BEFORE THE DEPARTMENT OF INSPECTIONS AND APPEALS

Roxana Sotomayor, Complainant, and IOWA CIVIL RIGHTS COMMISSION, vs. Fast Photo (Howard Horan, Owner), Respondent, and Horan Studio (Howard Horan, Owner), Respondent.	DIA # 01ICRC003 CP # 08-99-37858 PROPOSED DECISION

FINDINGS OF FACT:

I. JURISDICTIONAL AND PROCEDURAL FACTS:

1. On August 30, 1999, Roxana Sotomayor, the complainant, filed a charge of discrimination with the Iowa Civil Rights Commission charging respondents Fast Photo (Howard Horan, owner) and Horan Studio (Howard Horan, owner), with race, national origin, and retaliation discrimination in employment. (Cp. Ex. 1). Probable cause was found on this complaint on January 17, 2001. (Cp. Ex. 2). Conciliation efforts failed on or about October 15, 2001, (CP. Ex. 3). The Notice of hearing was issued on January 11, 2002. (Notice of Hearing). A one day public hearing on this complaint was held on March 5, 2002 before the Honorable Donald W. Bohlken, Administrative Law Judge, in Coralville City Hall, Coralville, Iowa. The Complainant was represented by attorney Todd Dwire. The Iowa Civil Rights Commission was represented by Rick Autry, assistant attorney general. The Respondents were represented by their owner, Howard Horan, but were not represented by counsel. The record was held open for the briefs of the Commission and the Respondent, which were received, respectively, on May 20 and May 22, 2002.

II. BACKGROUND:

2. The Complainant was born in Puerto Rico twenty five years ago. (Tr. at 8). She is not a native English speaker. (Tr. at 9). She moved to the continental United States at the age of seventeen after having learned some English in High School. Id.

3. In August of 1998 she came to work for Respondents at the Fast Photo and Horan Studio businesses. (Tr. at 10). She was about twenty one years old at the time she came to work for Howard Horan, owner of the Respondent businesses.

4. The Complainant came to Iowa City because her boyfriend had been accepted to medical school. She intended to remain for at least the four years of medical school. (Tr. at 10).

5. The Complainant was hired "on the spot" by Howard Horan to work in the one hour photo developing business called Fast Photo. (Tr. at 11). The Complainant came to trust Mr. Horan and even to think "he was like a dad for me" - a characterization which Mr. Horan did not eschew. (Tr. at 17, 147).

6. With a first year medical student as her boyfriend, the Complainant spent a great deal of time at work. During her time in Iowa her job became very important to her - so much that it was her "life". (Tr. at 16, 19). Towards the end of her employment she worked longer and longer hours. (Tr. at 13, 16). Her performance was excellent. (R.Ex. B).

7. The Respondent Fast Photo was owned by Howard Horan and located in same building as the Respondent Horan Studio. (Tr. at 12). The building was a small one and both businesses were located in close proximity. (Tr. at 12, 92).

8. There were only two full-time employees, Dana Stoll and the Complainant. (Tr. at 12, 190). Of these two, Dana Stoll was the longer term employee. (Tr. at 11, 129-30). Ms. Stoll was the "manager" at "Fast Photo/Horan Studio". (Tr. at 129, 141).

9. In this "manager" position, Ms. Stoll was the supervisor of the Complainant. (Tr. at 14, 141-42, 190). Dana Stoll was the "number two" person at Respondents Fast Photo/Horan Studio. (Tr. at 142). When Mr. Horan was out of the office for any reason Ms. Stoll was in charge. (Tr. at 14, 93, 188).

10. In Mr. Horan's opinion, Dana Stoll was the more valuable of the two full-time employees. (Tr. at 14, 190). As Mr. Horan is a photographer by trade, it would not be unusual for him to be out of the office on "shoots", for significant periods of time during the work week. (Tr. at 15). It was common, therefore, for Ms. Stoll and the Complainant to be alone in the business. (Tr. at 15).

11. Ms. Stoll and the Complainant were required by their jobs to be in constant contact. (Tr. at 15-16, 143). It was a requirement of the Complainant's job that she work very closely with Ms. Stoll. (Tr. at 15-16, 143, 187). In order for the Complainant to perform her job she had to work with Ms. Stoll on a "smooth continuous basis" from "moment to moment". (Tr. at 151, 186;

R.Ex. D). Communication between the two was a necessity of the job. (Tr. at 72-74; R. Ex D). Cooperation and trust between the two jobs on a daily basis was a necessity. (Tr. at 187).

12. On March 17 of 1999 the Complainant and Ms. Stoll were at a St. Patrick's Day celebration at "Charlie's Bar" in Iowa City. Ms. Stoll drank a lot during this celebration. At one point Ms. Stoll visited the rest room and was gone long enough that the Complainant became concerned for her.

13. When she entered the restroom the Complainant overheard a conversation between Ms. Stoll and another. Ms. Stoll was complaining that the Complainant was receiving too much attention from the men in the bar and Ms. Stoll remarked that the Complainant was a "fucking Puerto Rican". (Tr. at 17-18). The Complainant let Ms. Stoll know that she was in the room and the Complainant left shortly afterwards. (Tr. at 18-19).

14. Later the Complainant mentioned the incident to Mr. Horan and sought his advice. (Tr. at 19). Mr. Horan indicated that the incident was outside of work and therefore he was unable to do anything about it. (Tr. at 19, 149). The Complainant decided to take no further action since her job meant a lot to her. (Tr. at 19).

15. In June of 1999, 17-year-old LaTasha Massey was hired to work at Horan Studio on a part-time basis. (Tr. at 91). Ms. Massey is an African-American. Id. Her hours of work were part-time. (Tr. at 91). She worked in the photo studio business for Mr. Horan. (Tr. at 92).

III. WORKING ENVIRONMENT: DEROGATORY COMMENTS ABOUT ASIAN CUSTOMERS:

16. When Asian people came in to have passport pictures taken Mr. Horan would ask Ms. Massey about the race of the customers. (Tr. at 96; Cp. Ex 8). Mr. Horan would then mock the language presumably spoken by the Asian customers by making stereotypical noises such as "Chang chang chang" and similar "insulting sounds". (Tr. at 21, 96, 140-141). He did this whenever such a customer was seen by him, which was most days. (Tr. at 96).

17. On August 11, 1999 an Asian customer entered Horan Studio/Fast Photo and inquired about a passport photo. Mr. Horan asked Ms. Massey the race of the customer. Ms. Massey did not reply. (Cp. Ex. 8). The Complainant told Mr. Horan that he had an oriental customer wanting a passport photo and Mr. Horan then made the mocking "chang chong" noise. (Tr. at 21; Cp. Ex. 8). The Complainant did not reply to these noises. (Tr. at 21).

IV. COMPLAINANT'S OPPOSITION TO REMARKS ABOUT ASIAN CUSTOMERS AND THE EMPLOYER'S RESPONSE:

18. Later that day, Ms. Massey raised the issue of Mr. Horan's mocking of Asian customers with Ms. Stoll. (Tr. at 21-28, 96-103; Cp. Ex. 4, 8, 9). Ms. Stoll attempted to justify Mr. Horan's attitudes about Asians by the fact that he sometimes has trouble understanding them and

complying with their requests. Id. The Complainant and Ms. Massey challenged these explanations as unfair. Id.

19. Ms. Stoll remarked that if people come to this country they should learn the language. Id. Both her co-workers challenged this statement and Mr. Horan's assumption that persons of certain races could not speak fluent English. Ms. Stoll then attempted to justify racist attitudes by explaining how they are born of specific experiences. She mentioned a "Chinese gang" which had caused trouble for her brother and that they referred to this group of people as "dirty chinks". Id. (Tr. at 143).

20. **Ms. Stoll also stated that when she worked at Charlie's Bar there was a group of Hispanic men whose behavior was undesirable to Ms. Stoll. She told the Complainant and Ms. Massey that she referred to these men as "dirty spics" or "fucking spics".** (Tr. at 25, 98, 143). The use of the slur "fucking spics" was upsetting to the Complainant who then confronted Ms. Stoll over her attitude about Hispanics. (Tr. at 25). **The Complainant said to Ms. Stoll "I guess you don't like me then" and reminded Ms. Stoll of the incident on St. Patrick's Day.** (Tr. at 25-26). **The discussion of this event caused Ms. Stoll to suddenly throw things and shout violently "I'm a fucking racist take it or leave".** (Tr. at 27, 100; Cp. Ex. 4, 8). **In reaction to this the only other two people in the room, Ms. Massey and the Complainant, told Ms. Stoll they were "leaving".** (Tr. at 107; Cp. Ex. 4, 8, 9).

21. Ms. Stoll's reaction was to scream "Bitch" and storm out of the business. (Cp. Ex. 4, 8). Within a few minutes Ms. Stoll returned. When the Complainant placed negatives on Ms. Stoll's desk Ms. Stoll told her not to say anything because Ms. Stoll would "explode". (Tr. at 103; Cp. Ex. 8).

22. During this confrontation, Ms. Stoll lost her composure altogether and was completely out-of-control. (Tr. at 26-27, 100-102, 142). Her angry demeanor was "off the scale". (Tr. at 27). She was so angry she appeared that she would hyperventilate. (Tr. at 100). She was "really mad", "wide-eyed angry" and behaving in a "violent" manner. (Tr. at 26-27, 101).

23. Mr. Horan returned to the business sometimes towards the end of the argument between Ms. Stoll and her subordinates. (Tr. at 29-31, 104-106; Cp. Ex. 4, 8). There was no formal complaint procedure at respondents Fast Photo and Horan Studio. (Tr. at 192). Employees were expected to bring any problems to Mr. Horan. (Tr. at 192). Mr. Horan was "shoulder to shoulder with them on a day-to-day basis" and would in that fashion handle any problems that came up. (Tr. at 192-93).

24. **The Complainant informed Mr. Horan that Ms. Stoll had said she was a "fucking racist take it or leave"**. Id. **Mr. Horan's reaction was to place his hands over his ears and shake his head.** (Tr. at 30, 158; CP. Ex. 4, 8).

25. By the time Mr. Horan was informed of the fight, it was 4:00 p.m. and time for the Complainant to leave for the day. (Tr. at 30; Cp. Ex. 4). Mr. Horan caught up with her in the parking lot. Id. As she stood by her car, Mr. Horan asked her about her plans for the next day.

(Tr. at 30-31; Ex. 4). The Complainant told him she would not let him down and she asked that he do something about Dana. Id. She also indicated she would stay with the business until Mr. Horan could find a new employee to take her place.

V. CONSTRUCTIVE DISCHARGE AND SUBSEQUENT ACTUAL DISCHARGE OF COMPLAINANT:

A. The Constructive Discharge:

26. With respect to the constructive discharge, it must be noted that the Hispanic Complainant heard her supervisor justify the use of racist terms, i.e. "fucking spic, or "dirty spic". The Complainant's supervisor was confronted with having called the Complainant a "fucking Puerto Rican". The supervisor's reaction was to say specifically that the supervisor was "a fucking racist" and Complainant could "take it or leave."

27. Leaving her employment is a reasonably foreseeable consequence when a Latina objects to the phrase "fucking spic" and is told to "take it or leave". Any reasonable person would feel compelled to resign if she was in the circumstances facing the Complainant. First, any reasonable person would interpret Ms. Stoll's statement, in context, to mean that neither Ms. Stoll nor Mr. Horan intended to change their discriminatory conduct and that putting up with it was an express condition of employment. This is how both the Complainant and Ms. Massey understood the statement. (Tr. at 27, 102).

28. Second, while it is difficult to reconstruct the full color of Ms. Stoll's conduct, both Ms. Massey and the Complainant were alarmed by Ms. Stoll's volatile behavior. She was screaming, wide-eyed, and throwing things. She was totally out of control. Both her subordinates knew they had deeply angered their boss by their confrontation over racism.

29. Third, this situation was exacerbated by the requirement that the Complainant work closely with Ms. Stoll. Everyone at respondents Fast Photo/Horan Studio was required to work in close proximity. The Complainant was often alone with Ms. Stoll while Ms. Stoll was in charge. In order to perform her job, the Complainant had to interact and cooperate with Ms. Stoll on a continuous and smooth basis. The two had to trust one another and get along in order to function in their work. (Tr. at 121-22, 142-43). Mr. Horan himself asserted that, at the time Complainant left to go home at the end of the day of the confrontation with Ms. Stoll, she was no longer capable of performing her job. (Tr. at 187, 195).

30. Fourth, it should be noted that another person was present and witnessed Dana Stoll's outbursts. After seeing Dana Stoll's true colors, after being told "take it or leave", LaTasha Massey was the first to decide that she couldn't take it. She left. She never had any question that she would stay. (Tr. at 107). The reasonableness of the Complainant's judgment is supported by the action of the only other person in a similar position.

31. Fifth, although Mr. Horan was immediately informed of Ms. Stoll's behavior and asked to do something to correct it, he never indicated that he would take any action. He only covered his ears with his hands and shook his head.

32. The Complainant thus left her employment due to the treatment she received on August 11th. Although not a binding determination, it should be noted that a Job Service decision held that the Complainant quit her job for good cause attributable to the Respondent. (Cp. Ex. 5). The complainant was constructively discharged due to the racially discriminatory and retaliatory actions of her supervisor and her employer's refusal to remedy those actions after being informed of them.

B. The Discharge:

33. On the evening of August 11th, the Complainant called Jay Raabe, a coworker. (Tr. at 31; Cp. Ex. 4). She called him to try and arrange to have someone work for her the next day. Id. They discussed the argument with Ms. Stoll. Raabe gave her the names of the NAACP and some other resources.

34. Soon after learning that she had spoken with Raabe, Mr. Horan called the Complainant. (Tr. at 33; Cp. Ex. 4). Mr. Horan told the Complainant that, in seeking a remedy, she would not be hurting Mr. Horan but hurting his business. Id. He also suggested that the Complainant see a psychiatrist. (Tr. at 32-33).

35. The Complainant again insisted that Mr. Horan should do something about Ms. Stoll indicating, with the idiom "put your pant and your belt in your place," that he should take responsibility. (Tr. at 33, 49; Cp. Ex. 4). At no time did Mr. Horan indicate that he would take any action about Ms. Stoll's behavior on August 11, 1999. (Tr. at 30-31, 33; Cp. Ex 4).

36. During this telephone conversation, Mr. Horan asked the Complainant how she "felt". She replied "I feel to beat the hell out of Dana but I'm gonna take a nap." (Tr. at 32; Cp. Ex. 4). The Complainant did not say that she in fact planned to perpetrate any violence on Dana, nor did she mention knocking out Dana's teeth, as claimed by Mr. Horan. (Tr. at 33-35). Mr. Horan made no response to the Complainant's statement about how she felt to "beat the hell" out of Dana. (Tr. at 35; Cp. Ex. 4).

37. The next morning the Complainant arrived at Horan studio during a hard rain. (Tr. at 36). She saw Mr. Horan waiting for her at the door and thought he was going to hold the door for her. Id. Instead, he stopped her at the door and informed her that day was her last day. Id. (Cp. Ex. 4). He was concerned by her "threats" to Ms. Stoll and had decided that the Complainant could no longer work there. (R. Ex. B, D). The Complainant was escorted through the building so she could gather her personal belongings. She then left for good. (Tr. at 36; Cp. Ex. 4).

38. The reaction of Mr. Horan to his telephone conversation with Complainant was to terminate her employment the next day. The reason given by Mr. Horan was that he thought the Complainant had threatened Ms. Stoll and that he had to "separate" the two. (Tr. at 152).

39. The essence of the Respondents' position is that the Complainant showed she was unreasonable, untrustworthy and volatile by bringing the St. Patrick's Day event into the workplace. (Tr. at 151-152; R. Ex. B, D). This position is not supported by the greater weight of the evidence.

40. It was Ms. Stoll, not the Complainant, who was totally out of control on August 11th. Ms. Stoll admits being out of control. (Tr. at 142). Ms. Stoll was the one who acted in a violent" fashion and who remarked that she was going to "explode". (Tr. at 26-27, 101, 103; Cp. Ex. 8). In contrast, the conversation between the Complainant and Mr. Horan did not even take place in the presence of Ms. Stoll. It was not a credible specific treat made to Ms. Stoll. (Tr. at 33-35). The Complainant merely stated that she "felt like" beating up Ms. Stoll but was actually "going to take a nap."

41. The Complainant did not even initiate this "threat'. Mr. Horan asked her how she felt and she replied. While he alleges that he rid himself of the Complainant because she had "threatened" Ms. Stoll, he indicated no concerns about this threat when he told her that he would see her in the morning. (Tr. at 35). He didn't mention it in the letter of termination he gave the Complainant, but suggested there that he was accepting her resignation. (Cp. Ex. 6). Mr. Horan used this 'threat" as an after-the-fact rationalization for his decision to discharge her as opposed to dealing with racism in his business. This is, in effect, retaliation against the Complainant for her opposition to the racist views expressed by Ms. Stoll and the treatment of Asian customers by Mr. Horan.

42. There is no evidence that Mr. Horan looked for less extreme measures for dealing with this perceived "threat", such as asking the Complainant the next day what she actually intended to do with respect to Ms. Stoll or requiring that Ms. Stoll, who initiated actual violent behavior, i.e. shouting and throwing things around, take a few days off with or without pay to cool off the situation.

43. Mr. Horan also focused exclusively on the complainant's statement of what she felt like doing while disregarding other statements reflecting a more mature and responsible attitude. The complainant had also told Mr. Horan, as she left work, that she would not let him down and would remain employed until he could find a replacement. The implication is that she would continue to work with Ms. Stoll until a replacement for the Complainant was found.

44. By supposedly firing the Complainant based on this alleged threat, the Respondent ignored the discriminatory work environment created by the combinations of his racist ridicule of certain customers and the actions and statements of Ms. Stoll. It was this discriminatory and retaliatory working environment and harassment which directly resulted in this supposed "threat" by the Complainant. Such misconduct, if a mere statement of feeling given in response to an inquiry by the employer can be characterized as such, had its genesis in the working environment. There was no actual carrying out of this threat or even sufficient inquiry to determine if was real or merely a statement of emotion given in response to an inquiry about how the appellant felt. For

reasons stated in the conclusions of law, such a reason is not legitimate as the employer created the underlying problem.

VI. REMEDIES: BACKPAY:

45. The record shows the following earnings for the Complainant at Horan Studio:

A. 1998 - 699 hours over 17 weeks. (19 hours of overtime). Rate of pay was $8.00 per hour. ($12.00/hr overtime rate).

Total pay over this period:

680 regular hours x $8.00 = $5440.00
19 overtime hours x $12.00 =$ 228.00

Total 1998 pay = $5668.00

(Tr. at 147; R. Ex. B)

B. 1999 - 1,398.5 hours over 30 weeks. (198.50 overtime hours or apprx 6.6 hours overtime per week). Rate of pay was $8.00 per hour regular ($12.00 per hour overtime) for the first 15 weeks. This was raised to $9.00 per hour regular ($13.50 overtime) after this. Although Complainant testified that the overtime increased over time it can be evenly allocated for purposes of calculation:

600 regular hours x $8.00 = $4,800.00
99 overtime hours x $12.00 = $1,188.00

600 regular hours x $9.00 = $5,400.00
99 overtime hours x $13.50 = $1,336.50

Total 1999 pay = $12,724.50

(Tr. at 147; R. Ex. B).

46. According to Respondent, the Complainant earned an average weekly wage of $363.90. This average apparently was based on her entire time with Respondent and did not account for an increase in hours nor her increase in the rate of pay in 1999. (Tr. at 13, 37, 185-86; R. Ex. B).

47. Complainant credibly testified that her hours increased during the last three months or so of her employment. (Tr. at 13, 37). Mr. Horan testified that in 1998 Complainant worked an average of 41 hours per week. (Tr. at 147). He further testified that in 1999 she worked a total of 1,398.5 hours over thirty weeks. Id.

48. Given that the last three full months of Complainant's employment plus the portion she worked in August is about 15 weeks the following calculation is appropriate:

15 weeks at 41.12 hours per week (the 1998 average)= 616.8 hrs
15 weeks at 52.11 hours per week = 781.65 hrs
Total 1398.45 hrs

51. This is consistent with Complainant's testimony of 50 to 60 hours per week. (Tr. at 38). The Commission will therefore use 50 hours per week when calculating the requested backpay. Since 40 hours of this is straight pay and 10 hours is time-and-a-half, and the Complainant earned nine dollars an hour, (Tr. at 38), the calculation of gross weekly "would have earned" pay is:
(40 + (1 1/2 x 10)) hrs x $9.00 /hr = (40 + 15) hs x $9.00 /hr = 55 hours x $9.00 /hr = $495.00 per week.

52. Using these figures the gross backpay can be calculated:

1999 - 19 weeks @ $495.00	wk	$ 9,405.00	
2000 - 52 weeks @ $495.00	wk	$25,740.00	
2001 - 52 weeks @ $495.00	wk	$25,740.00	
2002 - 20 weeks @ $495.00	wk	$ 9,900.00	
TOTAL GROSS BACKPAY		$70,785.00	

53. Complainant was paid through August 25, 1999. (Cp. Ex. 6). The period from 8/25/99 to 12/31/99 is 19 weeks.

54. The Commission has therefore met its burden of proving the gross backpay due: $70,785.00 based on $495 per week since the date of discharge.

55. The following interim earnings appear in the record:
1999 - Starting in October Complainant earned approximately $312.00/ wk for approximately 11 weeks, (Tr. at 39), for a total of $3,432. This is increased by the amount of unemployment, $2004.66, calculated below, to $5436.66.
2000 - $13633.18. (Ex. 7).
2001 - $5,000.00. (Tr. at 40).
2002 - $280 / wk for 20 weeks = $5,600.00.

56. The amount of unemployment compensation can be calculated from the record. Since Complainant received a raise in April the highest full quarter earnings for her would be the second quarter. In the second quarter of 1999 Complainant earned approximately:

3 weeks at $8.00/hr for 40 hr/wk regular time with 19.8 hours of overtime at $12.00/hr.
12 weeks at $9.00 hr for 40 hr/wk regular time with 79.2 hours of overtime at $13.50/hr.

3 weeks x 40 hours x $8.00 = $960.00.
19.8 hours x $12.00 = $237.60

12 weeks x 40 hours x $9.00 = $4,320.00.
79.2 hours x $13.50 = $1,069.20

Total in highest quarter of 1999: $6586.80

57. Since Complainant had no dependents her weekly unemployment benefit would be 1/23 this amount. Iowa Code section 96.3 (2001). This would be $286.38 per week.

58. From her last paid day on August 25 to mid-October is about 7 weeks. Thus the total unemployment was approximately $2004.66 all paid in 1999.

59. The end of the first twenty weeks in 2002 approximately equals the typical college graduation date four years after Complainant started at Respondent. Backpay terminates at that point.

60. The net backpay appearing in the recordl, based on the formula of: gross back pay - (interim earnings and unemployment insurance) = net back pay:

1999: $ 9405.00 - $5436.66 = $ 3968.34
2000: $25740.00 - $13633.18 = $12106.82
2001: $25740.00 - $5000.00 = $20740.00
2002: $9900.00 - $5600.00 = $ 4300.00
TOTAL NET BACK PAY $41115.16

Total Net Backpay = $41115.16

VII. REMEDIES: EMOTIONAL DISTRESS:

61. As previously noted, during her stay in Iowa the Complainant spent her time working. As she worked longer and longer hours, work became her life. (Tr. at 13, 16, 19). She was a youth at the time and had been in the continental United States for less than five years when she started working for Respondent. She came to trust Howard Horan, to seek his advice, and to think of him like a father. (Tr. at 17). It was in this vulnerable situation the Complainant found herself on August 12, 1999 when Mr. Horan fired her. She felt "betrayed" by Mr. Horan.(Tr. at 42-43).

62. After this betrayal by Mr. Horan, the Complainant suffered some emotional pain. She cried a lot while driving home that day. She cried frequently while she was in Iowa. (Tr. at 43-44). She testified she went to a mental clinic because she felt like killing herself, but could not recall the name of the clinic. (Tr. at 43, 65). The clinic prescribed Paxil although it did not help much. (Tr. at 43, 81). While she testified that, for a month and a half, until she left Iowa, she fell into a pattern of self-destructive behavior and would, every day, sit in the dark in her living room and just cry, fail to take care of herself or her house, not want to go anywhere and turn into a vegetable who had nightmares and could not sleep, it appears that her life during this time was not quite the unending nightmare she describes. (Tr. at 44, 47). She admitted that, sometime after her constructive discharge, but before she left Iowa for Minnesota, she went to California

for a week or two for a family member's wedding, went dancing, went to the beach and had a good time. She was not depressed or sitting in the dark crying during that time. After she went to Minnesota, she got better. (Tr. at 62-65). There is also a slight discrepancy between claiming that, during this period in Iowa, she did not want to go anywhere while also claiming that every night she would go to a bar and drink until she was "unstable." (Tr. at 44, 47).

63. There is other testimony of the Complainant concerning her emotional distress, but no supportive medical evidence. She averred that whenever she drove by the studio she suffered some sort of attack where she became unable to breathe and felt as if someone was ripping her insides out. (Tr. at 43, 45-46). This depression and emotional turmoil drove the Complainant out of the State of Iowa. (Tr. at 46).

64. When the trial of this case came back to remind her of her treatment at the Respondent businesses, the distress also came back. The Complainant testified she was hospitalized for three days because of the stress of this litigation. She had severe stomach pain and couldn't stop vomiting. She has been placed on stress medication for her stomach because of the mere stress of dealing with Horan once again. (Tr. at 47-48). Again, however, there is no supportive medical evidence of these facts.

65. The Complainant cried during the course of her testimony. It may be and is reasonably inferred that this litigation also created additional emotional distress.

66. Emotional distress may also be and is reasonably inferred from the the harassment, constructive discharge and discharge of the Complainant as well as from the economic loss, in terms of back pay, set forth above.

67. In the light of all the facts and circumstances, including but not limited to the somewhat exaggerated initial testimony of the Complainant concerning the period before she left for Minnesota, as well as the lack of medical supporting evidence, the amount of ten thousand dollars ($10,000) is an appropriate amount to compensate the Complainant for the emotional distress caused by the discrimination and retaliation suffered by her.

CONCLUSIONS OF LAW:

I. Racial, National Origin and Retaliatory Harassment:

A. Proper Order and Allocation of Proof Under the Hostile Environment Theory:

1. The Commission, as the party with the burden of proof, Iowa Code *S* 216.15(7), is required to prove, by a preponderance of the evidence, all of the elements of a racial, national origin or retaliatory harassment case. *E.g.* Dorothy A. Abbas, 12 Iowa Civil Rights Commission Case Reports 1, 22 (1994)(retaliatory harassment); Cristen Harms, 11 Iowa Civil Rights Commission Case Reports, 89, 124 (1992)(sexual harassment); Royd Jackman, 11 Iowa Civil Rights Commission Case Reports 70, 79 (1991)(racial harassment). "[Wlhen an employee is exposed to . . . harassment that is so severe or pervasive that it creates an abusive working environment, the .

. . harassment necessarily affects a condition of employment. The conditions of employment are altered by the existence of the hostile working environment." McElroy v. State, 637 N.W.2d 48B, 500 (Iowa 2001).

B. Elements of the Harassment Case:

2. The Commission may establish a valid claim of national origin, race or retaliatory harassment by proving the following elements:

> 1) The Complainant is a member of a protected class [i.e. she is Puerto Rican and has lawfully opposed discrimination];
> 2) She was subjected to unwelcome harassment on the basis of her race, national origin or lawful opposition to discrimination;
> 3) The harassment was based upon her protected class status;
> 4) The harassment affected a term, condition, or privilege of employment [e.g. her working environment and ultimately led to termination of her employment], and;
> 5) The employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.

See Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993)(requirements for sex harassment case); Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632 (Iowa 1990) (religious harassment); Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 834 (Iowa 1990)(requirements for sexual harassment case); Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 378 (Iowa 1986)(racial harassment); Edmunds v. Mercy Hospital, 503 N.W.2d 877, 879 (Iowa Ct. App.1993)(sex harassment); Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982)(sex harassment); Dorothy A. Abbas, 12 Iowa Civil Rights Commission Case Reports 1993-1994 1, 22 (1994)(retaliatory harassment).

D. Protected Class Status of Complainant Sotomayor:

3. It is established in the record that Ms. Sotomayor is Puerto Rican, lawfully opposed discrimination toward oriental customers and toward herself, and is protected against discrimination in employment on the basis of race and national origin and is protected from retaliation for lawful opposition to discrimination. Iowa Code *S* 216.6, 216.11.

E**. Complainant Sotomayor Was Subjected to Unwelcome Harassment on the Bases of Race, National Origin and Retaliation:**

4. "The threshold for determining that conduct is unwelcome is whether it was uninvited and offensive." *Cf.* Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962 (8th Cir. 1993)(unwelcome sexual harassment). The discriminatory or retaliatory conduct "must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded it as undesirable or offensive." *Cf.* Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982), *quoted in* Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990)(unwelcome sexual harassment). The unwelcome nature of the race and national origin

based conduct and retaliatory conduct directed toward Complainant Sotomayor is established in the record when viewed as a whole. She found the race and national origin based conduct of Ms. Stoll and Mr. Horan to be offensive, objected to it, and complained about it to them as members of management. Although the record must be viewed as a whole, such complaints are often persuasive evidence that the conduct was unwelcome. Fair Employment Practices (BNA) 405:6681, 405:6685 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990). *See* Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990).

F. The Harassment Was Based on Complainant's Protected Class Status, I.e. Her Race or National Origin or Her Opposition to Discriminatory Conduct:

5. It is established in the record that the harassment sustained by the Complainant was directed toward her because she opposed discriminatory conduct and because she is Puerto Rican. This element, with respect to race and national origin, may be met by proof of the use of racial epithets. *See e.g.* Schlei, Employment Discrimination Law: 1987-1989 Supplement 35 (1991); Schlei, Employment Discrimination Law: Five Year Cumulative Supplement 88-90 (1989). In this case, it has been established that the harassment was based on both on Complainant's race or national origin because the harassment involves repeated racial epithets as well the manager's directive, "[I am a] fucking racist-take it or leave." The presence of "insulting comments aimed at [the complainant] [which] were particularly reserved for [Hispanics}," also justifies the conclusion that the harassment was due to the Complainant's race. Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990)(insulting comments which were particularly reserved for women demonstrates harassment due to sex). The statements and violent and out of control actions of the manager in response to the Complainant's concerns about racial discrimination in her workplace also demonstrates that the Complainant's lawful opposition to discrimination was one reason for the harassment.

G. The Harassment Affected A Term or Condition of Complainant's Employment, I.e. Her Working Environment and Ultimately Led to Her Termination:

1. Loss of Tangible Job Benefits Is Not Required To Establish That Harassment Has Affected A Term, Condition or Privilege of Employment:

6. Even if racial, national origin and opposition based harassment of the Complainant did not directly result in "the loss of a tangible job benefit," such a loss need not be proved in order to meet the requirement that a term, condition or privilege of employment was affected by the harassment. Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990). Her working environment is a condition of her employment. Thus, the creation of a hostile or abusive working environment is enough to show that a condition of employment has been affected. *See* id.; Royd Jackman, 11 Iowa Civil Rights Commission Case Reports 70, 79 (1991). "[I]n some circumstances the harasser's mere proximity to the plaintiff may in fact create a hostile work environment" McElroy v. State, 637 N.W.2d 48B, 501 (Iowa 2001). The record also shows that complainant was ultimately constructively discharged because of the harassment. Discharge implicates the loss of a term or condition of employment as it represents the loss of a tangible job benefit. *See* Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990).

2. The Standard for Determining When Harassment In the Workplace Violates the Iowa Civil Rights Act Focuses on the Pervasiveness and Severity of the Harassing Conduct:

7. In determining whether a hostile or abusive working environment has been created, the Supreme Court of Iowa has focused on the pervasiveness and severity of the harassing conduct. "A hostile working environment is caused by discriminatory conduct or harassment which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632 (Iowa 1990). "Where . . . 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 . . . harassment affects a condition of employment." Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990)(sex harassment case).

8. The Supreme Court of the United States has provided a standard which also focuses on the pervasiveness and severity of the harassment in determining whether there is an illegal hostile working environment: "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' . . . Title VII is violated. " Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 370 (1993).

3. The Totality of the Circumstances Must Be Examined to Determine Whether a Hostile or Abusive Working Environment Exists:

9. Under both the Iowa Civil Rights Act and Title VII of the Civil Rights Act of 1964, the totality of the circumstances in the case must be examined to determine whether a racially hostile or abusive working environment exists.

> **The existence of a hostile or abusive working environment must be established by the totality of the circumstances.** . . . Whether . . . use of . . . 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 a . . . 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 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, 633-34 (Iowa 1990)(citations omitted)(emphasis added).

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 371 (1993)(Title VII case).

10. In the Vaughn case, the Court considered a situation where the plaintiff and other employees were subjected to generally abusive remarks by one Mueller, a supervisor, on a daily basis. Vaughn, 459 N.W.2d at 630, 631, 633. In addition, plaintiff was subjected to anti-Catholic remarks by his supervisor on three days out of a three month period. Id. at 631. On a fourth day, he was also initially refused time off to go to church. Id. The refusal was rescinded four hours later. Id. The Court held that this set of facts presented "a close question" on the issue of "whether Mueller's behavior was sufficiently severe and pervasive to alter a condition of his employment." Id. at 634. The court did not resolve the question, but based its decision for the employer on the employer's prompt and appropriate response to the harassment. Id. at 634-35. The harassment of the Complainant in this case, unlike Vaughn, involved not only derogatory racial remarks, but the actions of an out-of-control manager who was throwing things around and yelling and ultimately charged, in effect, that the appellant had to take the racist conduct or leave.

11. All of the above factors were considered in reaching the conclusion that Complainant's working environment was hostile or abusive. With respect to the factor of interference with work performance, it is sufficient to prove that a reasonable person subjected to such harassment would find, "as the plaintiff did, that the harassment so altered work conditions as to 'ma[k]e it more difficult to do the job.'" Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. at 372 (Ginsburg, J., concurring)(quoting Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988)). It is not necessary to show that the Complainant's '"tangible productivity has declined as a result of the harassment.'" Id. (Ginsburg, J. concurring)(quoting Davis at 349)).

12. Another factor indicating the severity and pervasiveness of the racial harassment reflected in the record included that the harassment was also suffered by another coworker, who was also a member of a racial minority. Lindemann & Kadue, Sexual Harassment in Employment Law 178-79 (1992).

4. A Single Instance of Harassment May Be Severe Enough to Cause a Discriminatory Working Environment:

13. The Equal Employment Opportunity Commission has recognized that, while a hostile working environment claim usually requires a pattern of offensive conduct, "the more severe the harassment, the less need to show a repetitive series of incidents." Fair Employment Practices (BNA) 405:6681, 405:6690-91 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990)(emphasis added). A single incident of harassment can alter the terms of employment. *Eg.* Moring v. Arkansas Dept. of Correction, 243 F.3d 452 (8th Cir. 2001)

5. The Commission Has Met the Requirements that The Working Environment At Respondents Fast Photo and Horan Studio Be Shown to Have Been Considered Hostile and Abusive When Viewed From Both the Perspectives of the Complainant and of a Similarly Situated Reasonable Person:

14. The Complainant's working environment was found to have been considered by her to be hostile or abusive. It was also found that such an environment would be considered hostile and abusive by any reasonable person. Thus, the evidence in this case met both the subjective requirement that the Complainant personally find the conduct to be hostile or abusive, and the objective requirement that a similarly situated reasonable person would find such conduct be hostile or abusive. *See* Harris v. Forklift Systems, Inc,, 510 U.S. 17, 114 S. Ct. 367, 370, 371 (1993).

H. Respondents Knew or Should Have Known of the Harassment But Failed to Take Prompt and Appropriate Remedial Action:

15. The Commission has proven that Respondents knew or should have known of the harassment. The Commission has also proven that Respondent failed to take prompt and appropriate remedial action. Proof of these facts establishes the last element necessary to establish their liability for their hostile working environment. *See* Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632, 634 (Iowa 1990)(harassment by supervisor); Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 835 (Iowa 1990)(harassment by coworkers).

16. There is no question that Respondents owner and manager had actual knowledge of the harassment. First, they committed the harassment. Second, actual knowledge is also shown when either lower level first line supervisors or higher level management receive complaints about racial harassment. Lindemann & Kadue, Sexual Harassment in Employment Law 242 (1992). This is true even when the first level supervisor did not report the harassment to higher levels of management. Id. Actual knowledge of the harassment, and the failure to remedy the harassment, is imputed to the employer because supervisors are considered to be agents of the employer. *See e.g.*.Hall v. Gus Construction Co., 842 F.2d 1010, 1016, 46 Fair Empl. Prac. Cases 573 (8th Cir. 1988).

17. The requirement for "prompt and appropriate remedial action," Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 835 (Iowa 1990), 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). The respondents' owner's action here was to place his hands over his ears and thus indicate he did not want to hear the complaints. *Cf.* Waltman v. International Paper Co., 875 F.2d 468, 480 (5th Cir. 1989)(summary judgment denied employer where employee's evidence suggests employer may have dissuaded her from seeking an investigation of harassment). No effort whatsoever was made to remedy the harassment. "If 1) no remedy is undertaken . . . liability will attach." Fuller v. City of Oakland, 47 F.3d 1522, 1528, 67 Fair Empl. Prac. Cas. 992 (9th Cir. 1995)(citing Ellison v. Brady, 924 F.2d 872, 882, 54 Fair Empl. Prac. Cas. 1346 (9th Cir. 1991)).

18. On brief, the Commission asserts that in cases of supervisor harassment the "knew or should have known" standard has been replaced by the "affirmative defense created in Burlington Indus., Inc. v. Ellerth, 524 U. S. 742, 765 (1998) ; and Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Burlington Indus., Inc. v. Ellerth, 524 U. S. 742, 765 (1998). Obviously, the employer here proved neither part of this defense.

II. Constructive Discharge:

19. The Iowa Civil Rights Commission has held:

> "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, 65 (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).

Cristen Harms, 11 Iowa Civil Rights Commission Case Reports 1990-1992 89, 126-27 (1992).

20. The majority of Federal circuits have also settled on the objective test. Lindemann, I Employment Discrimination Law 839 (1996). "Most courts do not require proof that the employer intended for the employee to resign." Seymour, Equal Employment Law Update Spring 2000 Edition 21-726 (2001). Even in jurisdictions which require that the employer's intent to force the complainant to quit must be shown, '[t]he intent requirement is satisfied by demonstrating the plaintiff's quitting was a reasonably foreseeable consequence of the employer's discriminatory actions." Coffman v. Tracker Marine, L.P. , 141 F. 3d 1241, 1247 (8th Cir. 1998) (citations omitted). *See* Lindemann, I Employment Discrimination Law 841 & n.24 (1996). The complainant must establish that "a reasonable person in her situation would find the working conditions intolerable." Coffman v. Tracker Marine, L.P. , 141 F. 3d 1241, 1247 (8th Cir. 1998) (citation omitted).

21. The Commission has also held:

> 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). The first element will be satisfied if the evidence demonstrates a hostile work environment sufficient to compel a reasonably prudent woman to leave her employment. Appeal of T&M Assoc., 56 Fair Empl. Prac. Cases 1250, 1253 (N.H. 1991).

Cristen Harms, 11 Iowa Civil Rights Commission Case Reports 1990-1992 89, 127 (1992). All three of these factors have been established by a preponderance of the evidence.

22. There is no doubt that the Respondents manager's actions are racially discriminatory in nature. *C.f.* City of Minneapolis v. Richardson, 239 N.W.2d 197, 203 (1976) (Racial slurs per se discriminatory); *accord* Delph v. Dr. Pepper Bottling Co. of Paragould, Inc., 130 F.3d 349 (8th Cir. 1997); McKnight v. General Motors Corp., 908 F.2d 104, 114 (7th Cir. 1990); Hull v. Cuyahoga Valley Joint Vocational Schl. Dist.. Bd., 926 F.2d 505, 514 (6th Cir. 1991). In addition, Ms. Stoll's reaction was at least in part because her racist beliefs were being challenged. As such, the outrageous conduct endured by the Complainant and Ms. Massey was not only racist but retaliatory. 45A Am. Jur. 2d, Job Discrimination, *S* 228 (2000) (opposition & participation

retaliation discussed); Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989) (participation case) ; Lynch v. Des Moines, 454 N.W.2d 827, 830, 835 (Iowa 1990)(opposition case).

23. Another requirement for constructive discharge liability which is sometimes imposed is that the Complainant give the Respondent a reasonable opportunity to correct the situation. West v. Marion Merrell Dow, 54 F.3d 493, 62 FEP 1125 (8th Cir. 1995); Hanenburg v. Principal Mutual Life, 118 F. 3d 570, 73 ENA FEP 1565, 1568 (8th Cir. 1997). This was done here.

24. It was noted in the record that the Complainant stayed on, after informing the Respondent she was leaving, in order to allow him to hire a replacement. The next day she was discharged by the Respondent employer. This temporary staying on does not defeat a constructive discharge claim as the employee need not "technically 'quit' in every case" in order to make such a claim. Equal Employment Law Update Spring 2000 Edition 21-728 (2001)(*citing* White v. Honeywell, Inc., 141 F.3d 1270, 1279 (8th Cir. 1998)).

III. DISCHARGE:

25. The respondent openly admits discharging the Complainant, but claims it was due to a "threat" by her to assault her immediate supervisor. This "threat" resulted from the harassment, based on the Complainant's national origin, race and opposition to discrimination, which the supervisor directed towards the Complainant. When given the opportunity to learn about and remedy this harassment, the employer refused to even listen. As a general rule, it is well established that when a reason articulated for an employment action is based on employee conduct that results from discrimination for which the employer is responsible:

> [the] reason is ultimately "not legitimate because the Defendant employer created the problem initially." Lamb v. Smith International, Inc., 32 Empl. Prac. Dec. S 33770 at 30712, 30713, 32 Fair Empl. Prac. Cas. 105 (S.D. Tex. 1983)(discharge for poor work performance resulting from sexual harassment). This reasoning has been applied not only to situations where discriminatory or retaliatory practices have resulted in poor work performance, but also to cases where such practices have resulted in various forms of misconduct. See Ruth Miller, [11 Iowa Civil Rights Commission Case Reports 26, 44] (1990)(discharge of jailer for sleeping on the job found to be pretext where stress from discrimination and retaliation and discriminatory denial of shift change from midnight shift resulted in sleep loss); DeGrace v. Rumsfield, 21 Fair Empl. Prac. Cas. 1444, 1449 (1st Cir. 1980)(discharge for absenteeism resulting from racially hostile working environment); EEOC Decision No. 71-720, EEOC Decisions (CCH) S 6179 (1970)(discharge due to physical assault on supervisor resulting from racial harassment by supervisor). See also NLRB v. Vought Corporation, 788 F.2d 1378, (8th Cir. 1986)(discharge due to abusive language to supervisor resulting from warning given to employee who informed blacks that a white employee was being groomed to supervise a newly promoted black employee); Trustees v. NLRB, 548 F.2d 391, 393-94 (1st Cir. 1977)(discharge for repeated offensive behavior, including at one time brandishing scissors, where misconduct a response to employer hostility to employee's union activities); NLRB v. Mueller Brass Co.,

501 F.2d 680, 686 (5th Cir. 1974)(discharge for abusive outburst at supervisor on receiving suspension resulting from employer's anti-union bias); and NLRB v. M & B Headwear Co., 349 F.2d 170, 174 (4th Cir. 1965)(failure to rehire employee due to outburst of anger resulting from layoff due to union activities).

Dorothy Abbas, 12 Iowa Civil Rights Commission Case Reports 1, 21-22 (1994)(performance of personal work on city time resulted from employer's retaliatory reduction of duties), aff'd as modified sub nom City of Hampton v. Iowa Civil Rights Commission, No. 235/95-769, slip op. (Iowa September 18, 1996)(quoting Cristen Harms, XI Iowa Civil Rights Commission Case Reports 89, 129 (1992)discharge because employee lied to his employer as a result of retaliation inflicted by employer). *See also* Winbush v. State of Iowa, 69 Fair Empl. Prac. Cas. 1348, 1355, 1359 (8th Cir. 1995)(discharge for insubordination which resulted from racially hostile work environment for which employer was responsible); Avery v. Delchamps, Inc., 66 Fair Empl. Prac. Cas. 577, 577 (E.D. La 1994)(application of principle that "an employer cannot use an employee's diminished work performance as a legitimate basis for removal where the diminunition is the direct result of the employer's discriminatory behavior" in summary judgment decision where court had to assume that plaintiff stated a valid claim of racial harassment against employer and alleged discriminatory discharge was due to fight provoked by such harassment)(emphasis added); Tunis v. Corning Glass Works, 55 Fair Empl. Prac. Cas. 1655, 1661 (S.D.N.Y. 1988)(discharge due to "unfriendliness" and "disruptiveness" resulting from hostile environment of which employer was aware and did not remedy); . Broderick v. Ruder, 685 F. Supp. 1269, (D.D.C. 1988)(poor evaluations and threatened discharge due to deficient work performance resulting from sexually hostile environment for which employer was liable); Delgado v. Lehman, 43 Fair Empl. Prac. Cas. 593, 598, 600 (E.D. Va. 1987)(discharge due to diminished performance resulting from sexual harassment by employer); Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984)(discharge due to diminished performance resulting from religious harassment by employer).

26. The circumstances in the instant case do not reflect the kind of extreme situation where this rule does not apply. See Higgins v. Gates Rubber Co., 578 F.2d 281 (10th Cir. 1978)(victim of racial harassment who responded by striking offending employee with metal bar was properly discharged for assault with a deadly weapon); Edward D. Tillman, 13 Iowa Civil Rights Commission Case Reports 1995-1996 155, 170, 192 (victim of racial harassment responded by repeatedly slamming the harasser's head into a table until pulled off by supervisors-said he would have "finished him off" if not pulled off).

IV. REMEDIES:

27. Violation of Iowa Code section 216.6 and 216.11 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 *S* 216.15(8). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "An appropriate remedial order should close off 'untraveled roads' to the illicit end and not 'only the worn one.'" Id. at 771. In addition to the illustrative examples of remedial

action enumerated under Iowa Code section 216.15(8)(a), the Commission has the authority to require Respondents to develop and implement policies to prevent future instances of harassment. Lynch v. City of Des Moines, 454 N.W.2d 827, 835-36 (Iowa 1990)(development of educational program).

V. REMEDIES: BACK PAY:

28. The Commission has the authority to make awards of backpay. Iowa Code *S* now 216.15(8)(a). 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 or her damages. Diane Humburd, 10 Iowa Civil Rights Commission Case Rpts. 1, 9 (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 10 (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.

29. The burden of proof for establishing the interim earnings, including unemployment insurance payments, of the Complainant rests with the Respondent. Diane Humburd at 10 (citing 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 or unemployment insurance she is willing to concede. Diane Humburd at 10.

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

31. "Iowa Code section 601A.15(8) [now 216.15(8)] gives the Commission considerable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A [now 216]." 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)).

VI. REMEDIES: EMOTIONAL DISTRESS DAMAGES:

A. Legal Authority For and Purpose of Power to Award Damages for Emotional Distress:

32. "[D]amages for emotional distress are recoverable under our civil rights statute." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525 (Iowa 1990). A victim of discrimination is to receive "a remedy for his or her complete injury," including damages for emotional distress. Id. at 525-26.

33. The Iowa Supreme Court's observations on the emotional distress resulting from wrongful discharge are equally applicable to the distress resulting from the harassment and wrongful discharge in this case:

> [Such action] offends standards of fair conduct . . . the [victim of discrimination] may suffer mentally. "Humiliation, wounded pride and the like may cause very acute mental anguish." [citations omitted]. We know of no logical reason why . . . damages should be limited to out-of- pocket loss of income, when the [victim] also suffers causally connected emotional harm. . . . We believe that fairness alone justifies the allowance of a full recovery in this type of tort.

Niblo v. Parr Mfg. Co., 445 N.W.2d 351, 355 (Iowa 1989).

34. The emotional distress sustained by the Complainant is substantial. Since even mild emotional distress resulting from discrimination is to be compensated, it is obvious that compensation must be awarded here. Darrell Harvey, 11 Iowa Civil Rights Commission Case Reports 65, 79 (1994); Alice Peyton, 11 Iowa Civil Rights Commission Case Reports 98, 124 (1994); Tammy Collins, 11 Iowa Civil Rights Commission Case Reports 128, 137 (1994); Stacey Davies, 11 Iowa Civil Rights Commission Case Reports 143, 157 (1994); Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 73 (1990); Robert E. Swanson, 10 Iowa Civil Rights Commission Case Reports 36, 45 (1989); Ann Redies, 10 Iowa Civil Rights Commission Case Reports 17, 28 (1989). *See* Hy Vee , 453 N.W.2d at 525-26(citing Niblo, 445 N.W.2d at 356-57)(adopting reasoning that because public policy requires that employee who is victim of discrimination is to be given a remedy for his complete injury, employee need not show distress is severe in order to be compensated for it)).

B. "Humiliation," "Wounded Pride," "Anger," "Hurt," "Frustration," "Discomfort," and "Upset" Are All Forms of Compensable Emotional Distress:

35. **Among the many forms of emotional distress which may be compensated are "anger," "upset," "hurt,"** Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky.

1981); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-29 (1982)(citing Fraser and 121-129 Broadway Realty v. New York Division of Human Rights, 49 A.D.2d 422, 376 N.Y.S.2d 17 (1975)); *see also* Gaudry v. Bureau of Labor & Industries, 617 P.2d 668, 670-71 (Or. Ct. App. 1980); **"frustration,"** Gaudry, 617 P.2d at 670-71; *see also* Boals v. Gray, 577 F.. Supp. 288, 296 (N.D. Ohio 1983); **"discomfort,"** id., **"humiliation, wounded pride, and the like."** Niblo, 445 N.W.2d at 355. *See also* Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 571 (8th Cir. 1989)(upset and hurt feelings); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 550 (9th Cir. 1980)(upset).

C. Liberal Proof Requirements for Emotional Distress In Civil Rights Cases:

36. Emotional distress damages must be proven. Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980); United States v. Balistrieri, 981 F.2d 916, 931 (7th Cir. 1992). These damages must be and have been proven here, as in any civil proceeding, by a preponderance or "greater weight" of the evidence and not by any more stringent standard. Iowa R. App. Pro. 14(f)(6).

37. "Because of the difficulty of evaluating the emotional injuries which result from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries." Block v. R.H. Macy & Co., Inc., 712 F.2d 1241, 1245 (8th Cir. 1983). Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 570 (8th Cir. 1989); Phillips v. Hunter Trails Community Assn., 685 F.2d 184, 190 (7th Cir. 1982).

38. This reasoning is consistent with the holding of the Iowa Supreme Court:

> [O]ur civil rights statute is to be liberally construed to eliminate unfair and discriminatory acts and practices. [Citation omitted]. We therefore hold a civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct.

Hy-Vee , 453 N.W.2d at 526(emphasis added).

39. Medical testimony is not required in order to award damages for emotional distress. Hammond v Northland Counseling Center, (Sth Cir. 7/17/00); Kim v. Nash Finch, 123 F.3d 1046 (Bth Cir. 1997); *accord* Sanchez v. Puerto Rico oil Co.; 37 F.3d 712, 66 BNA PEP 148, (lst Cir. 1994); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1215 (6th Cir. 1996); Busche v. Burkee, 649 F.2d 509, 519 n. 12 (7th Cir. 1981); Franklin Publishing Co. v. Massachusetts Commission Against Discrimination, 519 N.E.2d 798, 49 BNA PEP 1251, 1252 (Mass. 1988); Brunson v. E&L Transportation Co., 441 N.W.2d 48, 56 ENA PEP 1587 (Mich. Ct. App. 1989); Reithmiller v. Blue Cross Clue Shield, 390 N.W.2d 227, 233-34 (Mich. App. 1986); *c.f. e.g.* Wilson v. General Motors Corp., 454 N.W.2d 405, 54 ENA PEP 680 (Mich. Ct. App. 1990) (distress damages awarded although no expert testimony); Moody v. Pepsi-Cola Bottling Co., 915 P.2d 201, 56 BNA PEP 1491 (6th Cir. 1990) (same). Although medical evidence is not a requirement for the award of damages for emotional distress, the Iowa Supreme Court has reduced an award

of $50,000 for emotional distress to $20,000 because there was a lack of medical evidence. City of Hampton v. Iowa Civil Rights Commission, 554 N.W.2d 532l, 537 (Iowa 1996).

D. Emotional Distress May Be Proven By Direct Evidence or Circumstantial Evidence:

40. Emotional distress may be proved by direct evidence. *E.g.* Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 571 (8th Cir. 1989)("[emotional distress] may be evidenced by one's conduct and observed by others."). *See* United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992)(plaintiff's testimony of humiliation cited as example of direct evidence of distress).

41. In this case there was direct evidence of the emotional distress caused Complainant by the retaliation and discrimination experienced by her. This evidence took the form of her testimony describing her distress and reactions to the discriminatory and retaliatory acts of the respondent. Although other evidence is also relied upon in this case to establish the distress caused by the Respondents, "[t]he [complainants'] own testimony may be solely sufficient to establish humiliation or mental distress." Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1273, 27 Fair Empl. Prac. Cases 487, 491 (8th Cir. 1981). *See also* Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977); Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. ' 15388 (N.D. Ill. 1981); Belton, Remedies in Employment Discrimination Law 415 (1992).

42. Emotional distress may also be established by circumstantial evidence. Tallarico v. Trans World Airlines, Inc., 881 F.2d at 571. *See* Howard v. Adkison, 887 F.2d 134, 139 (8th Cir. 1989)(damages may be proper because distress may be inferred from circumstantial evidence even where "the actual trial testimony contained no formal evidence of actual damage."); Sisneros v.. Nix, 884 F. Supp. 1313, 1344 (S.D. Iowa 1995)(same). *See also* Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d at 552 (race discrimination against Black male--distress inferred solely from the circumstances). Circumstances from which emotional distress may be inferred include economic loss, crying, and depression experienced by the Complainant.

43. Of course, both forms of evidence in this case must be weighed together when determining the existence, nature and extent of the emotional distress suffered by the complainant: "[Emotional distress] can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d 634, 636-37 (7th Cir. 1974)(quoted with approval in Blessum, 295 N.W.2d at 845 (Iowa 1980)). "[I]n determining whether the evidence of emotional distress is sufficient to support an award of damages, we must look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused that distress. . . . **The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action**; **consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress.**" United States v. Balistrieri, 981 F.2d at 932, 933 (emphasis added)(holding that distress damage awards to housing discrimination testers were justified despite the '"somewhat general and conclusory nature" of their testimony because "racial discrimination . . . . is the type of action that one could reasonably expect to humiliate or cause emotional distress to a person."). Since being told by one's employer that "I am racist, take it or

leave", being harassed, and being discharged due to race, national origin, and retaliation, are precisely those kinds of inherently degrading or humiliating actions from which distress may be inferred, the combination of those circumstances and somewhat conclusory testimony (weaker than the evidence in this case) will support an award of emotional distress damages. *See* id.

44. This approach is consistent with Iowa law, which provides that, even where "the express testimony of distress is not strong," Dickerson v. Young, 332 N.W.2d 93, 99 (Iowa 1983), the presence of other facts which "would inevitably have a strong impact on the emotions of an individual" are substantial evidence of emotional distress. Id.

45. The courts have also awarded damages for the distress to victims of discrimination who fight back "in a proper manner, in the courts" for the "the mental and nervous strain that litigants always undergo." Harrison v. Otto G. Heinzeroth Mortgage Company, 430 F.Supp. 893, 898 (N.D. Ohio 1977). Obviously, this principle applies equally well to litigants in the administrative process. *See* id.; 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 33 (1982); Brammer v. Lindquist, Slip op. at 15 (ICRC November 13, 2000)(Bohlken, ALJ).

E. Determining the Amount of Damages for Emotional Distress:

46.

> [D]etermining the amount to be awarded for [emotional distress] 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.

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)).

47. The decision of how much distress damages to award is, of necessity, a discretionary decision of the fact finder. *Eg.* Lynch v. City of Des Moines, 454 N.W.2d 827, 836 (Iowa 1990); Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 860 (Iowa 1973) ("Placing a dollar amount on [mental pain and anguish] is peculiarly a function of the jury"). The adequacy of the award in a particular case depends on the unique facts of that case. Lynch v. City of Des Moines, 454 N.W.2d 827, 836 (Iowa 1990)

48. Although awards in other cases have little value in determining the amount an award should be in another specific case, Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990), one source lists many examples of such awards, ranging from $500 to $150,000, for emotional distress in discrimination cases. *See e.g.* Belton, Remedies in Employment Discrimination Law 416 n.78 (1992)(listing awards in 19 cases; 17 of which were for $10,000 or over; 12 of which were for $20,000 or over); City of Hampton v. Iowa Civil Rights Commission, 554 N.W.2d

532, 537 (Iowa 1996)($20,000 for reduction in pay, hours, and harassment for making a civil rights complaint); McGrane v. Proffitt's, Case Number C 97-221-MJM (7-6-01 N.D. Iowa)($100,000 for termination based on sex supported only by Plaintiff and her husband's testimony); Moody v. Pepsi-Cola Bottling Co., 915 F.2d 201, 56 BNA FEP 1491 (6th Cir. 1990) ($150,000 for emotional distress caused by discharge based on age. No medical testimony was presented.); Foster v. Time Warner Entmlt Co., 250 F.3d 1189 (8th Cir. 2001) ($75,000 for retaliatory termination when only corroboration is by family members testifying to back pain, muscle stress, and stomach problems.) Brown v. Cox, ___F.3d ___ (8th Cir. 4-17-02)(011096)($50,000 emotional distress for constructive discharge even though evidence of plaintiff and daughter was 'hardly overwhelming, and there were no physical symptoms or treatment by psychologist.); Kucia v SE Ark.Community Action, 284 F.3d 944 (8th cir. 2002)(Affirming remittitur from 170K to $50,000 for race discrimination termination with minimal evidence of distress from plaintiff.); Moring v. Arkansas Dep't of Corrections, 243 F.3d 452, 456 (8th Cir. 2001) (A single incident of sex harassment supported a compensatory award of $50,000). While any award should be tailored to the particular case, one commentator has noted that "a $750 award for mental distress is 'chump change.' Awards must be made which are large enough to compensate the victim of discrimination adequately for the injury suffered." 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 60-61 (1982).

49. Regardless of whether they are characterized as direct or circumstantial evidence, numerous facts have been identified which may indicate the presence and severity of emotional distress. *See e.g.* 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 40-42 (1982). Undoubtedly, no complete listing of all such facts is possible. Nor could legal authority be found for each potentially relevant fact.

50. An award of damages for emotional distress may, however, 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). Nor need there be evidence of an effect on social activities. Marable v. Walker, 704 F.2d 1219, 1220 (11th Cir. 1983).

51. Nevertheless, the evidence of economic loss, involuntary unemployment, crying, the adverse effect of the discrimination on the Complainant's work, the number of persons exposed to the unlawful discrimination, the discrimination's occurrence in the presence of others, the abusiveness of the actions and language directed toward the Complainant, and her feelings of anger or frustration are among those factors in this case which indicate the existence of serious and substantial emotional distress justifying an award of the magnitude made in this case. *See* Blessum, 295 N.W.2d at 845 (Iowa 1980)(economic loss, effect on work); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988)(economic loss); Block v. R.H. Macy & Co., Inc., 712 F.2d at 1245 (unemployment and resulting loss); Rodgers v. General Motors Corp., 575 F. Supp. 12, 16 (W.D. Mich. 1982)(same); Aumiller v. University of Delaware, 434 F. Supp. 1273, 1310 (D. Delaware 1977)(same); Dickerson v. Young, 332 N.W.2d 93, 98 (Iowa 1983)(crying); Tallarico v. Trans World Airlines, Inc., 881 F.2d at 571 (crying); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d at 550, 552 (crying and economic

loss); Dorothy Abbas, 12 Iowa Civil Rights Commission Case Reports 1, 15-16, 24 (1994)(crying, economic loss, fear of economic loss); Kentucky Comm'n On Human Rights v. Barbour, 587 S.W.2d 849, 852 (Ky. Ct. App. 1979)(number of persons exposed to discrimination; number of times complainant exposed to behavior inducing embarrassment or humiliation; whether the acts of humiliation occurred in presence of others or otherwise resulted in public exposure; presence or absence of aggravating factors such as abusive language); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases at 40-42 (feelings of anger or frustration, effect on work, exposure to outrageous or abusive conduct; number of times complainant exposed to discrimination; whether discriminatory acts occurred in presence of others). *Cf.* Iowa Code *S* 96.2 (legislative recognition of the "crushing" burden of "involuntary unemployment"); Dobbs, Handbook on the Law of Remedies 530-31 & n.24 (1973)("The amount of the recovery is usually based on the severity of the actions and language used by the defendant.")(quoting Sutherland v. Kroger Co., 110 S.E.2d 716 (W.Va. 1959)).

52.

> 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 *S* 905). *[See also* Restatement (Second) of Torts *S* 905 (comment i).]

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 166 (1992). The severity and duration of distress, as well as other factors, were taken into account in making the damages award in this case.

F. Pre-Judgment and Post-Judgment Interest:

53. Pre-judgment 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 backpay due Complainant at any given time has been an ascertainable claim since the time she was discharged, pre-judgment interest should be awarded on those items. Such interest should run from August 12, 1999, the date of her discharge. The method of computing pre-judgment interest is left to the reasonable discretion of the Commission. Schei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 543 (2nd ed. 1989). 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).

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

G. Attorneys Fees:

55. The Complainant having prevailed, she is entitled to an award of reasonable attorney's fees. *See* e.*g.* Iowa Code section 216.15(8). 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).

H. Hearing Costs:

56. An administrative rule of the Iowa Civil Rights Commission provides, in relevant part, that: "If the complainant or the commission prevails in the hearing, the respondent shall pay the 'contested case costs' incurred by the commission." 161 IAC 4.7(1). "Contested case costs" include only:

> a. The daily charge of the court reporter for attending and transcribing the hearing.
> b. All mileage charges of the court reporter for traveling to and from the hearing.
> c. All travel time charges of the court reporter for traveling to and from the hearing.
> d. The cost of the original of the transcripts of the hearing.
> e. Postage incurred by the administrative law judge in sending by mail (regular or certified) any papers which are made part of the record.

161 IAC 4.7(3).

57. The above administrative rule follows the general rule in our jurisprudence that court costs are charged against the losing party. Dobbs, Handbook on the Law of Remedies 193 (1973). Since the Commission and the complainant have prevailed in this case against Respondents, an order awarding contested case costs is appropriate. The record should be held open so a bill of costs may be submitted after this decision becomes final. *See* Connie Zesch-Luense, 12 Iowa Civil Rights Commission Case Reports 160, 173 (1994).

DECISION AND ORDER:

IT IS ORDERED, ADJUDGED, AND DECREED that:

> A. The Iowa Civil Rights Commission and the Complainant, Roxana Sotomayor, are entitled to judgment because they have established that the prohibitions against race and national origin discrimination in employment and against retaliation, set forth in Iowa

Code sections 216.6 and 216.11, were violated by the Respondents Fast Photo and Horan Studio.

B. Complainant Sotomayor is entitled to a judgment, against Respondents Fast Photo and Horan Studio, of forty-one thousand one hundred fifteen dollars and sixteen cents ($41,115.16) in back pay for the loss resulting from her discriminatory and retaliatory discharge by Respondents.

C. Complainant Sotomayor is entitled to a judgment, against Respondents Fast Photo and Horan Studio, of ten thousand dollars ($10000.00) in compensatory damages for the emotional distress she sustained as a result the Respondent's discriminatory and retaliatory discharge and harassment of her.

D. Interest at the rate of ten percent per annum shall be paid by the Respondent s Fast Photo and Horan Studio to Complainant Sotomayor on her award of back pay commencing on the date payment would have been made if Complainant Schneider had remain employed with respondents and continuing until date of payment.

E. Interest shall be paid by the Respondents Fast Photo and Horan Studio to Complainant Sotomayor on the above award of compensatory damages for emotional distress at the rate of ten percent per annum commencing on the date this order becomes final, either by Commission decision or by operation of law, and continuing until date of payment.

F. 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 the parties cannot agree on a full stipulation to the fees, they shall so notify the Iowa Civil Rights Commission in writing. 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 the final order in this case, 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.

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

H. Respondents are assessed all hearing costs set forth in Conclusion of Law Number 55 and which were actually incurred in the processing of this public hearing. The precise calculation of costs shall be as shown on the bill of costs which is to be issued under the

executive director's signature after this decision becomes final. The record shall be held open for this purpose.

I. Respondents are hereby ordered to cease and desist from any further practices of race and national origin discrimination and retaliation for lawful opposition to discrimination, including but not limited to discrimination in discharge and through harassment.

J. Respondents shall post, within 30 days after the date of this order, in a conspicuous place at its location at Coralville, Iowa, in areas readily accessible to and frequented by employees, the notice, entitled "Equal Employment Opportunity is the Law" which is available from the Iowa Civil Rights Commission and the Equal Opportunity explaining their respective laws against employment discrimination

K. Respondents shall, within 60 days after the date this order, develop a written policy to prohibit race and national origin discrimination in employment and retaliation for lawful opposition to discrimination. This policy shall be subject to the approval of the Commission. In the event, in the sole judgment of the Commission's representative, agreement cannot be reached on the language of such policy, the version drafted by the Commission shall be adopted by the Respondents.

L. Respondents shall file a report with the Commission within 60 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs B through E and H through K inclusive of this order.

Signed this the 1st day of November 2002.

_____

DONALD W. BOHLKEN
Administrative Law Judge
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