainable before a final judgment. See Dobbs, Hornbook on Remedies 165 (1973).

34. The method of computing pre-judgment interest on back pay is left to the reasonable discretion of the Commission. Schlei & Grossman, Employment Discrimination Law: Five Year-Cumulative Supplement 543 (2nd ed. 1989). Complainant here has requested a period of time after this Commission's ruling in order to "allow the parties to agree upon the method of computation and the amount of prejudgment interest to which he is entitled on his back pay award." (Complainant's Brief at 42). Although the Commission is not required to do so, it would be reasonable to grant this request in its order and to retain jurisdiction to decide this issue in the event agreement cannot be reached.

Post-Judgment Interest:

35. 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:

36. The Complainant having prevailed, he is entitled to an award of reasonable attorney's fees. Iowa Code § 601A.15(8)(1989). If the parties cannot stipulate to the amount of these fees, they should be determined at a separate hearing. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987). The Commission must expressly retain jurisdiction of the case in order to determine the actual amount of attorney's fees to which Complainant 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).

RULING ON COMPLAINANT'S OBJECTION TO THOMAS DOYLE'S TESTIMONY

1. Complainant objected to the testimony of Thomas Doyle relating to Respondent's Exhibits 1 and 2, which are maps from the Iowa Department of Transportation. Complainant's objection was that Mr. Doyle was apparently relying on these exhibits as sources of information for his testimony and these exhibits had not been listed in Respondent's answer to Interrogatory Number 1 which requested the sources of information relied on in answering Respondent's interrogatories. The testimony was taken subject to the objection with an understanding that the objection would be ruled on in this decision. (Tr. 442-444).

2. At the time Mr. Doyle testified, these exhibits were already admitted into the record. (Tr. at 4-5). Mr. Doyle's brief testimony relating to these exhibits did not rely on these exhibits as sources of information, but was basically offered as "connecting up" testimony to lay a foundation for these exhibits. (Tr. at 445). Also, since Complainant had already waived any foundational objection to these exhibits, this testimony, although not required, was harmless to Complainant's case. (Tr. at 5). Complainant's objection is overruled.

RULING ON EXCLUSION OF WITNESSES

Findings of Fact:

1A. During the course of the hearing, the attorney for Complainant Jackman made a motion to exclude the testimony of three witnesses of the Respondent: Mark Sears, Charles Stansbury, and Chuck O'Gorman. (Tr. at 263-65, 269, 299). The motion was based on Respondent's failure to supplement its answers to interrogatories propounded by Complainant. (Tr. at 265, 269). The motion was granted. (Tr. at 303). After the motion was granted, Respondent's attorney was allowed to make an offer of proof by stating what the testimony of what each witness would be. (Tr. at 308-20).

2A. The Notice of Hearing in this matter was issued on June 25, 1990. Complainant filed its First Set of Interrogatories to Respondent with 'the Administrative Law Judge and served them on Respondent's attorney on July 6, 1990. These interrogatories specifically reminded Respondent of its duty to supplement answers concerning the identity and location of persons having knowledge of discoverable matters.

3A. Respondent's Answers to Interrogatories Propounded by Complainant *(hereinafter* "Respondents Answers to Interrogatories") were served on Complainant Jackman's attorney by mail, on August 6, 1990, and were filed with the Administrative Law Judge on August 7, 1990. Interrogatory No. 14 and its answer were set forth as follows:

> 14. Please identity all persons not previously identified in your answers to the preceding interrogatories who have or may have knowledge regarding discoverable matters, including any experts; summarize the substance of his or her knowledge; and identify each document or oral communication which, directly or indirectly, mentions, relates or pertains to his or her knowledge.Prior to answering this interrogatory, pleaserefer to Definitions 1, 2, 5, 6, 7, 8 and 10.
>
> ANSWER:
>
> None.

Respondent's Answers to Interrogatories.

4A. At no point in Respondent's Answers to Interrogatories are the names of Sears, Stansbury, or O'Gorman mentioned. Nor are their names mentioned in the list of witnesses stated by Respondent on their Prehearing Conference Form which was filed with the Administrative Law

Judge on September 7, 1990. The Respondent emphasizes that it did state in its Prehearing Conference Form that: "Respondent reserves the right to call other witnesses with relevant knowledge regarding issues in this case." (Respondent's Brief at 28).

5A. The complaint, which is attached to and incorporated by reference in the Notice of Hearing, was originally served on Respondent in July of 1989. (Tr. at 285). The complaint makes repeated reference to unnamed "supervisors" witnessing acts of racial harassment at the Traer worksite. (Complaint). The record in this case reflects a total of three supervisors at that worksite, including Mr. O'Gorman, and twelve to fifteen other employees. See Finding of Fact No. 4. Respondent was aware as of July of 1989 and afterward that Mr. Sears and Mr. Stansbury were employees of Respondent in Traer both at the time of Complainant Jackman's employment and at the time of the service of the complaint. (Tr. at 285, 288).

6A. The Commission first became aware that Mr. O'Gorman, Mr. Sears, and Mr. Stansbury were employees of Respondent Jensen Construction Company through a list of employees provided to the Commission during the course of the investigation. (Tr. at 293-94). At sometime after the Notice of Hearing was sent, the Complainant requested and received a copy of the Commission's investigative file. (Commission's Prehearing Conference Form). At sometime prior to August 24, 1990, Complainant provided Respondent with a copy of the Commission's file, which included copies of investigator's handwritten summaries of conversations with Mr. Sears and Mr. Stansbury. (Complainant's Objections to Discovery Requests; Tr. at 268, 300, 302). As a matter of law, this file was available to Respondent directly from the Commission since June 25, 1990, the date Notice of Hearing was issued and the contested case commenced. See Conclusion of Law No. 1 A.

7A. Despite the respondent's awareness of Mr. Stansbury's and Mr. Sears' employment at the Traer site since June of 1989, and its possession of summaries of their statements since sometime before August 24, 1990, Respondent made no effort to contact them until the week before the hearing. (Tr. at 281, 286-87). See Findings of Fact Nos. 5A, 6A. That week, Tom Doyle, Director of Personnel with the Rasmussen Group, of which Jensen Construction Company is a subsidiary, did contact Mr. Stansbury and Mr. Sears and tape recorded their statements. (Tr. at 281-82).

8A. On Thursday, September 20,1990, only two full business days(four calendar days) before the hearing, a letter was delivered to the office of Complainant's attorney, Mark Bennett, indicating that it was Respondent's intention to call Mr. Stansbury and Mr. Sears as witnesses. Tape recordings of their interviews accompanied the letter. (R. EX. # 7; Tr. at 264-65, 282). Mr. Bennett was out of town and had no notice of Respondent's intention to call these witnesses until Friday, September 2lst. (Tr.at264).It should be noted Respondent never notified Mr. Autry, the Commission's representative, of the tape recording or of its intention to call these two witnesses. (Tr. at 265).

9A. Despite the fact that it was aware that Mr. O'Gorman was one of three supervisors at the Traer site, and that the complaint served in July of 1989 alleged that unspecified supervisors had witnessed racial harassment, Respondent did not decide to contact Mr. O'Gorman until the latter part of the week before the hearing. (Tr. at 288). See Finding of Fact No. 5A. There is no

evidence in the record of any attempt to contact Mr. O'Gorman until Monday afternoon, September 24, 1990, the day before the hearing. (Tr. at 280, 296). On the morning of September 26, 1990, the second day of the hearing, Respondent first informed Mr. Bennett and Mr. Autry that Mr. O'Gorman would be called as a witness that very day. (Tr. at 272).

10A. The Respondent's failure to contact Sears, Stansbury, or O'Gorman until the eve of trial, and its failure to inform counsel for Complainant or the Commission until the eve of trial or beyond is due solely to Respondent's failure to adequately prepare for trial. The resulting late identification of these witnesses to the Complainant's counsel did not give him anywhere near sufficient time to prepare to meet the evidence to be offered through these witnesses and to avoid surprise at the hearing. It is self-evident that arranging for a deposition of these witnesses, providing reasonable notice to the parties of the depositions, obtaining and serving any necessary subpoenas, not to mention making any pre-deposition preparation which counsel may want to undertake before he questions the deponents, would require considerably more than zero to four days to accomplish. In addition, sometime would be required to digest the information obtained through their depositions and to marshall evidence to counter it. Complainant clearly and unjustifiably would have been taken by surprise if these witnesses had been allowed to testify.

Conclusions of Law:

1A. Discovery in this matter began on June 25,1990, the date the Notice of Hearing was issued. 161 Iowa Admin. Code § 161-4.2(2). See lowa code §§ 17A.13(l) and 17A.12. This is also the date the contested case proceeding commenced. Iowa Code § 17A.13(l). Once the contested case commences, "[i]dentifiable agency records that are relevant to disputed material facts . . . shall, upon request, promptly be made available to a party." Iowa Code § 17A.1 3(2). The Iowa Rules of Civil Procedure governing discovery are applicable to contested case proceedings. Iowa Code § 17A.13(l).

2A. Iowa Rule of Civil Procedure 122 (d)(1)(A) provides:

> d. Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to:
>
> (A) The identity and location of persons having knowledge of discoverable matters.

Iowa R. Civ. P. 122(d)(1)(A).

3A. "Implicit in this rule are sanctions for noncompliance such as exclusion of evidence, continuance, or other actions that a trial court deems appropriate." Miller v. Bonar, 337 N.W.2d 523, 527 (Iowa 1983)(emphasis added - referring to Rule 122's predecessor, then numbered as

Rule 125)(citing MZ Enterprises, Inc. v. Hawkeye Security Insurance Company, 318 N.W.2d 408, 414 (Iowa 1982). *See also* Sullivan v. Chicago & Northwestern Transportation Co., 326 N.W.2d 320, 324 (Iowa 1982); White v. Citizen's National Bank, 262 N.W.2d 812, 816 (Iowa 1978); Kilker v. Mulry, 437 N.W.2d 1, 4 (Iowa App. 1988).

4A. Rule 122(d)(1)(A) is designed to ensure the efficacy of discovery "as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to [the basic issues between the parties]." Metropolitan Transfer v. Design Structures, 328 N.W.2d 532, 539 (Iowa Ct. App. 1982). "The purpose of the rule is to avoid surprise and to permit the issues to become both defined and refined before trial. This allows litigants to prepare for the actual matters they will actually confront." White v. Citizen's National Bank, 262 N.W.2d 812, 816 (Iowa 1978)(referring to former rule 125).

5A. "The names of potential witnesses having knowledge of matters alleged in the pleadings is among the most important information that can be obtained by interrogatories. This information helps prevent surprise at trial, a major goal of the discovery rules." Blink v. McNabb, 287 N.W.2d 596, 600 (Iowa 1980). It should be noted that both the interrogatory considered in Blink v. McNabb and Complainant's Interrogatory No. 14 request the identification of potential witnesses. Id. at 599. See Finding of Fact No. 3A.

6A. Under the Rules of Civil Procedure, if a party wishes to take oral deposition of any person, it must provide *"reasonable notice* in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined." Iowa R. Civ. P. 140(b)(1)(emphasis added). It may also be necessary to obtain and serve a subpoena duces tecum to compel the person to be deposed to appear 'for the examination and to bring specified materials with him. Id.

7A. It should be noted that the duty set forth by the rule is to "seasonably" supplement the response to a discovery request. Rule 122. If this duty is not met, "[t]he *subjective explanation* for the default is *irrelevant.* It makes no difference whether it was due *to failure to prepare for trial or to an intentional*purpose to gain the benefit of surprise. The rule bars the result without regard to cause, except for those beyond control." Kilker v. Mulry, 437 N.W.2d 1, 4 (Iowa App. 1988)(Quoting White v. Citizen's National Bank, 262 N.W.2d at 816-17).

8A. Although, based on its language, and on the authorities set forth above, it would appear that Rule 122 is the proper authority for sanctions resulting from the failure to abide by that rule's requirement to seasonably supplement responses to interrogatories; Blink v. McNabb, 287 N.W.2d at 600-01 & n.1, seems to suggest that Rule 134 would also be an appropriate authority for sanctions for failure to meet that duty. See Iowa R. Civ. P. 134(b). Therefore, it was also cited as authority by the Administrative Law Judge. (Tr. at 303). Although Rule 134(b) specifically refers to "failure to comply with order," and there was no discovery order in the instant case, there was also no discovery order in Blink v. McNabb. Id. at 599.

9A. Respondent has cited no legal authority, case law, statute, or rule which supports the proposition that a statement in a preheating conference form reserving a right to call "witnesses

with relevant knowledge of the issues" either relieves it of its duty to seasonably supplement interrogatories or fulfils that duty. The Commission is aware of no such authority.

10A. The fact that the Commission and the Complainant had access to the names of Mr. O'Gorman, Mr. Sears, and Mr. Stansbury or to the interview notes of Sears and Stansbury does not relieve the Respondent of its duty to seasonably supplement its answers to interrogatories. See Sullivan v. Chicago & Northwestern Transportation Co., 326 N.W.2d 320, 324-25 (Iowa 1982). Nor does it indicate that the Administrative Law Judge abused his discretion in excluding the testimony of these three witnesses. Id. at 324. "it is not reasonable for [Respondent-Jensen Construction Company] to argue that the [Complainant] should be charged with the knowledge of [O'Gorman, Sears, and Stansbury] and it should not." Id. at 324-25.

11 A. Respondent has asserted that ' Blink v. McNabb, 287 N.W.2d 596, 601 (Iowa 1980) stands for the proposition that, before witnesses can be excluded, the moving party must move for first for a continuance and then for the sanction of excluding the witnesses. (Tr. at 297). Respondent has backed away from this position on brief asserting only that it would not have been error for the Administrative Law Judge to have allowed the three witnesses to testify in the absence of a motion for continuance. (Respondent's Brief at 34-35).

12A. In any event, it is clear that Blink v. McNabb does not require that a party challenging witnesses not listed in answers to interrogatories to make a motion for continuance either prior to or simultaneously with a motion to exclude the witnesses. In ' Blink v. McNabb, the Court "held that the failure to list . . . two [nonexpert] witnesses" in an answer to an interrogatory requesting "the names of all persons who had knowledge or information of the matters set forth in the petition and answer ... constituted a failure to adequately answer or supplement the interrogatory." Callaghan's Iowa Practice § 31.01 p. 547 (1983). Blink also stands for the proposition that, in order for a party to preserve error for appeal, in the event unlisted witnesses are wrongly allowed to testify, the party must either "have requested a continuance . . .or ... sanctions ... including a request the testimony of the witnesses be prohibited at trial." Id. (emphasis added).

13A. Respondent has argued that the exclusion of these witnesses under these circumstances violated its due process right to a fair hearing. (Respondent's Brief at 35). Respondent has cited no authority in support of its position and the Commission is unaware of any.

14A. An adjudicative body has wide discretion in ruling on discovery issues and will be reversed only if an abuse of discretion occurs. See In Interest of D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). An abuse of discretion is found "only when such discretion is exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Farley v. Ginther, 450 N.W.2d 853,856 (Iowa 1990). Such abuse is rarely found in Iowa cases and is generally only found in cases involving the dismissal of an action. In Interest of D.L., 401 N.W.2d 201, 202-03 (Iowa App. 1986). There was no abuse of discretion by the Administrative Law Judge in excluding these witnesses.

15A. Offers of proof are permitted in administrative hearings. Iowa Code § 17A.12 (6)(d). The Administrative Law Judge appropriately limited the Respondent to making a narrative offer of

proof. It is well recognized that either narrative or testimonial offers of proof are appropriate. Mauet, Fundamentals of Trial Techniques 367 (1980). A narrative offer of proof has the advantange of being less time consuming. Id. Both methods allow the Administrative Law Judge to determine if he wishes to reverse his ruling and any reviewing court to determine the nature of the excluded evidence and whether such exclusion was reversible error. Id. Of course, with a testimonial.offer, wherein the proponent conducts a direct examination of the witness, no cross examination is necessary to fulfill the purposes of the offer of proof. See Goldstein's Trial Technique § 13.31 (2d ed. 1969 & Supp. 1984)(example of testimonial offer of proof).

ADMINISTRATIVE LAW JUDGE PROPERLY LIMITED CROSS-EXAMINATION OF PAMELA ROSE TO THE SCOPE OF HER DIRECT EXAMINATION

1. The full scope of Complainant's witness Pamela Rose's brief direct testimony was to lay a foundation for the introduction of Complainant's Exhibit 5, a transcript of her interview with Bobby Prater. During the course of her direct examination, she testified that she had conducted the interview during her investigation of this complaint. (Tr. at 464-65). Respondent was allowed to cross-examine Ms. Rose on matters concerning credibility and the evidentiary foundation laid for the exhibit. (Tr. at 467-72).

2. On brief, Respondent argues that its crossexamination was improperly limited, when objections that the questions asked were beyond the scope of direct examination were sustained, because it was not permitted to examine her with regard to interviews of persons other than Prater and a general crossexamination into the investigation. (Brief **35).**

3. Cross-examination is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Iowa R. Evid. 611. This rule "promotes the orderly presentation of the case and thus viewed becomes an aspect of the judge's general control over the mode and order of interrogating witnesses." Richter, Evidentiary Trial Objections § 5.1 (1984). To allow a general exploration of the investigation and witness interviews under these circumstances would effectively nullify the rule. The Administrative Law Judge properly limited the scope of Respondent's cross-examination of Ms. Rose.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Royd Jackman, is entitled to judgment because he has established that he was subjected to racial harassment by a coworker, that Respondent Jensen Construction Company failed to remedy the harassment, and that Respondent constructively discharged him due to his race in violation of Iowa Code Section 601A.6 (1987).

B. Complainant's objection to Tom Doyle's testimony is overruled.

C. The Administrative Law Judge properly excluded the testimony of Mr. O'Gorman, Mr. Sears, and Mr. Stansbury.

D. Complainant Jackman is entitled to a judgment of five thousand four hundred fourteen dollars and fifty-eight cents ($5414.58) in back pay for the loss resulting from his constructive discharge by Respondent.

E. Complainant Jackman is entitled to a judgment of twenty-five thousand dollars **($25,000.00)** in compensatory damages against Respondent Jensen Construction Company for the emotional distress he sustained as a result of the discrimination practiced against him by the Respondent.

F. Within 15 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 to the Administrative Law Judge setting forth the method of computation and the amount of pre-judgment interest to which Complainant is entitled on his back pay award. If the parties cannot agree on such stipulation, they shall so notify the Administrative Law Judge in writing and submit briefs addressing this issue to him within 30 calendar days of the date of this order. The Administrative Law Judge shall then submit for the Commission's consideration a Supplemental Proposed Decision and Order resolving this issue.

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 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 (a) resolve the issue of Complainant's prejudgment interest on his back pay, and (b) determine the actual amount of attorneys fees to which Complainant is entitled to under this order and to enter a subsequent order awarding interest and attorneys fees. This order is final in all respects except for the resolution of the prejudgment interest on Complainant's back pay and the determination of the amount of the Complainant's attorney's fees.

I. Interest at the rate of ten percent per annum shall be paid by Respondent to Complainant Jackman 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.

J. Respondent Jensen Construction Company is hereby ordered to cease and desist from any further practice of failing to remedy instances of racial harassment of which it is aware.

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

L. The Respondent shall develop, within 120 days of the date of this order, 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. The plan shall be subject to the review and approval of the Commission. The plan shall be implemented within 150 days of the date 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 K and L of this order.

Signed this the twenty first day of April, 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 INTEREST AND ATTORNEYS FEES

1. On May 24, 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 with the exception that the amount of compensatory damages for emotional distress, which is stated in Finding of Fact Number 72 and in paragraph E of the Decision and Order, is reduced from the sum of twenty-five thousand dollars ($25,000) to the sum of ten thousand dollars ($10,000). The reduction was made because, when all of the evidence on this issue is considered, the later amount more accurately reflects the duration and severity of emotional distress suffered by the Complainant due to the Respondent's illegal race discrimination. This case was also remanded back to the Administrative Law Judge so the attorneys fees and interest issues may be resolved.

2. In accordance with paragraph G on page 65 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 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."

3. In accordance with paragraph F on page-64 of the proposed decision and order, the written stipulation on calculation of interest submitted by Respondent and Complainant shall be entered in the supplemental proposed decision and order submitted by the Administrative Law Judge.

IT IS SO ORDERED.
Signed this the 24th day of May, 1991.
Orlando Ray Dial, Chairperson
Iowa Civil Rights Commission

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