BEFORE THE IOWA CIVIL RIGHTS COMMISSION

CP # 09-91-21519

KATHRINE S. MARTIN, Complainant,

and

IOWA CIVIL RIGHTS COMMISSION,

v.

NORTHEAST IOWA MENTAL HEALTH CENTER AND J. DES MCIVOR, EXECUTIVE DIRECTOR. Respondents.

SUMMARY[*]

This matter came before the Iowa Civil Rights Commission on the Complaint, alleging discrimination in employment on the basis of disability, filed by Kathrine Martin against the Respondents Northeast Iowa Mental Health Center and J. Des McIvor.

Complainant Martin alleges that the Respondents replaced her in the position of substance abuse counselor because of a perceived physical disability, cancer. Through her complaint, she alleges that she was diagnosed with cancer on May 2, 1991. On May 16, 1991, she underwent surgery for the cancer. During the time of treatment and recuperation, she alleged Respondent McIvor was initially supportive of her. He informed her that full benefits would be paid through June 12, 1991 and instructed her to do "everything the doctors say until you can return." On August 2, 1991, she was informed during a telephone conversation with McIvor that someone else had been hired to do her job. When she asked why, he allegedly stated that it was "because of your cancer." He also allegedly stated, "In two months or two years, it (the cancer) could return." Her doctors had, however, given her full permission to return to work. McIvor did offer Complainant Martin a few hours of work per week with traveling and no benefits, which she found to be unacceptable.

A public hearing on this complaint was held on June 7-8, 1994 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the City Council Chambers and the County Courthouse in Decorah, Iowa. The Respondents were represented by attorney Donald H. Gloe. The Iowa Civil Rights Commission was represented by Assistant Attorney General Teresa Baustian. The Complainant was represented by attorney David Stamp.

The Respondents submitted a trial brief on June 7, 1994. The Complainant's Brief was received on August 24, 1994. The Commission's Brief was received on August 25, 1994. The Respondents' Reply Brief was received on or about September 8, 1994.

[*] This summary is provided as an aid to understanding the decision. It is not part of the findings of fact and conclusions of law.

Complainant Martin proved her allegation of discrimination in employment because of a perceived disability of recurring cancer. The complainant was terminated effective July 16, 1991 during a 16 week leave for the treatment of cancer. She was not informed of her termination until August 2, 1991 when she had completed her treatment and was attempting to make arrangements to return to work effective August 19, 1991, by which time she was fully recovered.

The Complainant established her case through direct evidence of discrimination. On August 2nd, when she asked why she had been replaced, Respondent McIvor's response was "how do I know but that you'll get cancer in two months or two years again?" McIvor had also indicated to another employee that he was afraid that Complainant's cancer would return. To another he had indicated he would not hire anymore older employees because the older they get, the sicker they get.

The Respondents' reasons for their action were shown to be pretexts for discrimination. Respondents argued that Complainant would not have been terminated if she had provided a return to work date. The time she would have been able to return to work would have been only two weeks after the starting date of her replacement. The Respondents, however, never asked Complainant for such a date despite their frequent communications with her. Complainant had also informed Respondents of her illness and provided information indicating her treatment would end by August 1st. Under these circumstances, if her current absence, and costs associated with it, were the only considerations in Respondent's decision-making process, it would be more rational to expect Respondent to contact her and ask for a return to work date prior to hiring a less productive new employee.

Respondents also argued that her failure to ask the board of directors for a leave of absence extending beyond six weeks was a factor in her termination. However, Respondents had already informed her that she had a paid leave of absence through June 24th and an unpaid leave of absence thereafter. The six week period was already exhausted before June 24, 1991.

Finally, Respondents argued that the revenue losses associated with the time she was absent played a role in the decision. There are several problems with the computations of and assumptions underlying these loss estimates. However, the major problem is that the evidence shows that only two weeks of the sixteen weeks worth of revenue losses during her absence were avoided by replacing her with a less productive new hire who did not begin until August 5th. Also, Respondents' admission that they would not have replaced her if they had known of her return date indicates that they were willing to bear those costs. The only reason they did not know of such a return date is their failure to ask. This failure tends to confirm what the direct evidence shows, i.e that Respondents were concerned not only about her present absence, but future recurrence of cancer.

Remedies awarded include $16,833.86 in back pay and benefits and $15,000.00 in compensatory damages for emotional distress.

RULINGS ON OBJECTIONS AND MOTIONS:

A. Ruling on Objection to Conciliation Procedures:

1. Findings of Fact:

a. The Conciliation Process In This Case:

1. "Administrative Law Judge Don Grove determined on October 26, 1992, that Probable Cause existed to credit the allegations of disability discrimination." (Stipulation of Facts No. 11 hereinafter "Stip."). After this finding was made, the case was assigned to Carol Leach, a conciliator on the Commission staff, for conciliation. (Tr. at 375-76). The usual procedure followed by Ms. Leach is to review the investigative file in order to become familiar with the remedial and other issues of the complaint. (Tr. at 377-78). Ms. Leach then contacts the complainant and her attorney and formulates with them a proposal for settlement. A proposed conciliation agreement is drafted and transmitted to respondent. (Tr. at 383). After the transmittal of the proposal to the respondent, conciliation meetings may be held either in person, by telephone conference, or other means.(Tr. at 386).

2. On December 9, 1992, Ms. Leach sent a proposed conciliation agreement to the Respondent, (Tr. at 383, 389). Ms. Leach had several contacts with Respondent's counsel, by telephone and letter, discussing conciliation. (R. EX. No. 21, 22; Tr. at 383). Ms. Leach had formulated this proposal after first engaging in correspondence with the complainant and her counsel. This was done in order to assist the conciliator in fulfilling her role as an advocate who seeks a full remedy for the complainant. (R. Ex. # 22; Tr. at 383, 387). The Respondent surmised that the conciliator had met with the Complainant's counsel prior to formulating a proposal and that a conciliator is not a neutral party. Once the Respondent became aware of these facts, it refused to participate any further in conciliation. In his letter of December 11, 1992 to the Commission, "Because of this you leave us no choice other than to state pursuant to Section 601A.15(d) that the respondent is unwilling to continue with the conciliation." (R. EX. # 21)(emphasis added). (While this argument was not made on brief, Respondent stated in the letter that these procedures denied his client due process.) (R. EX. 21). In her response of December 16, 1992, Ms. Leach noted the respondent's refusal to continue with conciliation and asked him to contact her if she was in error with respect to that. (R.EX. 22). Two days later the Respondent confirmed they were not interested in further negotiation. (Tr. at 391).

b. Objection of Respondent:

3. At the outset of the hearing, the Respondents objected to the "entire proceeding commencing with the conciliation on the basis that the Commission failed to follow the statute by having a--specifically 216.15, by having a conference with the respondents before initiating conciliation." (Tr. at 5). The same objection was made on the Respondent's Prehearing Conference Form as follows: "The commission failed to follow the mandate of Section 216.15 of the Code of Iowa as it attempted to impose conciliation upon the Respondent without having a 'initial conciliation, (sic) meeting between the Respondent and the commission staff' pursuant to Section 216.15(3)(b) of the Code of Iowa.'"

c. Arguments of Respondent and Commission:

4. In it's response to these objections, which the Commission understood to focus on the method by which meetings were held, i.e. by telephone or letter instead of face to face in person meetings, the Commission argued that the legislature did not intend to limit the conciliation process to face to face meetings. (Commission's Brief at 7-8).

5. In its reply brief, the Respondent asserts that the question of whether the legislature intended for meetings to be in person or not is beside the point. (Respondent's Reply Brief at 14.) The Respondent's argument is that the legislature intended that the Commission should begin the conciliation process by formulating a position without any input from the complainant. The Commission's conciliator should then meet alone with the Respondent, "to present its own independent position and recommendations to remedy the situation to the Respondent in an initial conciliation meeting." (Reply Brief at 15). The Respondent argues that by communicating first with the Complainant or her counsel to ascertain what the Complainant desires in the way of a remedy, the Commission staff violated the intent of the legislature. "The statute does not say if the Complainant is represented by a lawyer, the Commission staff shall meet with said lawyer and tell the Respondent what the Complainant wants in order to start the conciliation proceeding. This relieves them of their responsibility to adopt a position on their own to endeavor to eliminate the unfair or discriminatory practice." (Reply Brief at 15).

2. Conclusions of Law:

a. Statutory Authority on Conciliation:

6. The relevant parts of the Iowa Civil Rights Act concerning conciliation are set forth below:

> d. The Commission staff must endeavor to eliminate the discriminatory or unfair practice by conference, conciliation, and persuasion for a period of thirty days following theinitial conciliation meeting between the respondent and the commission staff after a finding of probable cause. After the expiration of thirty days, the director may order the conciliation,conference, and persuasion procedure provided in this section to be bypassed when the directordetermines the procedure is unworkable by reason of past patterns and practices of the respondent, or a statement by the respondent that the respondent is unwilling to continue with the conciliation.
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> . . .
>
> 9. The terms of a conciliation agreement reached with the respondent may require the respondent to refrain in the future from committing discriminatory or unfair practices of the type stated in the agreement, to

> take remedial action as in the judgment of the commission will carry out the purposes of this chapter, and to consent to the entry in an appropriate district court of a consent decree embodying the terms of the conciliation agreement.

Iowa Code SS 601A.15 (3)(d) and .l5(9)(1991)(now codified as 216.15(3)(d) and .l5(9))(emphasis added). These sections became effective on January 1, 1979 after they were rewritten by amendment. Iowa Code Annotated 601A.15 (Supp. 1987)(historical note citing Acts 1978 (67 G.A.) ch. 1179, SS 11 to 19).

7. Prior to the l979 amendments, the statutory provisions concerning conciliation stated, in relevant part:

> 3. if . . . probable cause exists for crediting the allegations of the complaint, the investigating official shall promptly endeavor to eliminate such discriminatory or unfair practice by conference, conciliation, and persuasion.
>
> 5. In case of failure to satisfactorily settle a complaint by conference, conciliation, and persuasion, or in advance thereof if in the opinion of the investigating official circumstances so warrant, the official may issue and cause to be served a written notice together with a copy of such complaint . . . requiring the . . . respondent, to answer the charges of the complaint in writing within ten days after the date of such notice or within such extended time as the investigating official may allow.
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> 6. When the investigating official is satisfied that further endeavor to settle a complaint by conference, conciliation and persuasion shall be futile, the official shall report the same to the commission. If the commission determines that the circumstances warrant, it shall issue . . . a written notice requiring the respondent to answer the charges of the complaint at a hearing.

Iowa Code Annotated S 601A.14 (1975)(emphasis added).

b. Pertinent Administrative Rules On Conciliation in Effect as of December 1992:

8. The relevant Commission rules on conciliation in effect on December 1992 are set forth below. These rules became effective on January 13, 1988:

> 2.1(6)(d)....Whenever the offer of adjustment by a respondent is acceptable to the investigating official, but not to the complainant, the commission may close the case as satisfactorily adjusted. In a case which has been determined by the commission as having probable cause, the respondent's signature must be obtained before the case can be considered to be satisfactorily adjusted.

2.1(6)(e) The term "successfully conciliated" shall mean that a written agreement has been executed on behalf of the respondent, on behalf of the complainant, and on behalf of the commission, the contents of which are designed to remedy that alleged discriminatory act or practice and any other unlawful discrimination which may have been uncovered during the course of the investigation.

. . .

3.12(6) Conciliation. All cases that result in findings of probable cause shall be assigned to a staff conciliator for the purpose of initiating attempts to eliminate the discriminatory or unfair practice by conference, conciliation, and persuasion. When a conference is held, a synopsis of the facts which led to the finding of probable cause along with written recommendations for resolution will be presented to respondent.

3.12(7) Participants. Both the complainant and respondent shall be notified in writing of the time, date, and location of any conciliation meeting. The complainant may be present during attempts at conciliation.

3.12(8) Limitation on conciliation. Upon the commencement of conciliation efforts, the commission must allow at least 30 days for the parties to reach an agreement. After the passage of 30 days the executive director may order further conciliation attempts bypassed if it is determined that the procedure is unworkable.

3.12(9) Conciliation agreements. A conciliation agreement shall become effective after it has been signed by the respondent or authorized representative, by the complainant or authorized representative, and by a commissioner or executive director on behalf of the commission. Copies of the agreement shall be served upon all parties.

161 IAC SS 2.1(6)(d)-(e); 3.12(6)-(9)(1992)(now superseded by sections 3.13(6)-(10)(emphasis added).

c. Applicable Rules of Construction:

9. Administrative rules and statutes are interpreted and construed under the same rules. Motor Club of Iowa v. Dept. of Transportation, 251 N.W.2d 510, 118 (Iowa 1977). The polestar of all statutory construction is the search for the true intention of the legislature. Iowa National Industrial Loan Co. v. Iowa State Dept. of Revenue, 224 N.W.2d 437, 439 (Iowa 1974). All other rules of construction are designed to reach this goal and may even be disregarded if necessary to fulfill the legislature's intent. Id. The legislature intended that the Iowa Civil Rights Act is to be broadly construed to effectuate its purposes. Iowa Code S 601A.18 (1991).

10. In construing statutes strained, impractical, or absurd results should be avoided. Id. at 440. "Ordinarily, the usual and ordinary meaning is to be given the language used, but the manifest intent of the legislature will prevail over the literal import of the words used." Id. "Where language is clear and plain, there is no room for construction." Id. "It is necessary to look at the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." Id. "All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion." Id.

11. Phrases within a statute should be construed according to the context of the language. See Iowa Code S 4.1(38). When a statute is ambiguous, the following should be considered in determining the intention of the legislature: the object sought to be obtained by the statute, the circumstances under which the statute was enacted, the legislative history, the common law or former statutory provisions on the same or similar subjects, the consequences of a particular construction, the administrative construction of the statute and any preamble or statement of policy in the statute. See Iowa Code S 4.1(6).

d. Construction of Statutes Addressing Conciliation:

12. An examination of the pertinent statutes addressing conciliation in 1992 reveals that the legislature did not establish a detailed step by step procedure of how the conciliation process was to be implemented. See Iowa Code SS 601A.15 (3)(d), .15(9)(1991). The legislature did not, for example, prohibit contacts between the Commission conciliator and the complainant or her attorney prior to contacting the respondent or at any other time. See Iowa Code SS 601A.15 (3)(d) (1991). Nor did the legislature require that the initial conciliation meeting be limited to the participation of the conciliator and the respondent. See id.

13. The legislature did set forth some broad requirements concerning conciliation in the statute. See id. It is well recognized that such broad standards allow the agency to use its administrative expertise to regulate and administer the details necessary to fulfilling the legislature's intent. Cf. B. Schwartz, Administrative Law S 2.2 p. 44 (1991)("The courts . . . acknowledge the comprehensive regulation required today is too intricate and detailed for direct legislative processes").

14. Under the plain language of the statute, the legislature requires that "[t]he Commission staff must endeavor to eliminate the discriminatory or unfair by conference, conciliation or persuasion." Iowa Code S 601A.15(3)(d). See Iowa Code S 4.1(30)(b). It is equally clear and plain that the legislature also established a minimum time period during which such efforts must be made: "for a period of thirty days following the initial conciliation meeting between the respondent and the commission staff after a finding of probable cause." Iowa Code S 601A.15(3)(d). Once this time period has expired, the director may order a bypass of further conciliation if he determines "the procedure is

unworkable by reason of past patterns and practices of the respondent, or a statement by the respondent that the respondent is unwilling to continue with the conciliation." Id.

15. The import of the phrase "initial conciliation meeting between the respondent and the commission staff," when viewed with respect to the full context of the statute, Iowa Code S 4.1(38), is that the clock does not begin running on the time period until there has been a conciliation meeting involving, at a minimum, the respondent and the commission staff. And this would hold true regardless of whether there were prior contacts between the Commission conciliator and the complainant. To hold that this phrase prohibits prior communication with the complainant or limits participation in the meeting to the respondent and Commission staff is to give undue importance to an isolated portion of the statute. See Iowa National Industrial Loan Co, 224 N.W.2d at 440.

16. Both the amended statute and its predecessor require that efforts be made to conciliate the case. See Iowa Code S 601A.15(3)(d)(1991); Iowa Code Ann. S 601A.14(3), (5)-(6)(1975). The major impact of the 1979 amendments, insofar as the conciliation requirements addressed here are concerned, is (a) the establishment of the minimum time during which conciliation efforts with the respondent are to proceed before they may be ended, and (b) the commission no longer had complete discretion to avoid the conciliation process when "in the opinion of the investigating official circumstances so warrant." See Iowa Code Ann. S 601A.14(5)(1975); Iowa Code S 601A.15(3)(d)(1991). Neither the past nor present statute prohibit communication between the conciliator and the complainant prior to the initial conciliation meeting. See Iowa Code Ann. S 601A.14(5)(1975); Iowa Code S 601A.15(3)(d)(1991).

17. The administrative construction of the statute is evident from the rules in effect in 1992. These rules treat the conciliation process as an effort involving all three parties, i.e. the complainant, the respondent, and the Commission. See 161 IAC SS 2.1(6)(d)-(e); 3.12(6)-(9)(1992). The rules expressly allow the complainant to be present at all conciliation meetings. Id. at S 3.12(7).

18. To construe these statutes as prohibiting contact between the conciliator and the complainant prior to the initial conciliation meeting with the respondent would yield strained, impractical and absurd results which are to be avoided. Iowa National Industrial Loan Co., 224 N.W.2d at 440. The conciliator is expected to endeavor to eliminate the respondent's "discriminatory or unfair practice." Iowa Code S 601A.15(3)(d)(1991). It is anticipated that, as part of this effort, she will attempt to obtain "remedial action" necessary to "carry out the purposes of this chapter." Id. at 601A.15(9). Such remedies would include, for example, back pay, compensatory damages, and reinstatement or hiring for the complainant. Id. at 601A.15(8)(a). The conciliator cannot know what proposals to make on these issues without contacting the complainant. How would the conciliator possibly be able to accurately formulate a back pay offer, in a discharge or failure to hire case, without contacting the complainant and determining the amount of interim earnings the complainant received after the discriminatory act in order to deduct them from the back pay as required by Iowa Code section 601A.15(8)(a)(1)? How would the conciliator be able to estimate an amount for emotional distress damages without

contacting the complainant to ascertain what emotional impact the discrimination had on her? In failure to hire or discharge cases, the complainant is entitled to hiring or reinstatement as a remedy. But often, in these cases, the complainant either has new employment or the prior employment was so traumatic that he does not want reinstatement. It would be impractical to hold that the law requires the commission staff to attempt to persuade a respondent to agree to provide remedies which the complainant will refuse. It would be absurd to conclude that the legislature intended for the conciliator to be ignorant of the facts he needs to conciliate the case.

19. This legislation does not expressly address the question of whether or not the conciliator may contact the complainant prior to the respondent. However, the courts have recognized that when the legislature empowers an administrative agency to perform a certain task, "everything necessary to carry out the power and make it effectual and complete will be implied." Koelling v. Board of Trustees, 259 Iowa 1185, 1194, 146 N.W.2d 284 (1967). As the above examples illustrate, the conciliator may need to contact the complainant prior to communicating with the respondent in order to effectively and completely carry out the conciliation function. Therefore, the power to do so is implicit in the Act.

20. The major federal anti-discrimination agency, the Equal Employment Opportunity Commission (EEOC), is also required to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." 42 U.S.C. S 2000e-5(b). The EEOC's conciliators have long been expected to "confer with the . . . complainant before meeting or contacting the respondent to determine whether any events have occurred since the completion of the investigation which would affect the original remedial objectives (e.g. . . complainant's employment history and interest in hire/rehire, loss of earnings computation)." CCH, EEOC Compliance Manual S 62.4(a) (1993)(procedures revised effective October 1988)(emphasis added); See also EEOC Compliance Manual 62-2 (Order 915, 1/79 update).

21. It is implicit in the statute that the conciliator is not a neutral party. The conciliator's job is "to endeavor to eliminate the discriminatory or unfair practice" through completely voluntary means. See Iowa Code S 601A.15(3)(d)(1991). The conciliator is to act on the basis that there is, in fact, a "discriminatory or unfair practice" to eliminate. See id. Elimination of such practices is the principal purpose of the Act. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 170 (Iowa 1982). There is no authority in the statute empowering the conciliator to adjudicate the case or reevaluate the probable cause finding. See id. at S 601A.15(3)(d)(1991). As noted in the Commission's reporter of its contested case decisions:

> A conciliator tries to negotiate the best possible settlement on behalf of the Commission and the Complainant. The difference between mediation and conciliation is that the conciliator, unlike the mediator, is an advocate for the Commission. There having been a finding of probable cause that discrimination has occurred, it is the conciliator's duty to try to negotiate

not only a remedy for the Complainant, but also a change in any practices found to be discriminatory.

XI Iowa Civil Rights Commission Case Reports iv (1990-92)("Complaint Process").

22. Since conciliation is a completely voluntary, nonadjudicatory proceeding where the Commission has no power to deprive a party of property, see Iowa Code S 601A.15(3)(d)(1991), constitutional guarantees of due process are not implicated. See Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 306, 310 (Iowa 1979). "The requirements of due process apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property." Id. See also IOWA CONST. art. 1 S 9; SEC v. O'Brien, 467 U.S. 735, 742 (1984)(procedure which adjudicates no legal rights does not implicate due process).

23. Neither communicating with the complainant nor relaying the complainant's proposals to the respondent prevents the Commission staff from making an independent judgment as to whether a full remedy is offered by the respondent. Under the Commission's rules, the Commission may close a case as being satisfactorily adjusted if, in its independent judgment, it believes a full remedy is offered. 161 IAC S 2.1(6)(d)(1992).

24. It is unnecessary to address the methods by which conciliation meetings may be held (i.e. in person meetings or other methods) as Respondent indicated its objections were not directed to that concern. (Reply Brief at 14). However, it should be noted that the statutory obligation of a party to meet to negotiate is fulfilled, even though no meeting has occurred, when the opposing party responds to invitations to negotiate by refusing to meet. Cf. In Re Alabama Symphony Assn., 155 B.R. 556, 576 (N.D. Ala. 1993)(bankruptcy debtor's obligation to meet with union prior to rejection of collective bargaining agreement was fulfilled when union refused to meet with debtor). To hold otherwise under this statute would give a respondent veto power over the Commission's ability to take a case to public hearing. See Iowa Code S 601A.15(3)(d) (1991)(setting time at which conciliation may be terminated at 30 days after the conciliation meeting with the respondent). It would be unreasonable to hold that the requirement for a conciliation meeting, however "meeting" is defined, is not fulfilled whenever a meeting is not held because the respondent refuses to negotiate or participate in such a meeting.

3. Ruling:

25. The Commission's staff acted in accordance with the law in its conciliation efforts with respect to all the actions objected to by Respondent. The Respondent also informed the Commission during the conciliation process that it was "unwilling to continue with the conciliation." Respondent's objection, therefore, is overruled.

B. Ruling on Motion to Dismiss:

1. At the close of the hearing, the Respondents made a motion for dismissal. (Tr. at 393). This motion was based on the argument that the Commission had failed to carry its burden of persuasion because (a) the statute provides that the case in support of the complaint shall be presented by the commission's attorney, (b) the burden of proof is on the Commission, (c) the evidence was introduced through the complainant's attorney, not the Commission's attorney, (d) this evidence was not formally adopted by the Commission's attorney, and, therefore, (e) the Commission failed to met its burden of persuasion because evidence was not presented by its attorney. (Tr. at 393-94).

2. The statutory authorities relied upon by the Respondent are Iowa Code sections 216.15(6)(1993)(formerly 601A.15(6)) and 216.15(7)(1993)(formerly 601A.15(7)). These sections provide:

> 6. The case in support of such complaint shall be presented at the hearing by one of the commission's attorney's or agents. The investigating official shall not participate in the hearing except as a witness nor participate in the deliberations of the commission in such case.
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> 7. The hearing shall be conducted in accordance with the provisions of chapter 17A for contested cases. The burden of proof in such a hearing shall be on the commission.

Iowa Code S 216.15(6), (7) (1993).

3. While the Respondent emphasizes the provisions concerning the presentation of evidence by the commission's attorney's or agents and the burden of proof being on the commission, Iowa Code S 216.15(6), (7), it neglects the provision providing that the "hearing shall be conducted in accordance with the provisions of chapter 17A [the Iowa Administrative Procedures Act] for contested cases." Iowa Code S 216.15(7). It is important to note that this latter provision was added by the 1979 amendments. Acts 1978 (67 G.A.) ch. 1179, S 15).

4. This amendment requiring compliance with the Iowa Administrative Procedures Act (IAPA) provisions for contested cases replaced four subsections of the Iowa Civil Rights Act setting forth hearing procedures. Acts 1978 (67 G.A.) ch. 1179, S 15. One of the stricken provisions provided that the complainant might be allowed, at the discretion of the hearing officer, to intervene and present evidence at the hearing. Iowa Code Ann. S 601A.14(8)(1975). The effect of the amendment, however, was to recognize that the complainant (as well as the Commission and respondent) had a right to an "[o]pportunity . . . to respond and present evidence and argument on all issues involved and to be represented by counsel." Iowa Code S 17A.12(4), "in accordance with the provisions of chapter 17A for contested cases." Iowa Code S216.15 (7) (1993). It is inherent in this statute that all three parties, the Commission, the Complainant, and the Respondent, also have the right to present evidence by the introduction of exhibits and the examination of witnesses. See Iowa Code S 17A.12(4). After the amendment, the Complainant's

opportunity to present evidence was not subject to the discretion of the hearing officer. See id;.Acts1978 (67 G.A.) ch. 1179, S 15.

5. This right would be rendered meaningless, however, if the evidence presented by the complainant were not to be considered in determining whether the Commission had met its burden of proof. This absurd result which would be contrary to the legislature's intent in giving parties the right to present evidence, Iowa Code S 17A.12(4), requiring the record to include "[a]ll evidence received or considered," id. at S 17A.12(6)(b), requiring findings of fact to be "based solely on evidence in the record and on matters officially noticed in the record." id. at S 17A.12(8), and requiring reversal or other corrective action on judicial review, if the decision is "unsupported by substantial evidence in the record . . . when that record is viewed as a whole." Id. at 17A.19(8)(f)(emphasis added). There is no statute or other legal authority requiring the Commission in its prosecutorial capacity to formally adopt the evidence in the record introduced by any other party, whether complainant or respondent, before that evidence can be considered in deciding whether the Commission has met its burden of proving discrimination.

6. Finally, the statute requiring the Commission's attorneys or agents to present evidence in support of the complaint, Iowa Code S 216.15(6), is a directory, not a mandatory, statute. The difference was explained in Foods, Inc. v. Iowa Civil Rights Commission:

> Mandatory and directory statutes each impose duties. The difference between them lies in the consequence for failure to perform the duty. Whether the statute is mandatory or directory depends upon legislative intent. When statutes do not resolve the issue expressly, statutory construction is necessary. If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute, but is designed to assure order and promptness in the proceeding, the statute is ordinarily directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.

Foods, Inc. vs. Iowa Civil Rights Comm., 318 N.W.2d 162, 170 (Iowa 1982)(quoting Taylor v. Dept. of Transportation, 260 N.W.2d 521, 522-23 (Iowa 1977)).

7. Iowa Code subsection 216.15(6) does not expressly state whether it is directory or mandatory. The subsection has remained intact from the time when the complainant had no statutory right to present evidence and the Act made no provision for attorney's fees or monetary remedies beyond back pay. See Iowa Code Ann. SS 601A.14 (7), (8), (12) (1975). It was understood that it might be difficult for a complainant to retain counsel if his fees were to be paid out of the limited damages then available. See Bonfield, A., State Civil Rights Statutes: Some Proposals, 40 Iowa L. Rev. 1067, 1113 (1964)(noting difficulty of retaining plaintiff's counsel in civil rights action due to limited damages--the influence of this article on the content of the Iowa Civil Rights Act was recognized in United States Jaycees v. Iowa Civil Rights Commission, 427 N.W.2d 450, 454 (Iowa

1988)). This provision, therefore, helps to assure order and promptness in the public hearing in two ways. First, by assigning to Commission attorneys or representatives the task of presenting evidence in support of the complaint, the statute avoids the confusion of proceedings where pro se complainants would be required to attempt to present the evidence themselves. Second, it resolved the question of whether the Commission could properly present evidence as a party acting in the public interest at its hearings. Cf. Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District, 222 N.W.2d 391, 395 (Iowa 1974)(local civil rights commission acts as plaintiff on behalf of the public interest in hearings before the agency). Of course, the provision still serves both purposes in those cases where complainants are not represented by counsel and the second purpose where evidence is presented by both the Commission's and complainant's counsel.

8. Nonetheless, subsection 216.15(6) is subsidiary to the principal purpose of the Act, "to eliminate unfair and discriminatory practices in . . . employment," Foods, Inc., 318 N.W.2d at 170 (quoting 1965 Session, 61st G.A., ch. 121). That purpose can be served equally well by the presentation of evidence either by the complainant's counsel or the Commission's counsel. There is no showing that Respondent has been prejudiced by the Complainant's exercise of her statutory right to present evidence or by any failure of the Commission's counsel to do so. See id.

9. The motion to dismiss is denied.

D. Ruling on Whether Question Requests Evidence Which is Irrelevant, Immaterial or Incompetent:

1. The Respondent objected to the following question, which was asked of Complainant Martin, on the grounds that it was irrelevant, immaterial and incompetent: "Q. What was your understanding of what John [Bandstra, a therapist employed by Respondent who worked in Oelwein] was supposed to be doing as far as keeping Northeast Iowa Mental Health Center informed of your progress?" (Tr. at 31).

2. As a general rule, "administrative agencies are not bound by technical rules of evidence." Hamer v. Iowa Civil Rights Commission, 472 N.W.2d 259, 262 (Iowa 1991). The Commission may rely on "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs." Iowa Code S 17A.14(1). However, "[i]rrelevant, immaterial, or unduly repetitious evidence should be excluded." Id.

3. The witness here was competent to testify as to her own understanding of what Mr. Bandstra was supposed to be doing with respect to keeping the Northeast Iowa Mental Health Center informed of her progress. Therefore the objection as to competency is overruled.

4. The question asks for relevant information which tends to "make the existence of [a] fact of consequence to the determination of the [contested case] more or less probable than it would be without such evidence." Iowa R. Evid. 401 (definition of relevant

evidence). The fact is the complainant's understanding of Bandstra's role in keeping the Respondents informed of her progress with respect to her cancer surgery and recovery. This has some bearing on the question of whether respondent was kept informed of the progress of her illness. The question also requests material evidence as it is pertinent to that issue. BLACK'S LAW DICTIONARY 881 (5th ed. 1979)(citing Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 863 (definition of material evidence)). The objections to materiality and relevancy are also overruled.

E. Ruling on Other Concerns Raised on Brief:

1. There are some other concerns with Commission procedures raised on Respondent's Reply Brief which should be addressed although they are not dispositive. (Reply Brief at 13-14). Respondents seem to suggest that the complainant is being represented by two counsel, her attorney and the assistant attorney general, both of whom were allowed to examine witnesses. Respondents feel this is unfair and contrast this situation with that in trial court where "a party may employ as many attorneys as he wants . . . but . . . only one of them may question any one witness and they may not take turns questioning that witness." (Reply Brief at 13-14). The basic misunderstanding here is the failure to realize that there are two "plaintiffs" in this proceeding, not one. The first is the Commission operating in its prosecutorial capacity, on behalf of the public interest, as the party with the burden of proof. See Iowa Code S 216.15(6), (7); Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District, 222 N.W.2d 391, 395 (Iowa 1974). By definition, the burden of proof can only be imposed on an entity who is a party. See BLACK'S LAW DICTIONARY 178 (5th ed. 1979)("burden of proof"). In accordance with the statutes, it is represented by an assistant attorney general. Iowa Code SS 13.2, 13.7. The second is the Complainant, represented by her counsel under Iowa Code S 17A.12(4), who is protecting her statutory and due process property "right not to be discriminated against because of her [disability]." Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 305, 310 (Iowa 1979). As in civil court proceedings, each party is entitled to examine or cross-examine witnesses, as required by due process. See Koelling v. Board of Trustees, 259 Iowa 1185, 1197, 146 N.W.2d 284 (1967).

2. Relying only on an article which cites no legal authority, McKinley, The President's Letter, 54 The Iowa Lawyer 4 (February 1994), Respondents argue that the combination of investigative, probable cause, and adjudicative functions within an administrative agency is unfair. The Iowa Supreme Court, however, has held for almost thirty years that "[a] 'fair day in court' is not defeated by the fact the hearing is before the same administrative agency which lawfully conducted a prehearing investigation or preferred charges." Cedar Rapids Steel Transportation Inc. v. Iowa State Commerce Commission, 160 N.W.2d 825, 836 (Iowa 1968). The Iowa Supreme Court, the United States Supreme Court, and the two leading legal treatises on administrative law are all in agreement that the general combination of investigative, probable cause, prosecutorial, and adjudicative functions within an agency does not violate due process. See e.g. id.; Board of Dental Examiners v. Hufford, 461 N.W.2d 194, 200 (Iowa 1990); Hartwig v. Board of Nursing, 448 N.W.2d 321, 323-24 (Iowa 1989); Wedergren v. Board of Directors, 397 N.W.2d 12, 17-18 (Iowa 1981); Withrow v. Larkin, 421 U.S. 35, 53, 56-58 (1978); B. Schwartz,

Administrative Law S 6.22, p. 356 (1991); 3 K. Davis, Administrative Law Treatise (1980) 384 (citing Withrow at 53). The combination of prosecutorial and adjudicative functions in the same individual may violate due process, Wedergren, 307 N.W.2d at 18, but such combination cannot happen here. Iowa Code S 17A.17(3). Also, the only significance of the probable cause finding in this hearing is that it is a statutory prerequisite to the holding of the hearing. Iowa Code S 216.15(3).

FINDINGS OF FACT:

I. JURISDICTIONAL AND PROCEDURAL FACTS:

A. Stipulated Facts:

1. The parties stipulated to certain procedural and jurisdictional facts:

8. The Complainant, Kathrine S. Martin, filed a verified complaint with the Iowa Civil Rights Commission on September 20, 1991, alleging a violation of Iowa Code Chapter 601A (renumbered as Chapter 216 in the 1993 Iowa Code) by discrimination on the basis of age, sex, and perceived physical disability which filing was within the statute of limitations.

9. A true copy of the verified complaint was promptly served by certified mail upon the Respondents on September 26, 1991.

10. The investigation of the complaint was completed, with the investigator recommending a finding of No Probable Cause with respect to the allegations of age and sex discrimination and probable cause as to the allegation of discrimination on the basis of disability discrimination.

11. Administrative Law Judge Don Grove determined on October 26, 1992, that Probable Cause existed to credit the allegations of disability discrimination.

12. The Respondents were notified of the determination on October 28, 1992, by certified letters No. 32,544 and No.. 32,545.

13. The Executive Director of the Commission, Don Grove, recommended bypassing further conciliation on January 3, 1994; Sally O'Donnell, a Commissioner of the Iowa Civil Rights Commission, made a determination on January 11, 1994, to bypass conciliation and proceed to public hearing. This determination is evidenced by a Report to the Commissioner.

14. The Respondents were notified that conciliation had failed on January 27, 1994.

(Stipulation of Facts).

B. Subject Matter Jurisdiction:

2. The complaint allegation which was the subject of this hearing was discrimination in employment on the basis of "perceived physical disability." (Stip. No. 8; Notice of Hearing). Specifically, Complainant alleges that the Respondents replaced her in the position of substance abuse counselor because of a perceived physical disability, cancer. This is a sufficient allegation to bring the complaint within the subject matter jurisdiction of the Commission.

C. Timeliness:

3. The parties have stipulated that the complaint was timely filed. (Stip. No. 8).

D. Jurisdictional Prerequisites:

4. The parties have stipulated that the complaint was investigated, that probable cause was found, that the Respondent was notified that conciliation had failed, and that the Executive Director and a Commissioner determined to bypass further conciliation and proceed to public hearing. (Stip. Nos. 10-14). The Respondent's objections to conciliation procedures followed in this case have been overruled. Notice of Hearing was issued on March 11, 1994. (Notice of hearing).

II. BACKGROUND:

A. Background of Complainant:

5. The Complainant, Katherine Martin was hired by Respondent Northeast Iowa Mental Health Center (NEIMHC) as a full time substance abuse counselor effective March 12, 1990. (CP. EX. 1; R. EX. 9; Tr. at 13). (Exhibits marked "plaintiff's exhibit" or "petitioner's exhibit" or "exhibit" are referred to here as "CP. EX." for "complainant's exhibit". All respondent's exhibits are so marked). Her duties in that position involved evaluating clients, teen education, chemical dependency group, adult group, individual counseling sessions, and writing progress notes and other necessary paperwork. (Tr. at 16). She mainly worked out of the Oelwein office of NEIMHC. (Tr. at 16-17).

6. On April 25, 1991, the Complainant had a biopsy done. (Tr. at 17-18). On May 1, 1991 she learned that she had cancer. (Tr. at 18). The tests showed that she had cancer of the floor of her mouth. (Dr. Vega deposition, hereinafter "Vega dep." at 5; CP EX. 2).

7. The Complainant had taken some time off work for the biopsy. (Tr. at 21-22). Therefore, her last full day of work before her cancer surgery was April 24, 1991. (Stip. No. 4).

8. On May 9, 1991 the Complainant underwent outpatient surgery. (CP. EX 2; Tr. at 22-23). This surgery involved using various apparatus to visually examine the larynx, the esophagus, and bronchial tubes of the lungs. Multiple biopsies of the floor of the mouth were also taken. (CP. EX. 2). On May 16, 1991, the Complainant underwent inpatient surgery. (CP. EX. 2; Tr. at 23). This was described as "a floor of mouth resection and bilateral supraomohyoid neck dissections." (CP. EX. 2). "Resection" refers to the "excision of a segment or a part." Stedman's Illustrated Medical Dictionary 1220 (5th Unabridged Lawyers Ed. 1982). "Dissection" refers to the act, in an operation of "separat[ing] different structures along natural lines by dividing the connective tissue framework." Id. at 415. The surgery was serious enough that, for fourteen days in the hospital, Complainant Martin was not able to speak due to the insertion of a "trach tube." (CP. EX. # 1; Tr. at 31). On May 30, 1991, Complainant was released from the hospital. (Tr. at 27).

9. After a healing period, for her surgery, Complainant Martin began radiation therapy on June 14, 1991. This consisted of repeated treatments of 45 seconds of radiation to the very front of Complainant's face, mouth and neck and an additional 30 seconds on both sides. This treatment burns out both healthy and cancerous tissue resulting in a significant amount of pain and other adverse reactions to the treatment. (CP. EX. 2; Tr. at 28). This six and one-half week treatment was undertaken because she had a residual tumor at the floor of the mouth and at one lymph node. (Vega dep. at 6). Because of her difficulty in tolerating the treatment, it was interrupted, beginning July 5th, for five days to allow her mouth to heal and then resumed. Her radiation treatment ended on July 30, 1991. (Vega dep. at 7, 8; CP. EX. 2; Tr. at 28). A person undergoing this type of treatment would not be able to engage in their usual work. (Vega dep. at 6). Complainant was unable to work from April 29, 1991 through August 19, 1991, at which time she was given a complete release to return to work from her treating physicians. (Stip. No. 4). Official notice is taken that this period extended for a total of sixteen (16) weeks. Fairness to the parties does not require that they be given the opportunity to contest this fact.

10. Complainant Martin's sick leave and vacation benefit days were exhausted by noon on May 29, 1991. (R. EX. # 10; Tr. at 180, 188-89). J. Des McIvor decided to exercise his prerogative as Executive Director and extend Complainant's benefits and salary until June 24, 1991. (CP. EX. 1, 6; Tr. at 99-100, 166-68, 276-77, 339). This action is consistent with Complainant's admission in her complaint that the Respondents were initially supportive of her. (Notice of Hearing). She was also informed on June 5th that, after June 24, 1991, she would be on a leave of absence without pay, but NEIMHC would pay one half of her single medical policy. (CP. EX. 1).

11. On August 2, 1991, Complainant Martin telephoned J. Des McIvor, her supervisor and executive Director of NEIMHC in order to confirm a meeting scheduled for August 12, 1991 to discuss her return to work. (Tr. at 44-45, 334, 336). It was during this conversation that Mr. McIvor first informed her that she may not have her old job to return to and that he had hired someone else. (Tr. at 45-46). At the meeting on August 12th, Complainant Martin was informed by McIvor that "she has no job at the current time." (CP. EX. # 1-JDM dictation of 8/13/91). She was also offered three alternatives by

McIvor: (1) Unemployment insurance, (2) Disability insurance, and (3) Part-time employment wherein, at least initially, she could only be assured of employment at the rate of about four hours per week with no benefits such as insurance. (CP. EX. # 1-JDM dictation of 8/13/91; Tr. at 49-51, 104, 107, 297, 330-331, 352). There are other aspects of the August 2nd and 12th conversations which will be discussed later. The Complainant elected to file for unemployment insurance as she could not survive on four hours per week of employment and was not eligible for disability insurance, as she was not actually disabled. (CP. EX. 1; Tr. at 49-50, 52). She filed on or about August 18, 1991. Her unemployment insurance was not contested by NEIMHC. (CP. EX. 1).

12. "The Complainant, Kathrine S. Martin, was rehired by the Respondent, Northeast Iowa Mental Health Center, on August 25, 1992, as a substance abuse counselor. She is still employed in that capacity and has no disabilities which interfere with her performance of the work." (Stip. No. 1).

B. Background of Respondents:

13. "The Northeast Iowa Mental Health Center is a private, non-profit community mental health center organized specifically for the purpose of providing outpatient mental health and substance abuse services to a defined catchment area." (R. EX. 16, 17). In 1991, this area included seven counties in northeast Iowa. (R. EX. 16, 17). The main office is in Decorah with a branch office in Oelwein. (R. EX. 17). The NEIMHC has an elected policy making board of directors composed of members from the participating counties. (Tr. at 216). The board meets annually. (Tr. at 217).

14. The NEIMHC administers both a mental health component and a substance abuse component. The two programs are funded differently and have different standards. (Tr. at 212).

15. The duties of a substance abuse counselor begin with doing intake assessments of clients. This is an assessment of the client's social history, substance abuse history, legal history, psychiatric history, health history, and financial history. (Tr. at 230). The counselor also is involved in individual and group counseling. (Tr. at 232). Approximately 60 per cent of a counselor's time is spent in direct patient contact activities such as assessment and counseling. The remaining 40 per cent of their time is spent on such activities as filling out paperwork, conferring with probation officers and meeting the needs of referral sources. (Tr. at 231).

16. J. Desmond McIvor has been executive director of the Northeast Iowa Mental Health Center since 1967. (Tr. at 208). Mr. McIvor also practices his profession as a psychiatric social worker who sees patients. (Tr. at 210). It is his responsibility to hire and discharge employees at NEIMHC. There are, however, limitations on his authority to discharge non-probationary employees which are described more fully below. (CP. EX. # 6; Tr. at 271).

17. Under the personnel manual, professional staff employees are under a probationary period for the first six months. Professional staff employees "may be discharged during the six (6) . . . month probationary period for any cause deemed worthy by the Executive Director. The grievance process is not available to employees on probation." (CP. EX. # 6; Tr. at 310).

18. Pertinent personnel manual provisions governing the discharge of full time staff who are no longer probationary employees state:

> Full time staff who have passed their probationary period and for justifiable reasons are no longer able to maintain a satisfactory evaluation of job performance relating to attitude, dependability, quality of work, quantity of work, job knowledge, or insubordination will be approached by their immediate supervisor, whether it be the Executive Director or the Assistant to the Director, and informed of their poor performance in writing. Part of this communication will indicate that another evaluation will be made. This will be documented in memo form and placed in the employee's personnel folder.
>
> If the performance continues to be poor, the employee can be asked to resign by the Assistant to the Director or the Executive Director. If the employee refuses to resign, the Executive Director or the Assistant to the Director is to complete a written evaluation that is to be shared with the employee and sent to the Personnel Committee of the Board with recommendations for the employee to be terminated under the rules and regulations described previously in the personnel policies. The employee may then request a hearing with the Personal Committee or, if necessary, with the full Board.

(CP. EX. # 6).

19. Pertinent leave provisions provide:

> XII. VACATIONS
>
> . . .
>
> Center Absence Clause
>
> A Center employee shall not be absent from work longer than six (6) consecutive weeks unless approved by the Board of Directors in advance. No combination of holidays, vacation, leaves or interpretation of any other personnel policy items, or past Center policy items may be used to exceed the six (6) consecutive week restriction unless approved by the Board of Directors. The only exception is the Maternity Leave policy. (Section XIV).

XIII. SICK LEAVE

Sick leave with full pay is allowed to all full-time employees when they are incapacitated for duty due to illness or injury. Sick leave is allowed on the basis of one (1) working day per mouth or twelve (12) per year of service. Sick leave cannot be taken until one month of continued service is completed.

Employees shall be allowed to accumulate a total of twenty (20) days of sick leave. Any accumulated sick leave in excess of 20 days shall accumulate as "permanent disability" leave up to a total of seventy (70) working days. Any accumulated sick leave beyond the 20 working days and 70 permanent disability days shall be forfeited.

Permanent Disability

In the event an employee is found to be permanently disabled, as diagnosed by a physician, the employee shall be paid during the duration of his/her accumulated permanent disability to the extent of his/her accumulated permanent disability leave to a maximum of 70 days as described above.

For the purpose of this policy, permanent disability means that because of injury or sickness, the employee is completely prevented from engaging in any occupation for which he/she is suited by education, training, or experience. The employee must be under a physician's care during this time.

Additional Guidelines

In case of absence due to illness in excess of three (3) working days, evidence of medical treatment may be required before a return to work is authorized or before payment of such absence is authorized.

In cases of continued or repeated periodic absence due to illness, the Executive Director may require evidence of professional care and treatment.

In cases where the duration of illness exceeds the allotted time for leave, further leave may be granted by the Executive Director.

It is the employee's responsibility to report his/her absence due to illness as soon as possible. Unless otherwise directed, the employee shall notify his/her immediate supervisor.

. . .

XV. ABSENCE FROM WORK WITHOUT PAY

> Leaves of absence are not encouraged by the Center because of problems arising regarding adequate coverage during periods when essential personnel are absent. Under unusual circumstances, however, approval may be given by the Executive Director for such absences. Employees desiring leaves of absence should make application as far in advance of the time desired as possible in order to provide adequate time for administrative consideration. Vacation and sick leave do not accrue during the day or days of leaves of absence without pay.

(CP. EX. # 6)(emphasis added).

20. During the course of Complainant Martin's absence, the NEIMHC hired a new substance abuse counselor, Allen Ekholm, for the Oelwein office. Mr. Ekholm began work on August 5, 1991. (CP. EX. 3; Tr. at 192-93, 201, 272, 288). The offer of employment was extended to him by a letter from J. Des. McIvor dated July 10, 1991. It was accepted by his signing and returning a copy of the letter on July 12, 1991. The letter was received by NEIMHC on July 16, 1991. (CP. EX. 3; Tr. at 193). Mr. Ekholm had interviewed with NEIMHC over a two or three month period of time beginning in May 1991, after responding to an advertisement placed by McIvor on May 6th. (CP. EX. 5; Tr. at 192, 271-72). When McIvor sent Mr. Ekholm the letter of July 10th, he knew he was hiring Ekholm to replace Complainant Martin. (Tr. at 288, 329).

III. CREDIBLE DIRECT EVIDENCE IN THE RECORD DEMONSTRATES THAT THE COMPLAINANT WAS REPLACED BECAUSE OF A PERCEIVED PHYSICAL DISABILITY:

A. Respondent J. Des McIvor, Acting as Executive Director of the Respondent NEIMHC, Perceived Complainant Martin to Be Physically Disabled:

1. This Complaint is Concerned With An Allegation of Discrimination on the Basis of Perceived Disability, Not Actual Disability:

21. The parties stipulated that: "The Complainant was never permanently disabled, but was merely unavailable for work until she completed her treatment and therapy." (Stip. No. 2). This stipulation is consistent with the complaint which alleges discrimination on the basis of perceived physical disability as opposed to an actual physical disability during the time she was absent due to treatment of her cancer in 1991. The claim is that cancer occurring at a future date was perceived as a disability The only individual alleged to have this perception was J. Des McIvor, Executive Director of NEIMHC. There is no claim based upon discrimination due to temporary disability. The allegation concerns a perceived disability which may occur or recur over a period of months or even years. (Notice of Hearing).

2. Complainant Martin's Testimony Concerning Her Conversations With Respondent McIvor on August 2 and 12, 1991 Is More Credible and Provides Direct Evidence of Discrimination:

22. There is substantial, credible direct evidence that J. Des McIvor did perceive Complainant Martin to be physically disabled. During their August 2, 1991 telephone conversation, Complainant Martin asked Mr. McIvor if she still had a job, as he had made very little comment during the conversation. He replied "You may not." (Tr. at 45). She asked what was going on. McIvor stated "I've hired somebody else." Martin replied, "You hired somebody else to do my job? Its about the time that I'm going back to work." (Tr. at 46). McIvor then responded, "How do I know but that you'll get cancer in two months or two years again?" (Tr. at 46, 106). He stated he had to hire somebody. (Tr. at 106).

23. Taken in the total context of the conversation, this remark is an explanation as to why a replacement was hired. Martin then commented that she could also cross the street and get hit by a car. She finally confirmed she would meet with him on the 12th, as there was nothing further to say. (Tr. at 46).

24. On August 12, 1991, as previously noted, Complainant Martin did meet with Respondent McIvor. It is undisputed that, during that meeting, one of the options given Martin was to file for disability insurance. See Finding of Fact No. 11.

24A. There is no evidence in the record to indicate that, on August 2nd or 12th, McIvor believed that Complainant Martin had not recovered from the cancer she was treated for. His notes made concerning the conversation of August 12th refer to "her recovery from cancer." (CP. EX. 1). The concerns he expressed on August 2nd dealt with future occurrences of cancer. See Finding of Fact No. 22.

25. Complainant Martin's demeanor and testimony indicated that her recollection of the August 2, 1991 telephone conversation was clear, definite, and certain. (Tr. at 46). She did not have to rely upon her journal notes or other documentation to refresh her recollection on this matter. (Tr. at 44). Her testimony is also credible because it is consistent with her statements made in her complaint on September 18, 1991. The complaint, sworn before a notary public, states that on August 2, 1991, "Respondent stated he had hired someone to do my job. In asking him why he stated that it was 'because of your cancer' and also he said "In two months or two years, it (the cancer) could return.'" (Notice of Hearing).

26. Respondent McIvor testified that he did not remember talking about cancer to the complainant on the phone on August 2, 1991. (Tr. at 304). With respect to the conversation on August 12th, where he gave the Complainant the option of filing for disability insurance, he testified that he did not feel she was disabled when he made that suggestion. (Tr. at 352). He testified that he suggested she check this out because it was the only resource the NEIMHC had available which might be worth checking out. (Tr. at 298, 352). He further testified that he did not know what the personnel policy gave as a

definition of disability when he made this suggestion. He stated that he did not have any definition of disability in mind when he made the suggestion. (Tr. at 333-34). He testified that on neither August 2nd or 12th did Complainant Martin act or appear to him to be disabled. (Tr. at 352-53).

27. With respect to the August 2nd conversation, Complainant has the better, clearer, more detailed memory. With respect to August 12th, it is certainly true that the recommendation to an employee by an employer to check out a disability policy does not necessarily mean she is perceived as disabled. This is not believable as the explanation for the suggestion in this case, however, because of the prior remarks McIvor made to the Complainant on August 2nd and his remarks to others discussed below.

3. Respondent McIvor's Remarks to Alice Scott and Allen Ekholm:

28. In 1991, Alice Scott was employed as a clinical social worker with NEIMHC. (Tr. at 115). At some point after Complainant Martin began her leave, Ms Scott found out she was gone due to cancer. (Tr. at 118). During that time, McIvor made a statement to several persons, including Ms. Scott, who were talking about Ms. Martin's illness. McIvor made a remark to the effect that he wasn't going to hire any more people over 50 because the older they got, the sicker they became. (Tr. at 120, 129). He also made a remark about money, to the effect that he couldn't afford it. (Tr. at 120). It should be noted, however, that these statements were, to a degree, made in a humorous context, although Ms. Scott did not find them to be funny, but offensive. (Tr. at 129). Ms. Scott felt Mr. McIvor tried to make "a joke out of everything." (Tr. at 130). There is nothing in the record to indicate that Ms. Scott was a biased witness.

29. Allen Ekholm had a conversation with Mr. McIvor about Complainant Martin and her cancer. This conversation was "somewhere around the time of when it was known by everyone that she wouldn't return to work. I don't know if it was right before or right after, but it was somewhere around that time." (Tr. at 196). Certain documents help provide an idea of when that time might be. On August 14, 1991, NEIMHC received a letter, dated August 13, 1991, from Complainant Martin to Mr. McIvor. In that letter, Martin indicates she had consulted with her doctors who indicated that she was ready to return to her job and perform her duties as she had prior to surgery. Therefore, she stated, "the Long Term Disability Insurance will not work for me." She also asked to return to her full-time position with benefits. If this was not acceptable, she would have to file for unemployment insurance. (CP. EX 1). On August 19, 1991, she verbally informed McIvor that she was "going to try for unemployment insurance." (CP. EX. 1). Complainant Martin filed for unemployment insurance was on August 18, 1991. See Finding of Fact No. 11. Notice of this filing was mailed to NEIMHC on August 21, 1991. The copy of the notice in Complainant's personnel file is date stamped "AUG 23 1991". (CP. EX. 1). Therefore, it would appear that the time when "everyone" knew that Complainant Martin wasn't returning to work would have been during or after the period of August 19-23, 1991.

30. During the course of this conversation, Mr. McIvor informed Ekholm that McIvor was afraid that Complainant Martin's cancer would return, that she would have future problems with her cancer. Ekholm stated, "[McIvor] was afraid that cancer might come back on her, there would be future problems with the cancer, and I took that to be . . . the main reason why she wasn't coming back. That's all I got out of that conversation, because of her cancer, he wasn't going to bring her back." (Tr. at 197).

31. Mr. Ekholm has also filed a pending civil rights complaint against the Respondent, but denies that this has influenced his testimony. (Tr. at 198-200). Of greater importance in assessing his credibility is his lack of a clear, specific, and detailed account of the conversation. (Tr. at 196-97). Mr. Ekholm also had some difficulty remembering other facts, which are not material to this case, such as the fact that his six month probationary period had not ended when he was terminated in 1992. (Tr. at 200-02). However, his testimony seems credible because of its consistency with Complainant Martin's testimony concerning her August 2nd conversation with Mr. McIvor.

4. The Record of Complainant's Hospitalization and Treatment, and of the Respondent's Knowledge and Beliefs Concerning The Complainant's Treatment and Condition Support the Finding That Complainant Martin Was Perceived As Disabled and Therefore Had A Substantial Handicap:

32. The Complainant's absence, hospitalization, surgery, and radiation treatment for cancer have already been described. See Findings of Fact Nos. 6-9. The Respondents' awareness that she was absent for hospitalization and involved in such treatments is demonstrated by documents in the personnel and sick leave files. (CP. EX. 1; R. EX. 10). In a letter of July 18, 1991, and memorandum of August 2, 1991, Respondent McIvor also suggested that the Complainant underwent chemotherapy, although this is not mentioned in her testimony and is denied in her complaint. (CP. EX. 1; Notice of Hearing). At times during her surgery and radiation treatment, Complainant Martin's ability to speak was affected. (Vega dep. at 13; CP. EX. 1; Tr. at 28). Respondents were informed of this, with respect to the surgery, on or about May 22, 1991 by Mr. Bandstra. (CP. EX. 1). Due to the surgery and radiation, Complainant Martin no longer has any saliva glands and must drink water to replace the saliva whenever she talks. (Tr. at 7). At one time prior to the end of her absence, Respondent McIvor was concerned that she would not be able to work full-time because of "her speech problem" resulting from the treatment. (Tr. at 354). See Conclusion of Law No. 47.

5. Neither McIvor's Failure to See or Otherwise Personally Observe Complainant's Condition Through His Own Senses During Her Leave Prevent the Commission From Concluding That He Perceived Her to Be Disabled:

33. It is undisputed that, from on or about the time her leave began on April 29, 1991 to her meeting with Respondent McIvor on August 12, 1991, Respondent McIvor neither personally viewed Complainant Martin nor had official medical reports on her condition. (Tr. at 91-93, 98). Respondents argue that this means McIvor could not have perceived Complainant Martin to be disabled. For reasons stated in the Conclusions of Law, this

does not prevent the Commission from finding that McIvor perceived Martin to be disabled. See Conclusion of Law No. 14-15.

6. Neither The Treatment Given Other Employees With Cancer, All of Whom Went on Leave After the Complaint Was Filed, Nor the Rehire of Complainant Martin Demonstrates That McIvor Did Not Perceive Martin or Any Other Employee With Cancer As Being Disabled:

34. The evidence in the record demonstrates that two other employees, Beverly Smith and Jacqueline Fenelon, took sick leave for cancer and did not lose their jobs. (Tr. at 125, 300-01, 359-60). Both of these sick leaves occurred in 1992. (Tr. at 359). Similarly, the Complainant was rehired by NEIMHC on August 2, 1992. (Stip. No. 1). These events occurred months after service of the complaint in this case on Respondents on September 26, 1991. (Stip. No. 9). While Respondents argue that these cases demonstrate that they did not perceive individuals with cancer as being disabled, it is well recognized, as stated in the conclusions of law, that corrective or nondiscriminatory actions taken in the face of litigation are not persuasive evidence with respect to the practices, and, by analogy, the perceptions, of Respondents prior to the service of the complaint. See Conclusion of Law No. 23.

7. The Offer of Limited Part-time Employment Once Complainant Was Able to Return to Work Does Not Demonstrate That McIvor Did Not Perceive Complainant Martin to Be Disabled:

34A. Respondents also argue that the offer of limited part-time employment to the complainant after she was replaced in her full-time job demonstrates that she was not perceived as disabled. (Reply Brief at 10). As set forth more fully below, there is direct and circumstantial evidence that the Respondents did perceive Complainant Martin as having a continuing disability involving recurring cancer. It flies in the face of logic to require this Commission to find that an employer did not perceive as being disabled a full-time employee on leave for cancer treatment merely because, after replacing her, it subsequently offers her a very limited part time position without benefits. See Finding of Fact No. 11.

B. There is Credible Direct Evidence in the Record to Show that Complainant Martin Was Terminated From Her Former Position and Replaced Because of a Perceived Physical Disability:

1. The Greater Weight of the Evidence Demonstrates That Complainant Martin Was Terminated From Her Former Position and Replaced By Allen Ekholm:

35. There is contradictory evidence concerning whether or not Complainant Martin was effectively terminated from her position as substance abuse counselor on or about the time that Allen Ekholm's acceptance of the offer for that position was received by Respondents on July 16, 1991. See Finding of Fact No. 20.

36. On the one hand, Complainant Martin had been informed by telephone on June 5th, and by a typed message on June 12, 1991, that, after June 24th, she would be on unpaid leave of absence without pay, although one-half of her medical insurance premium would

be paid by NEIMHC. This was to continue until July 24th, when the situation would be re-evaluated. (CP. EX. 1). On July 18th, McIvor sent Martin a letter indicating that he would be on vacation from July 19th through August 1st and would meet with her on August 12th. (CP. EX. 1). This evidence would indicate that Complainant Martin had not lost her position, but was on a leave of absence until August 12th.

37. On the other hand, although Respondent McIvor's written offer to Ekholm of July 10th mentioned that Ekholm would be sharing an office with Complainant Martin, McIvor knew when he sent the letter that Ekholm was replacing the Complainant. (CP. EX. # 3; Tr. at 288, 329). Nonetheless, McIvor testified that he still hoped to offer Complainant new employment in some capacity, depending on what hours were available. (Tr. at 289, 291, 292-93). On August 2nd, Complainant Martin was informed for the first time that she may not have her old job to return to and that a replacement had been hired. On August 12th, she was informed by McIvor that she had "no job at the current time" with Respondent NEIMHC. See Finding of Fact No. 11.

38. On brief, Respondents admit that "Kathrine Martin's position [was] being either filled or terminated;" that "a replacement was hired for her;" and "that she lost her job." (Reply Brief at 9, 11).

39. Based on the above facts, it is clear that Complainant Martin was terminated from her position as substance abuse counselor on or about July 16, 1991. After that date, the "unpaid leave" referred to in the communications to Complainant Martin was the equivalent of a post-termination extension of the benefit of one-half the cost of medical insurance premiums. After July 16th, Complainant Martin's employment status was, at most, a bare possibility of an offer of employment with NEIMHC at the end of her absence due to cancer. The extent of employment offered or whether there would be an offer depended on what, if any, hours were available. There was an offer of part-time employment made to the Complainant after she was informed, on August 2nd and 12th, of the termination of her position and her replacement. See Finding of Fact No. 11. Respondent McIvor's claim that Complainant Martin was never terminated until August 12, 1991 is simply not credible in light of the above facts. (Tr. at 320-21, 339-40).

2. The Direct Evidence Previously Noted Demonstrates That Complainant Was Replaced Because of Her Perceived Physical Disability:

40. The statements, detailed above, made by Respondent McIvor to Complainant Martin, Alice Scott, and Allen Ekholm constitute credible direct evidence that McIvor replaced Complainant Martin because of a perception that there would be future recurrence of her cancer. See Findings of Fact Nos. 22, 28, 30. This evidence is sufficient to establish a prima facie case of perceived disability discrimination with regard to the direct evidence method of proving discrimination. See Conclusions of Law Nos. 58.

3. It May Be Reasonably Inferred From The Evidence That the Reason Why Respondent Was Concerned About A Recurrence of Complainant's Cancer Would Be the Future Absences and Associated Costs Which Would Result From Such Recurrence:

41. The reason why recurrence of Complainant's cancer was of concern to McIvor may be inferred from a second reason given to complainant for her termination and replacement by Ekholm. At the August 12, 1991 meeting, she was told by McIvor that he had lost a considerable amount of money due to the length of her absence and needed to have someone come in and work full time. Therefore, he stated, he had hired Ekholm. (Tr. at 47, 48). This factor was not mentioned during the August 2nd telephone call. (Tr. at 47). It is undisputed that Complainant Martin's absence was due to cancer experienced by her in 1991. (Stip. No. 3; CP. EX. # 1). It may be reasonably inferred from this second reason, that McIvor's concern with recurrence of cancer, expressed on August 2nd, was related to the recurrence of past absences and costs associated with Complainant Martin's cancer. McIvor agreed that he thought that if the Complainant became ill again she would cost NEIMHC a lot of money if she was off work. (Tr. at 317).

IV. Ruling: The Respondent's Liability Is Established Because It Has Offered No Affirmative Defense To the Showing of Perceived Disability Discrimination Made Through the Credible Direct Evidence of Discrimination In the Record:

42. Unlike cases based on circumstantial evidence of discrimination, the probative direct evidence of discrimination in the record, which is sufficient to show that the discharge of Complainant Martin was due to a perceived physical disability, places the burden on the Respondents to prove an affirmative defense responsive to the direct evidence. Examples of such affirmative defenses would include the bona fide occupational qualification defense and the "mixed motive" or "same decision" defense. See Conclusions of Law No. 48, 62. Such defenses are not set forth on brief nor in Respondents' prehearing conference form or other pleadings. (Trial Brief, Reply Brief, Prehearing Conference Form).

43. The defenses set forth by Respondent are that the direct evidence of perceived disability discrimination is either not credible or not sufficient to show such discrimination; that perceived disability discrimination was not involved in the decision to terminate or replace the Complainant, and that the termination took place solely for legitimate non-discriminatory reasons. (Trial Brief, Reply Brief, Prehearing Conference Form). Since no affirmative defense responsive to the direct evidence of discrimination has been offered by Respondents, they have not rebutted the direct evidence of perceived disability discrimination. Thus, Complainant Martin and the Commission have established the Respondents' liability for terminating or replacing her due to a perceived physical disability.

V. Ruling in the Alternative: Complainant Also Established the Liability of the Respondents for Perceived Disability Discrimination Under a McDonnell-Douglas Analysis:

A. Complainant Established A Prima Facie Case of Perceived Disability Discrimination Under a McDonnell-Douglas Analysis Through Direct Evidence:

44. The direct evidence showing that Complainant Martin was perceived to be disabled and that she was terminated due to this perceived disability, see Findings of Fact Nos. 22-

31, is also one means of establishing a prima facie case of perceived disability discrimination with respect to a McDonnell Douglas analysis. See Findings of Fact Nos. 22-31. See Conclusions of Law Nos. 68-69.

B. Respondents' Presentation of Evidence of Legitimate Non-Discriminatory Reasons Sufficient to Rebut the Prima Facie Case of Discrimination Under the McDonnell-Douglas Analysis:

45. To meet its burden of rebutting the prima facie case under the McDonnell-Douglas analysis, Respondents are only required to present evidence of legitimate, non-discriminatory reasons for their termination of Complainant Martin. The questions of whether the evidence is believed or is a pretext for discrimination are not considered at this point. See Conclusion of Law No. 70. Respondent presented evidence that:

(1) During the sixteen weeks Complainant Martin was absent from work through August 12, 1991, neither she nor her doctor ever informed Mr. McIvor as to when she could return to work, (See Finding of Fact No. 9; R. EX. 4; Tr. at 91-92, 93, 94, 260, 264, 276, 289, 293, 311, 322-23, 351);

(2) Complainant Martin had not requested from the Board of Directors a leave beyond six weeks in length as allowed under Respondent's Center Absence Clause in its personnel policy, (See Finding of Fact No. 19; Tr. at 83-84);

and (3) the absence of Complainant Martin caused serious financial difficulties for NEIMHC. (R. EX. 2; Tr. at 48, 264, 267, 284, 286, 316-17).

C. The Greater Weight of the Credible Evidence Shows That These Reasons are A Pretext for Discrimination:

46. The reasons given by Respondents for Complainant Martin's termination or replacement are all related to her absence. Although it is undisputed that the Complainant's total absence extended to 16 weeks by August 12th, the complainant was terminated or replaced effective July 16, 1991. This was 11 weeks after her absence began on April 29th. She was, however, unable to work for the full sixteen weeks. See Findings of Fact Nos. 9, 39.

1. Under the Circumstances Set Forth Below, Respondents' Failure to Make Any Effort To Ascertain When Complainant Martin Could Return to Work Indicates That The Complainant's Failure to Provide a Return or Recovery Date Is A Pretext For Discrimination.

a. Respondents never made any effort prior to August 12, 1991 to obtain complainant Martin's return to work or recovery date:

47. There was evidence produced in the record indicating that neither Complainant nor her doctors provided a recovery or return date through August 12, 1991. See Finding of Fact No. 45. However, at no point before August 12th did Respondents make any effort whatsoever to request that Complainant Martin either provide such a date or a release

from her doctors which would have permitted them to communicate with the Respondents. (Tr. at. 33-35, 37, 54-55, 73, 104, 314-16, 345). Even on those instances where Respondent McIvor was in communication with Complainant Martin or others in contact with her, he never requested this information. This was the case when McIvor talked to the Complainant and her daughter on May 29, 1991; when he wrote the Complainant on May 30, 1991; when he talked to her on June 5, 1991; when a memo was sent to her at McIvor's direction on June 12, 1991; when a memo was sent to her from McIvor on July 2, 1991; and when McIvor wrote to her on July 18, 1991. (CP. EX. 1; Tr. at 33-35, 37, 54-55, 104, 345). If such information had been requested, Complainant Martin would have provided it. (Tr. at 104).

b. Respondents rely on a personnel rule which does not require employees to provide return to work or recovery dates:

48. Respondents argue that it was Complainant's burden to provide a recovery date on her own initiative. (Reply Brief at 11-12). This argument is based on the provision in Respondent's personnel policies stating, "It is the employee's responsibility to report his/her absence due to illness as soon as possible. Unless otherwise directed, the employee shall notify his/her immediate supervisor." Neither this nor any other sick leave or illness provision, however, states that the employee on sick leave is required to provide a return to work or recovery date. There is a provision, however, that permits the Executive Director to "require evidence of professional care and treatment" in "cases of continued . . . absence due to illness." See Finding of Fact No. 19. Also, if violation of a personnel policy or excessive absenteeism is considered to reflect of a lack of dependability, it is the supervisor's duty to inform the employee of the problem under the discipline and discharge policies. See Finding of Fact No. 18. (Tr. at 334, 336). Respondent McIvor admitted Complainant Martin had not violated personnel policy. (Tr. at 321).

c. Complainant Martin complied with the actual requirements of the rule, i.e. to report her absence as soon as possible:

49. There is overwhelming evidence in the record that Complainant Martin reported her absence due to illness as soon as possible in compliance with this provision of the personnel policy. Her time sheets are in the record for the period through May 25, 1991. (R. EX. 10). These are submitted weekly by employees to show how their time is spent. (R. EX. 5; Tr. at 280-81, 283,350). They show that she was off for sick and other leave from April 25th, the date she had her first biopsy, through May 25th. The one exception is four hours (16 units X 15 min./unit) of work and 3.5 hours of sick leave on May 7th. (R. EX. 10; Tr. at 18, 281). Summaries of her sick leave and vacation show that they were exhausted during the period from April 24th to noon on May 29th. (R. EX. 10).

50. As noted, Complainant Martin had taken time off for the biopsy on April 25th. (Tr. at 21-22). On May 1, 1991, when Complainant found out she had cancer, she informed Respondent McIvor. (Tr. at 18, 21, 26). The "Sick Leave, Vacation, Educational Leave, Personal Leave Summary" has a notation, dated May 10, 1991, signed by Jacqueline

Fenelon, assistant to executive director McIvor, (Tr. at 162), stating: "Kathy Martin to have surgery & expects 18-20+ days for hospitalization & recuperation. After she uses sick leave & vacation plus personal day, we are to let her know." (R. EX. 10).

51. On May 22, 1991, Ms. Fenelon prepared a memo addressed to all staff indicating that Complainant Martin was at the Covenant Medical Center. On May 24th, a note was prepared for her personnel folder by Ms. Fenelon indicating that John Bandstra, a coworker and friend, had visited Complainant Martin. (CP. EX. 1; Tr. at 29, 32). Complainant Martin relied on Bandstra to inform her employer of her condition as she could not speak. (Tr. at 31-32). The note has a blank next to McIvor's name which is checked off. The memo states: "Her doctor said that three week after she is discharged from the hospital, she should be prepared for radiation therapy for 5-6 weeks. John said the lab reports had not been returned as yet but feels the doctor is preparing Kathy for the inevitable. The radiation treatments would be required on a regular basis for that period of time. Kathy is feeling supported by the agency. Told John to greet her for us and keep us informed." (CP. EX. 1).

52. On May 29th, according to a note prepared for Respondent McIvor, he had conversed with Complainant Martin that day. She agreed to his proposal to carry all her salary and benefits through June 24th. She also informed him that she would be leaving the hospital by May 31st and would be in touch with him. (CP. EX. 1; Tr. at 33).

53. On May 31st, the day after Complainant Martin got out of the hospital, she called McIvor and told him that she would need 28 days of radiation therapy to her head and neck. She informed that she could not work during this time. McIvor's response was "that's fine. They have a treatment plan just like we have treatment plans for the people we see." He told her to follow through with the plan and stay in touch. (Tr. at 27).

54. Complainant Martin again conversed with McIvor about her leave on June 5th. (CP. EX. 1). At some point prior to July 8th, she wrote Mr. McIvor and informed him that the radiation treatment had been stopped due to side effects, but would resume on July 8th. (CP. EX. 1).

55. A July 18, 1991 letter sent to the Complainant by McIvor reflects his awareness that she had undergone surgery. According to a notation, dated July 22, 1991. by Ms. Fenelon on the letter, the Complainant called and stated she hoped to return part-time before August 12th. The notation indicates that the Complainant was told that McIvor did not want her to return until they talked on the 12th. (CP. EX. 1). This is apparently a reference to Complainant Martin's call on the 19th, not the 22nd. The Complainant had received McIvor's July 18th letter, which refers to McIvor taking vacation from July 19th to August 1st, on July 19th. (Tr. at 40). She called on the morning of the 19th in the hope she would talk to him prior to his leaving on vacation. (Tr. at 40). She called because she wished to tell McIvor that she thought she could come in to work on a part-time basis for two weeks before August 12th. (Tr. at 40-41). He had already left, however, and she talked to Ms. Fenelon. (Tr. at 41). She again called the office and talked to Ms.. Fenelon

on July 22nd about insurance matters, which are also mentioned in the notation. (CP. EX. 1; Tr. at 43). McIvor was aware of the contents of this notation. (Tr. at 294).

56. Her next conversation with Respondent McIvor was on August 2nd. See Findings of Fact Nos. 22-23, 25-27. At no point during the course of her 1990-91 employment with Respondents was failure to comply with this rule given as a reason for Complainant's termination or replacement or was she told that she was not keeping Respondents sufficiently informed of her treatment or that she was violating any personnel policy. (CP. EX. 1; Tr. at 54-55, 73, 345).
d. In the course of complying with the rule, the Complainant gave the Respondents accurate estimates as to when her treatment would end:

57. While reporting to the Respondents and updating them about her absence, Complainant Martin also provided Respondents with estimated times as to the length of the different stages of her treatment and of her overall treatment. These are highlighted above. See Findings of Fact Nos. 50-55. At one point in his testimony, Respondent McIvor was asked to confirm that "[n]o one ever told you how many weeks she [Complainant Martin] had to be off work; is that right?" He replied, "She sent me a letter saying that she'd be off a certain amount of time." (Tr. at 323). It is not clear in the record exactly which correspondence this refers to.

58. Respondent McIvor admitted that he had been informed by Complainant Martin on May 10th that she would require 18 to 20 days hospitalization and recuperation. He also admitted that he had been informed by Bandstra, as indicated by the note of May 24 that the doctor had indicated that, three weeks after discharge from the hospital, Complainant Martin would require 5 to 6 weeks of radiation therapy. (Tr. at 325-27). Twenty days after May 10th is May 30th, which corresponds to Complainant's actual date of hospital discharge, of which McIvor was informed. See Findings of Fact Nos.52. 53. Nine weeks (3 weeks + 6 weeks) after May 30th is August 1st. Complainant's radiation treatments actually ended on July 30th, two days prior to August 1st. See Finding of Fact No. 9.

f. Respondent McIvor admits that, if he had known when Complainant Martin would be able to return, he would not have replaced her with Allen Ekholm:

59. Respondent McIvor admitted that if he known, especially before July 10th, when Complainant Martin would be able to return, he would not have replaced her with Al Ekholm. (Tr. at 351). He also acknowledged that, on August 12, 1991, Complainant Martin would be a more productive employee than Allen Ekholm. (Tr. at 355-56).

g. Summary: The Respondents' reason that Complainant was terminated or replaced because of her failure to provide a date for her return to work or expected recovery is a pretext for discrimination:

60. There are a number of factors which indicate this reason is not worthy of credence. First, the Respondents were aware that Complainant Martin would be a more productive employee than Mr. Ekholm. Second, they were also aware, prior to July 10th, that her

treatment was expected to end by August 1, 1995. Ekholm did not begin work until August 5th. Respondents claimed that if they knew Complainant Martin would have been available for work when she was, they would not have hired Ekholm. Third, the personnel rule, which Respondents argue required the Complainant to provide a return to work date on her own initiative, in fact required only that she report her absence due to illness as soon as possible. Fourth, Complainant not only complied with the rule, but provided continuous updates on her treatment. Fifth, an employer whose concern was the cost and length of Complainant's present absence, and not anticipated future recurrences of the cancer, and who was aware her treatment was ending on August 1st, would have made an effort to ascertain when the Complainant would be able to return to work before hiring a new, less productive employee who would start on August 5th. In this case, however, Respondents made no such effort. Sixth, the direct evidence of perceived disability discrimination indicates that the true motivation for the termination of complainant was her perceived disability and not a failure to provide an anticipated return to work date.

2. Under the Circumstances Set Forth Below, the Respondent's Reason that Complainant Martin Was Terminated or Replaced Because of Her Failure to Request Approval From the Board of Directors of a Leave Beyond Six weeks in Length, as Allowed Under Respondent's Personnel Policy, Is a Pretext for Discrimination:

61. Respondents argue that Complainant was terminated or replaced for a legitimate reason because she failed to follow a personnel policy (the Center Absence Clause) which "required that she could not be absent from work longer than six consecutive weeks unless approved by the Board of Directors." (Reply Brief at 12). This is a reasonable construction of the Center Absence Clause. See Finding of Fact No. 19. Nonetheless, it was Respondent McIvor, who, on his own initiative, relied upon another provision of the sick leave policy as authority to offer the Complainant an extended paid leave beyond her usual sick leave through June 24th. See Findings of Fact Nos. 10, 19. (CP. EX. 1, 6; Tr. at 84, 99-100, 166-68, 169-70, 276-77, 332, 339). As indicated by a note in her personnel file, he informed her on June 5th that she would be on unpaid leave of absence beyond June 24th, which would be reevaluated on July 24th. This is also confirmed by a written message sent to the Complainant by Ms. Fenelon dated June 12th. (CP. EX. 1). At hearing, it was McIvor's position that Complainant was on an unpaid leave of absence through August 12, 1991. (Tr. at 320-21). Based on the sick leave and personnel records, her leave had extended to beyond six weeks before June 24th. (CP. EX. 1; R. EX. 10)

62. It makes no sense to require or expect Complainant Martin to apply for an extended leave when she was already informed by her employer that she had such a leave. Why would the Complainant be expected to challenge the employer's application of its own leave policies under these conditions? If there was a misinterpretation or misapplication of the leave policies, the record shows it was committed by the Respondents, not the Complainant. Respondent McIvor admitted Complainant Martin had not violated personnel policy. (Tr. at 321). In addition, although there is evidence (a) of the content of the Center Absence Clause, see Finding of Fact No. 19, and (b) that Complainant Martin

never applied to the Board of Directors for leave under the Clause (Tr. at 83-84), there is no evidence in the record that her failure to apply for such leave played any role in Respondents' decision to terminate or replace her. Respondents never informed her that failure to apply to the Board for such leave was a reason for her termination. (Tr. at 105). In light of these facts, and the direct evidence of perceived disability discrimination in the record, this is a pretextuous reason for the termination of Complainant Martin.

3. Under the Circumstances Set Forth Below, the Financial Difficulties Allegedly Caused By the Absence of Complainant Martin for Respondent NEIMHC Are Pretexts For Discrimination:.

a. Respondents' argument:

63. Respondents argued that the absence of Complainant Martin "caused serious financial difficulties for her employer." (Reply Brief at 12). As previously noted, Complainant Martin was informed by Respondent McIvor on August 12, 1991 that the loss of money due to the length of her absence was a factor in his hiring Ekholm as a replacement. See Finding of Fact No. 41.

b. Funding of the substance abuse program is dependent on billing for client counseling:

64. Complainant Martin's position was part of the substance abuse program. See Finding of Fact No. 5. The substance abuse program is funded through a contract from the Iowa Department of Public Health and from fees collected from individuals or their insurance companies. (R. EX. 20; Tr. at 219, 221). It is a patient driven, revenue producing system. (Tr.at 221). The state sets an allotment of a total lump sum for the program at Respondent NEIMHC. It also determines group counseling and individual rates. (Tr. at 219). The basic method of "drawing down" this allotment is to counsel clients and submit expenses to the state at a hourly unit rate for each individual counseled. (Tr. at 219). Thus, in order to receive revenues from the Department, it is necessary for counselors to see patients each month and to submit hours and billings to the Department. (Tr. at 220, 285).

c. Amount and methods of computation of claimed losses:

65. The Respondents claim that the absence of Complainant Miller cost NEIMHC $32,519.80 in revenue over a four month period from May to August of 1991. (R. EX. 2; Tr. at 316-17). This is an amount over $7,000 higher than the amount of losses McIvor stated to the Complainant in 1991. She found even that amount hard to believe. (Tr. at 96-97).

66. The Respondents claimed an estimated loss of $27,519,80 based on a comparison of the revenue produced by the full staff at the Oelwein office, including Complainant Martin, during the period of January through April of 1991 ($69,654.00) to the amount of revenues produced by the Oelwein staff minus the revenues produced by (a) Dave Hans and the Decorah staff while they were covering for the Complainant and (b) new hire Allen Ekholm during the period of May through August 1991 ($42,134.80). (R. EX. 2).

67. Respondents added another $5,000.00 to the above losses to compensate for the revenue lost at the Decorah office while the Decorah staff was covering for Martin in Oelwein. (R. EX. 2). It is unexplained in the record how this $5000.00 estimate was computed.

d. Deduction of revenues earned by Decorah staff in Oelwein is not justified:

68. This methodology overstates the losses of the Respondents. The only justification that there might be for not including the revenues earned by the Decorah staff in Oelwein would be that the amount they earned there approximates the amount they might have earned in Decorah. However, Respondents add an estimated $5000.00 in losses for precisely this reason. Rationally, only the $5000.00, if that is a reasonable estimate, should be included in the losses while the amount earned by the Decorah staff is added back in to Oelwein revenues.

e. Deduction of revenues earned by Hans in Oelwein is not justified:

69. There is no reason to deduct the Oelwein revenues earned by David Hans as he was not part of the Decorah staff, but was hired "to provide group service in Kathy's absence." (R. EX. 2). It should be noted that these figures deal only with revenues and do not take into account either the salary of Hans, the salary expense for Complainant Martin through June 24th, or the salary savings for the unpaid leave for Martin after June 24th. (R. EX. 2).

f. Deduction of revenues earned by Ekholm in Oelwein is not justified:

70. Similarly, there is no reason to deduct the Oelwein revenues earned by Allen Ekholm, who was hired to replace the Complainant in Oelwein.

g. Revised estimate of losses:

71. Once the Oelwein revenues of the Decorah staff, Hans, and Ekhom are added back in to revenues, the total Oelwein revenues for the four month period from May to August 1991 are increased from $42,134.80 to $53,054.80. This reduces the revenue losses in Oelwein by $10,920.00. The total losses, therefore, including the $5,000 estimated loss in Decorah, would be $21,599.80, not $32,519,80.

h. None of the estimated losses take into account any factor for the losses other than Complainant's absence from May to August 1991:

72. The losses represented above are all based on the assumption that they were caused solely by Complainant's absence. They do not take into account, for example, the impact of staff vacations during the summer. Respondent McIvor has been Executive Director of NEIMHC since 1967. See Finding of Fact No. 16. On June 5, 1990, he made application to the Iowa Department of Public Health "for a cash advance of $40,000 against our 1990-91 contract." (R. EX. 20). The cash advance was requested because of financial

difficulties. In the letter, McIvor noted, "We have never been able to draw down sufficient dollars in July and August of each year to meet our expenses because of staff vacations." (R. EX. 20). This factor is not accounted for by Respondents. (R. EX. 2).

73. The statistics provided by the Respondents also show fluctuations in revenues from month to month at the Oelwein office which are unexplained in the record. For example, revenues at the Oelwein office increased from $15,184.60 in March of 1991 to $21,658.00 in April of 1991. Revenues decreased from $18,071.03 in October of 1991 to $14,918.00 in November of 1991. (R. EX. 2). It is not known whether or not the causes of these fluctuations could account for all or part of the change in revenues from the first third of 1991 to the second third.

i. None of the revenue losses incurred through August 5, 1991 were avoided by terminating Complainant Martin and replacing her with Allen Ekholm:

74. Complainant Martin was terminated and replaced by Allen Ekholm on July 16, 1991. See Finding of Fact No. 20, 35-39. When Respondents extended the offer to him on July 10th, they did so with the understanding that he would not begin work until August 5, 1991. (CP. EX. 3). Therefore, none of the losses incurred due to Complainant's absence through July 16th were avoided by the hire of Ekholm or the termination and replacement of the Complainant. The same is true for all losses through August 5th which were incurred due to absence of a substance abuse counselor in the Oelwein office. Allen Ekholm began his employment two weeks earlier than the Complainant could have if she had been retained. See Findings of Fact Nos. 9, 20. Therefore, the only losses which may have been avoided by the hiring of Ekholm were the ones which would have been incurred during those two weeks. Given her higher productivity, see Finding of Fact No. 59, and Respondent McIvor's estimate that Ekholm was working only 40% of the time, (Tr. at 322), it is likely that the revenues the Complainant generated would soon have exceeded those of Ekholm.

j. Respondent McIvor's admission that he would not have hired Ekholm if he had known Complainant Martin would be able to return by August 19th demonstrates that the revenue losses incurred through that date would not have led to her termination if he had made inquiry about her return date:

75. Respondent McIvor's admission that he would not have hired Ekholm if he knew that the Complainant would return when she did demonstrates that, if he had such knowledge, he would not have terminated the Complainant despite revenue losses. See Finding of Fact No. 59. This brings us back to the ultimate question of motivation. If Respondents' only concern was the length and cost of Complainant's current absence, and not future absences, Respondent would have made inquiry as to her expected date of return. The accurate information Complainant provided as to the length of her treatment and her willingness to obtain a return date indicate that such inquiry would have been successful. The failure to make such inquiry, and the direct evidence in the record, lead to the conclusion that perceived disability discrimination was the true motivation behind Respondents' termination and replacement of Complainant Martin.

75A. Even if there were no evidence undermining this rationale for Complainant Martin's discharge and replacement, the finding that the two previous reasons were pretexts sufficiently damages the Respondents' credibility so as to support a finding that this reason is also a pretext. In addition, the weaknesses, inconsistencies and implausibilities concerning this reason supports such a finding. See Conclusion of Law No. 74.

4. Other Circumstances Indicating That Respondent's Reasons for Terminating and Replacing Complainant Martin are Pretexts for Discrimination:

76. There are other respects in which the termination of Complainant Martin is so at variance with Respondent's policies as to suggest that concerns other than the costs associated with Complainant's absence from April 25th through July 16th of 1991 were involved in the decision. The policy manual provides, at page 20, that "[P]rofessional staff receive at least one (1) month's notice in writing before discharge or termination of service. If discharge is effective immediately, the employee receives one (1) month's salary." (CP. EX. 6). Complainant Martin received neither one month's notice nor pay. (R. EX. 9; CP. EX. 1). See Findings of Fact Nos. 11, 39.

77. The policy manual also provides, at page 28, for a grievance procedure where grievances may progress from the Executive Director, to the Personnel Committee of the Board, to the full Board of Directors. A similar termination grievance procedure is provided at page 19. (CP. EX. 6). Complainant Martin asked Respondent McIvor if she could contest her being given the choice of part-time, disability, or termination with the Board of Directors He indicated that she had no rights; that the Board did not know what had been done, and that it made no difference if they did. This effectively discouraged Complainant Martin from filing any grievance. (Tr. at 49, 111-12).

78. On August 2, 1991, Allen Ekholm has not yet begun his employment. See Finding of Fact No. 20. Ekholm is a probationary employee who Respondent McIvor has no reason to believe is sick or disabled. (CP. EX. 3; 6; Tr. at 320, 321, 356). Under the rules he can be terminated "for any cause deemed worthy by the Executive Director. The grievance process is not available to employees on probation." (CP. EX. 6). See Finding of Fact No. 17. McIvor believes he has the "sole discretion" to retain or discharge Ekholm. (Tr. at 319-20). Complainant Martin has just informed Respondents of her readiness to return from her leave for cancer treatment. See Finding of Fact No. 11. (If Respondent McIvor's version of the facts were believed, she is on leave and not yet terminated). (Tr. at 320-21). She is a nonprobationary employee, who can only be discharged for "justifiable reasons," and has grievance rights. See Findings of Facts Nos. 5, 17-18. Respondent McIvor considers her to be the more productive of the two employees. (Tr. at 355, 356).

79. McIvor is now faced with a choice as there are two employees who want the same position. (Tr. at 317-18). Despite the Complainant's nonprobationary status and her higher productivity, Respondent McIvor never even thinks of terminating Ekholm and returning the Complainant to her position. (Tr. at 336).

D. Finding of Discrimination:

80. In light of the above circumstantial and direct evidence of discrimination, Complainant Martin has established by a preponderance of the evidence that she was terminated and replaced due to a perceived physical disability.

VI. Remedies:

A. Backpay and Benefits:

81. The parties stipulated to the following facts:

5. As of April 24, 1991, Complainant was paid $21,000.00 per year.

6. While off work, Complainant received $10,800.00 in unemployment compensation.

Stipulations Nos. 5-6.

1. Backpay:

82. According to an Application for Funding for the fiscal year July 1, 1991 to June 30, 1992, Complainant Martin was to receive a salary of $22,250.00 for that period. (R. EX. 20). The accuracy of this application was certified by Respondent McIvor on March 1, 1991 and by the Chairperson of the NEIMHC Board of Directors on April 2, 1991. This document is attached to a Contract Award from the Iowa Department of Public Health. (R. EX. 20). Given this certification, this figure is probably a more accurate indication of the increase Complainant Martin would have received, if she had not gone on leave, than the handwritten note on her evaluation. The March 1991 evaluation indicates a raise to $22,050.00 (CP. EX. 1; R. EX. 20; Tr. at 61-62).

83. Complainant Martin received her first salary increase, from $19,000.00 per year to $21,000.00 per year, six months after her hire on March 12, 1990. (R. EX. 9).

84. Complainant Martin was rehired on August 25, 1992 at the rate of $21,000.00 per year. Six months later, on February 25, 1993, her annual salary was increased to $21,800.00. Nine months after that, on November 24, 1993, her annual salary was increased to $22,454.00. This is her last salary raise reflected in the record. (R. EX. 9).

85. The evidence does not indicate what the date or amount of Complainant's next salary raise after June 30, 1992 would have been if she had not been terminated. Therefore, her front pay should end when her annual salary exceeds $22,250.00. This would be on November 24, 1993. (R. EX. 9).

86. Complainant's back pay for the period from August 19, 1991 to November 24, 1993 is computed as follows:

(a). Gross back pay prior to the deduction of unemployment insurance and interim earnings: = (Gross annual salary earnings for the two year period of August 19, 1991 to August 19, 1993) + (Gross annual salary earnings for the 14 week period from August 19, 1993 to November 24, 1993) = (2 years X $22,250.00 annual salary) + (14 weeks X $427.88 per week) = ($44500.00 + $5990.32) = $50490.32.

(b). Unemployment Insurance and Interim Earnings = [($10,800.00 U.I.) + (annual salary earnings for the 26 week period from 8/25/92 to 2/25/93) + (annual salary earnings for the 39 week period from 2/26/93 to 11/24/93)] = [($10,800.00) + (26 weeks X $403.85/wk) + (39 weeks X $419.23/wk)] = [$10,800.00 + $10,500.10 + $16349.97] = $37650.07.

(c). Complainant's Total Back Pay After Deduction of Unemployment Insurance and Interim Earnings: = (a) - (b) = $50490.32 - $37650.07 = $12,840.25.

2. Benefits: Retirement Plan:

87. Complainant participated in the NEIMHC retirement plan wherein NEIMHC contributed an amount equal to 10 per cent of her salary. (CP. EX. 6; Tr. at 65). She should be compensated for the contributions not made while she was unemployed and for reduced contributions made while she was employed at a lower salary than she would have had if she had never been terminated. This is an amount equal to ten percent of the backpay or $1,284.03.

3. Benefits: Health Insurance Premiums:

88. Complainant Martin is due a total of $2289.58 for health insurance premiums paid by her which would have been paid by Respondent NEIMHC if she had not been terminated. (Tr. at 64, 68).

4. Benefits: Education Reimbursement Program:

89. "While employed, Complainant was allowed $500.00 per year to spend towards professional education and development." (Stip. No. 7). In 1992, Complainant Martin attended such a conference. She should be reimbursed for her expenses of $420.00. (Tr. at 68-69).

5. Seniority, Vacation, and Sick Leave Benefits:

90. Complainant's seniority should be restored. Her personnel records will indicate that Complainant's hire date is March 12, 1990. Complainant shall receive one additional day of personal leave, 15 days of accured vacation leave, and 12 days of accrued sick leave or permanent disability leave (up to the limits indicated in the personnel policy) to reflect the year (8/91-8/92) she was off work. (CP. EX. 6). Her vacation shall accrue under the personnel policy as if she had been continuously employed since March 12, 1990.

B. Emotional Distress:

91. There is no doubt, based on this record, that Complainant Kathrine Martin suffered serious and substantial emotional distress due to her termination and replacement by Respondents. Her testimony of distress is supported not only by her adult son and daughter, a mental health professional, but by Respondent McIvor. (CP. EX. 1; Tr. at 47, 56-57, 69-70, 133-37, 152-159).

92. When Complainant Martin was told in the telephone call, on August 2, 1991, that she had been replaced, she was hit with feelings of sadness, as if she had done something wrong. After having successfully gone through the surgery and radiation treatment for cancer, she felt defeated by this event. (Tr. at 47, 69-70). Her job was important to her. (Tr. at 70). She felt that McIvor's comment about cancer returning in two months or two years wasn't fair. "We had just talked about my prognosis, my recovery, how well this had gone and the fact that I could talk again. And then it was like he dropped this on me and I felt real bad about it." (Tr. at 47).

93. In order to help her cope with her job loss, Dr. Vega, her radiation oncologist, recommended that Martin do volunteer work because, "no matter how you're feeling, it isn't good for your recovery to keep feeling bad." (Vega dep. at 3; Tr. at 56). She followed up on this advice by volunteering to do counseling for such organizations as Goodwill, Parent Share & Support, or the Family Center. (Tr. at 57, 136). She also tried to stay busy doing such tasks as yard and lawn work or walking for exercise. (Tr. at 136). These tasks were undertaken because not working had an adverse emotional impact on her. (Tr. at 136-37).

94. In Respondent McIvor's notes concerning the telephone call of August 2, 1991, he stated:

> Kathy Martin contacted me by phone . . . and wondered when she would start back to work. I informed her that I didn't quite know because there is no business. She felt that there would be a job available for her. She felt very hurt and rejected as well as angry because she is worried about her employment and medical costs. She feels she is ready for work and has completed her chemotherapy. I told her we would meet on August 12 and discuss it further.

(CP. EX. 1).

95. McIvor also stated in his notes of their August 12, 1991 conversation that Complainant Martin was "very disappointed that her job was not available to her after her recovery from cancer;" that she found her treatment to be "unfair," and "was not very satisfied and wonders if this the policy of the agency to dismiss people who are suffering from cancer." (CP. EX. 1).

96. On April 21, 1992, eight months after she was told she was replaced, McIvor talked to her about her application for the second counselor position there. He noted that "[s]he still feels a little angry and bitter that she was treated unfairly." (R. EX. 7). Her feelings were serious enough that he decided to offer her the new position only as a probationary employee because he wondered if she could to the work without feeling negative about the place. (Tr. at 309-10).

A year before, in March of 1991, he had evaluated her as an employee "who gets along well with other staff members at the Oelwein office. . . . conduct[ed] her practice in a professional, independent, and ethical manner. . . . is usually polite and conducts herself in a professional manner. . . .has been able to function quite well independently." (CP. EX 1).

97. The Complainant's son, Steve Martin, moved back to Oelwein in the spring of 1991. He saw her every day after she was diagnosed with cancer. Her number one goal in that time was to get back to work following her treatments. (Tr. at 133).

98. Throughout the rigors of Kathrine Martin's cancer treatment, her son noted she had a good attitude despite the pain resulting from the radiation treatments. She was working toward her goal of getting back to work. (Tr. at 134). Then, in August, he noticed a change: "After . . . the phone call and the conference, you could tell it just took a little bit of air out of her, so to speak . . . because now she couldn't go back to work.. . . . [I]t was out of reach for her . . . and she didn't like that at all." (Tr. at 134-35). His mother had been financially independent and she found it difficult to go on unemployment insurance given her strong work ethic and her enjoyment of her job. He is certain that the decision to terminate and replace the Complainant had a "very detrimental" emotional effect on her. (Tr. at 135). He observed that it still affected her as of the date of the hearing. (Tr. at 136).

99. Laura Martin, the Complainant's daughter, is a mental health counselor with the chronic mentally ill. (Tr. at 153, 154). In June of 1991, Laura came home an average of once a week. Every other weekend, she had a three day weekend and would visit home then. She then moved in with her mother from the end of August 1991 until October 31, 1991. (Tr. at 153-54). In July and August of 1991, she came home every other day and also every other weekend. (Tr. at 154).

100. Laura observed that her mother dealt with the cancer in a positive fashion. She underwent surgery and an aggressive radiation treatment soon after the diagnosis was made. (Tr. at 155). Despite the difficulties, she was as positive as possible until August of 1991. Returning to work was the most important goal for her. (Tr. at 155). She missed the contact with clients and enjoyed her work. (Tr. at 156).

101. Laura also observed the effect that losing her job had on her mother. Complainant Martin became depressed. "I don't think 'sad' does it just cause. She was tearful at times. It was a sock to her self-esteem. She put so much identity in her work that, when she was told she wouldn't be able to return, her self-esteem or self-worth was just shot." (Tr. at 156). Due to her success with the cancer, her mother had been "on an upbeat" before

being informed she no longer had a job in August 1991. (Tr. at 156-57). Although the Complainant was determined to get a job, "at times it was difficult because she was having these emotions that she was being punished for something she didn't have control of." (Tr. at 157). These emotions still affect her. (Tr. at 158). The complainant had feelings "where its her fault of getting cancer. [T]hroughout the years, I've seen her struggle with her self-esteem and trying to rebuild it, and that doesn't happen overnight." (Tr. at 158). The complainant is still working on this process. (Tr. at 158).

102. Given the duration and severity of Complainant Martin's emotional distress due to discrimination, an award of fifteen thousand dollars (**$15,000.00**) in emotional distress damages would be full, reasonable and appropriate compensation.

CONCLUSIONS OF LAW

I. Jurisdiction and Procedure:

A. Timeliness and Other Statutory Prerequisites:

1. All the statutory prerequisites for hearing have been met, i.e. timely filing, investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code *S* 601A.15 (now 216.15). See Findings of Fact Nos. 1, 3-4..

B. Subject Matter Jurisdiction:

2. Subject matter jurisdiction ordinarily means the authority of a tribunal to hear and determine cases of the general class to which the proceedings in question belong. Tombergs v. City of Eldridge, 433 N.W.2d 731, 733 (Iowa 1988). Ms. Martin's complaint is within the subject matter jurisdiction of the Commission as the allegation that the Respondents discharged her because of her perceived disability falls within the statutory prohibition against unfair employment practices which the Commission has the power to hear and determine. Iowa Code *SS* 601A.6, .15 (now *SS* 216.6, .15). See Conclusions of Law Nos. 5-12.

II. Stipulations:

3. There are stipulations of fact in this case. A "stipulation" is a "voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate [the] need for proof." BLACK'S LAW DICTIONARY 1269 (5th ed. 1979). Stipulations as to fact are binding on a court, commission or other adjudicative body when, as in this case, there is an absence of proof that the stipulation was the result of fraud, wrongdoing, misrepresentation or was not in accord with the intent of the parties. In Re Clark's Estate, 131 N.W.2d 138, 142 (Iowa 1970); Burnett v. Poage, 239 Iowa 31, 38, 29 N.W.2d 431 (1948).

III. The Persuasive Value of Opinions From Other Jurisdictions Should Be Determined In Light of Requirements For Liberal Construction and Interpretation of the Statute and Rules In Order to Effectuate Their Purpose:

4. In determining the persuasive effect of legal authorities cited by the parties, the following principles were applied:

a.. Federal court decisions applying Federal anti-discrimination laws are not controlling or governing authority in cases arising under the Iowa Civil Rights Act. *E.g.* Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978). Nonetheless, they are often relied on as persuasive authority in these cases. *E.g.* Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Although even decisions of the United States Supreme Court have been rejected as persuasive authority when their reasoning is inconsistent with the broad remedial purposes of the Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d at 831; Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866-67 (Iowa 1978), its opinions are often entitled to great deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission at 866.

b. In determining the persuasive value of any Federal decision, or decision of another state, or other legal authority, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures of our country," Iron Workers Local No. 67 v.Hart, 191 N.W.2d 758, 765 (Iowa 1971).

c. Decisions from other jurisdictions should be rejected as persuasive authority when violative of the controlling authority requiring liberal interpretation and construction of the Iowa Civil Rights Act. When determining the sense and meaning of the written text of a statute providing regulations conducive to public good or welfare, the statute is liberally interpreted. State ex. rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624, 629 (Iowa 1971). When determining the legal effect of its provisions, the Iowa Civil Rights Act "shall be broadly construed to effectuate its purposes," Iowa Code *S 601A.18 (1991), a*nd "liberally construed with a view to promote its objects and assist the parties in obtaining justice." Iowa Code S 4.2. "Logic requires that this principle of construction also be applied to [the Commission's] administrative rules." *F*oods Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 167 (Iowa 1982). "In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." Monroe Community School District v. Marion County Board of Education, 251 Iowa 992, 998, 103 N.W.2d 746 (1960); Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 832 (Iowa 1978). Therefore, constructions of the statute or rules which "effectively defeat the remedial purpose of Chapter 601A [the Iowa Civil Rights Act]" should be rejected. See Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 167 (Iowa 1982).

IV. The Complainant Is "Disabled" Under the Iowa Civil Rights Act:

A. The Commission Did Not Exceed Its Statutory Authority in Enacting Rules Concerning "Perceived Disability":

5. For any claim of disability discrimination to be given effect under Iowa law, it must be shown that the Complainant falls within the protected class of the "disabled". Falczynski v. Amoco Oil Co., 533 N.W.2d 226, 231 (Iowa 1995). Therefore, issues which are concerned with what constitutes a "disability" under Iowa law and whether Complainant Martin falls within that category shall be considered first.

6. The Respondents argue that the Commission exceeded its statutory authority in enacting rules which attempt "to extend the statutory definition to include someone regarded as having such an impairment[;] to include rules involving perceived as constituting such a limitation[;] or perceived as having such an impairment." (Reply Brief at 3). If the Respondents are correct, the case ends here, since the Complainant and Commission acknowledge that the Complainant's case is based on these Commission rules. (Complainant's Brief at 2; Commission's Brief at 9). The complaint itself refers to "perceived physical disability." (Notice of Hearing).

7. The pertinent statutory provisions state:

> "Disability" means the physical or mental condition of a person which constitutes a substantial handicap, and the condition of a person with a positive human immunodeficiency virus test result, a diagnosis of acquired immune deficiency syndrome, a diagnosis of acquired immune deficiency syndrome-related complex, or any other condition related to acquired immune deficiency syndrome. The inclusion of a condition related to a positive human immunodeficiency virus test result in the meaning of "disability" under the provisions of this chapter does not preclude the application of the provisions of this chapter to conditions resulting from other contagious or infectious diseases.

Iowa Code S 601A.2(4) (1991)(emphasis added).

8. The pertinent rule provisions state:

> 8.26(1) The term "substantially handicapped person" shall mean any person who has a physical or mental impairment which substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such an impairment.
>
> 8.26(2) The term "physical or mental impairment" means:
>
> a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:

> neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine;
>
> . . .
>
> 8.26(3) The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> . . .
>
> 8.26(5) The term "is regarded as having an impairment" means:
>
> a. Has a physical or mental impairment that does not substantially limit major life activities but that is perceived as constituting such a limitation;
>
> b. Has a physical or mental impairment that substantially limits major life activities only as a result of attitudes of others toward such impairment; or
>
> c. Has none of the impairments defined to be "physical or mental impairments," but is perceived as having such an impairment.

161 IAC 8.26 (formerly 240 IAC 6.1)(emphasis added).

9. In 1987, the Iowa Supreme Court first recognized that a complainant who is either actually disabled or who is perceived by the employer to be disabled is "disabled" as that term is used with respect to the Act's prohibitions against disability discrimination in employment. See Frank v. American Freight Systems, Inc., 398 N.W.2d 797, 800 (Iowa 1987)(citing Iowa Code S 601A.6). In making the determination that those perceived by the employer to be disabled are covered by the Act, the Court relied upon the same rules cited by the Complainant and the Commission in this case. See id. at 799, 800 (quoting and citing 240 IAC 6.1). Although these rules have since been renumbered, their content has not changed. Compare 240 IAC 6.1 et. seq.(1987) with 161 IAC 8.26 (1991) et. seq. See Annear v. State, 454 N.W.2d 869, 875 n.6 (Iowa 1990). The Court emphasized the word "perceived" in the subsection dealing with perceived impairments. See Frank v. American Freight Systems, Inc., 398 N.W.2d 797, 799 (Iowa 1987)(quoting 240 IAC 6.1(5)(c)(now 161 IAC 8.26(5)(c)). The Court relied upon these rules in determining that "[the plaintiff] is 'disabled' as that term is used in Iowa Code section 601A.6". See id. at 799-800.

10. The Court had previously applied rule 240 IAC 6.1(5)(c)(now 161 IAC 8.26(5)(c)) in Sommers v. Iowa Civil Rights Comm., 337 N.W.2d 470, 477 (Iowa 1983). The Commission had rejected the claim of a transsexual that she was perceived to be disabled. Id. at 475, 477. In affirming the Commission's action, the Court held "[a]n adverse societal attitude does not mean that the transsexual is necessarily perceived as having a

physical or mental impairment. . . . [The] discrimination [is] based on societal beliefs that the transsexual is undesirable, rather than beliefs that the transsexual is impaired physically or mentally as that term is used in the statute and defined in the rule." Id. at 477. While the validity of the rule was not decided, the Commission's interpretation of its rules "was not contrary to the statute or rule nor arbitrary, capricious or unreasonable." Id. at 476.

11. In Brown v. Hy-Vee, 407 N.W.2d 598 (Iowa 1987), the Court held the plaintiff did not fall within this rule because "[n]either [the plaintiff] nor his employer perceived or regarded the [plaintiff's back] injury as a substantial handicap." Id. at 600.

12. In 1990, the Court specifically addressed the question of whether paragraph (5)(c) of the rules, dealing with perceived disability, was beyond the authority granted by the statute. Annear v. State, 454 N.W.2d 869, 875 (Iowa 1990)(construing 240 IAC 6.1(5)(c)(now 161 IAC 8.26(5)(c)). The complainant argued that "the real reason for not hiring him was a perceived physical disability. He presents his claim as one in which the [employer's] representatives in the hiring process incorrectly believed that the disability [a back injury] which caused his separation from employment [with the same employer] in 1981 continued to exist in March of 1982 [when the employer failed to hire him]." Id. at 874. The employer denied that disability had anything to do with the failure to hire complainant. Id. It proffered legitimate reasons for its action which had nothing to do with disability. Id. There were no facts to support complainant's claim. Id. at 875. The court held the rule was within the statutory authority of the Commission as long as application of the rule was limited in certain respects:

> The issue thus becomes whether, if the State did not hire plaintiff because it believed he was physically unable to do the work and was wrong in that assessment, this error of judgment would constitute and unlawful discrimination in hiring under section 601A.6(1)(a). We believe it does not. To literally apply the language of subparagraph c to this set of facts would extend the scope of an employment discrimination claim beyond the breadth of the statute by which such claims have been created. Agency action in promulgating a rule may not exceed its statutory authority. Sommers v. Iowa Civil Rights Comm'n., 337 N.W.2d 470, 475 (Iowa 1983).
>
> In order for the definition contained in subparagraph c of these regulations to be given effect under the act, it must be limited to situations involving a categorical organic disorder of the body. Cf. Sommers, 337 N.W.2d at 476. The definition may not be extended to differences of opinion over the degree of recovery from a disabling injury, notwithstanding a lack of reasonable basis for the employer's belief.

Id. Under this authority, and with the limitations stated, the Commission did not exceed its statutory authority in enacting rule 161 IAC 8.26(5)(c) concerning perceived disability.

B. The Use of the Word "Perceived" In Commission Rule 161 IAC 8.26(5)(c) Does Not Require That the Respondent Employer Have Either Personally Observed the Complainant or Seen Her Medical Reports and Concluded From Such Observation or Reports That She Is Disabled:

13. The Respondents argue that because Mr. McIvor did not personally observe Complainant Martin from the time her sick leave began until August 12, 1991, and had not received medical reports describing her cancer during that time, he could not have perceived that she was disabled when he spoke to her on August 2, 1991. (Reply Brief at 5-7). Respondents relied on particular definitions of "perceived":

> The word "perceived" is defined in Websters New Collegiate Dictionary "1973 edition" as follows: "(1) To attain awareness or understanding of; and (2) to become aware of through the senses esp: see, observe.
>
> The word perceive is defined in the American Heritage Dictionary of the English Language, (1969 Edition) as: "(1) To become aware of directly through any of the senses; especially to see or hear; (2) to take notice of; observe, detect; . . . "

(Reply Brief at 5-6).

14. The meaning of the word "perceive" is not, however, limited to situations involving observation with the senses or acquiring information from medical reports. Other definitions of the word "perceive" are found in the dictionaries relied on in the majority and the dissenting opinions interpreting other language of the Iowa Civil Rights Act in United States Jaycees v. Iowa Civil Rights Commission, 427 N.W.2d 450, 454, 457 (Iowa 1988)(the massive Webster's Third New Int'l Dictionary relied on by majority; Webster's Ninth New Collegiate Dictionary relied on by dissent). The secondary definition in both of those dictionaries is "to become aware of through the senses." Webster's Third New Int'l Dictionary 1675 (1993); Webster's Ninth New Collegiate Dictionary (1987). The primary definitions in Webster's Third New Int'l Dictionary (1993) are "1.a: to become conscious of. [examples and synonyms omitted]. b: to recognize or identify esp. as a basis for or as verified by action. [example omitted]." Id. at 1675. The primary definition given in Webster's Ninth New Collegiate Dictionary (1987) is "1. to attain awareness or understanding of." Id. at 872. This is also the primary definition in the 1973 edition quoted by Respondents. (Reply Brief at 5).

15. Under these primary definitions of "perceive", it is not necessary to show the employer obtained awareness solely through means of direct observation or medical reports. Under a liberal construction or interpretation of the rule covering persons who actually have "none of the impairments defined to be 'physical or mental impairments,'" 161 IAC 8.26(5)(c), an employer may have "perceived [such person] as having such an impairment", id., if the employer "[became] conscious," "recognize[d] or identif[ied]" Webster's Third New Int'l Dictionary 1675 (1993), or "attain[ed an] awareness or understanding," Webster's Ninth New Collegiate Dictionary 872 (1987), that the person

had such an impairment. Under these definitions, there are no limitations on how the employer became aware or conscious of, or recognized or identified the impairment.

C. Proof of "Perceived Disability" Under Commission Rule 161 IAC 8.26(5)(c) Refers to the Respondent Employer's Perception That the Complainant Is Disabled:

16. Respondents argue that, under rule 161 IAC 8.26(5)(c), Complainant Martin must be perceived by the public or employers generally to be impaired and not just by the employer charged with discrimination. (Reply Brief at 7-9). This proposition is contrary to the greater weight of controlling and persuasive legal authority.

17. The Iowa Supreme Court's decision in Frank v. American Freight Systems, Inc., 398 N.W.2d 797 (Iowa 1987) was discussed previously. In that case, the employer, American Freight, argued that the plaintiff, Frank, was actually disabled under the statutory and rule provisions governing disability. Id. at 800. Frank argued that "he is not actually disabled but that American Freight perceives him to be and he is therefore considered to be disabled for discrimination purposes under commission rules 6.1(1) and (5)." Id. (citing rules 240 IAC 6.1(1) and (5)(now 161 IAC 8.26(1) and (5)). The Court concluded, "[i]n either event, Frank is 'disabled' as that term is used in Iowa Code section 601A.6." Id. (citing Iowa Code S 601A.6, now S 216.6). This controlling authority stands for the proposition that either an actual disability or a perception by the employer that the employee is disabled will suffice to support the conclusion that the employee is disabled with respect to the Act's provisions, and the Commission's rules, addressing disability discrimination in employment. Id.

18. The Respondents suggest that the decision in Annear means "that it is not the perception of the sole employe[r] that governs as it recognizes that a mistake in judgment cannot be the basis of a finding of discrimination." (Trial Brief at 11). The Court's comments, previously quoted, about a hypothetical situation where an employer might, through an error in judgment, believe that an applicant was physically unable to do the work, do not, however, indicate that the employer's perception of disability is never at issue in a perceived disability case. See Annear v. State, 454 N.W.2d 869, 875 (Iowa 1990). See Conclusion of Law No. 12. Rather, the court held only that the third part of the definition of the term "is regarded as having an impairment", [now at 161 IAC S 8.26(5)(c)], "may not be extended to differences of opinion over the degree of recovery from a disabling injury, notwithstanding a lack of reasonable basis for the employer's belief." Annear at 875.

19. In addition, the Iowa Supreme Court has recognized that the federal Rehabilitation Act of 1973, and the rules and cases under that act, are persuasive authorities with respect to the Iowa Civil Rights Act and rules. See Boelman v. Manson State Bank, 532 N.W.2d 73, 79 (Iowa 1994); Probasco v. Iowa Civil Rights Commission, 420 N.W.2d 432, 435 (Iowa 1988) . While the Court has not yet found that the Americans With Disabilities Act statute, rules, and cases are persuasive authorities with respect to the Iowa Civil Rights Act, there are reasons to believe that it may do so. In accordance with Congressional intent, the ADA statutory definition of "disability" is adopted from the Rehabilitation

Act's definition of the term "individual with handicaps." EEOC, Americans With Disabilities Handbook I-25 (1991)(EEOC Interpretive Guidance to 29 C.F.R. S 1630.2(g)). This was done so that Rehabilitation Act caselaw could be applied to this ADA definition. Id. Similarly, the ADA rules reflect the congressional intent that they be modeled after the Department of Education's regulations implementing the Rehabilitation Act of 1973. EEOC, Americans With Disabilities Handbook I-3 (1991)(citing 34 CFR part 104). Given these similarities between the Rehabilitation Act and the ADA, it would appear that the ADA statute, rules, and cases would also constitute persuasive authority with respect to the Iowa Civil Rights Act.

20. These federal rules and statutes, like the Commission rules, address persons "regarded as having such an impairment" Compare e.g. 161 IAC 8.26(1) with 29 U.S.C. S 706(8)(B) (Rehabilitation Act of 1973); 42 U.S.C. S 12102(2)(c) (Americans With Disabilities Act-ADA); 29 C.F.R. S 32.3 (Dept. of Labor Rehabilitation Act rules); 34 C.F.R. S 104.3(j) (Dept. of Education Rehabilitation Act rules), 45 C.F.R. S 84.3(j)(1)(Dept. of Health and Human Services Rehabilitation Act rules); and 29 C.F.R. S 1630.2(g) (EEOC ADA employment rules). The federal rules recognize that the key question with respect to disability discrimination against persons with no actual impairment is whether the employer treated the complainant as if he had a substantially limiting impairment. See e.g. 29 C.F.R. S 32.3(5)(iii)(the "recipient" of federal funds under the Rehabilitation Act of 1973); 34 C.F.R. S 104.3(j)(2)(iv)(c)(same); 45 C.F.R. S 84.3(j)(2)(iv)(C)(same); 29 C.F.R. S1630.2(1)(the "covered entity" under the ADA).

21. The similarity between the federal rules and Iowa rules may best be demonstrated by quoting the Department of Health and Human Service's (HHS) Rehabilitation Act rules which may be compared to the Commission's rules set forth above. The United States Supreme Court found these rules to be of "significant assistance" in determining whether an individual is handicapped. School Board of Nassau County v. Arline, 480 U.S. 273, 279 (1987). "[T]hese regulations were drafted with the oversight and approval of Congress" and "provide 'an important source of guidance on the meaning of S 504.'" Id. The HHS rules state:

> (j) "Handicapped person." (1) "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.
>
> (2) As used in paragraph (j)(1) of this section, the phrase:
>
> (i) ["physical or mental impairment" definition which is identical to that in the Iowa Civil Rights Commission's rules].
>
> . . .
>
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but

> that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

45 C.F.R. 84.3(j)((2)(1989).

22. The Iowa rule dealing with persons who have no impairments, but are perceived as having such an impairment, 161 IAC 8.26(5)(c), is analogous to the third part of the ADA's "statutory definition to the term 'disability' . . .[which] covers . . . persons who have no impairments but nonetheless are treated as having substantially limiting impairments." EEOC Compliance Manual, Volume 2, EEOC Order 915.002, Section 902.8 (emphasis added)(as printed in BNA, Fair Employment Practice Manual 405:7278 (1995)). While the exact language of the regulations differ in that the Iowa Civil Rights Commission's rules refer to a person who is "perceived as having such an impairment," 161 IAC 8.26(5)(c), and the EEOC's rules refer to a person who "is treated by a covered entity as having a substantially limiting impairment," 29 C.F.R. S 1630.2(1), the Compliance Manual comments indicate that the EEOC's rules are also concerned with the perception of the employer:

> [T]his part of the definition is directed at the employer rather than at the individual alleging discrimination. The issue is whether the employer treats the individual as having an impairment that substantially limits major life activities. Thus, as the legislative history of the ADA notes, "[t]he perception of the covered entity is a key element of this test." House Judiciary Report at 30. Because it is the employer's perception that is at issue, it is not necessary that the individual alleging discrimination actually have a disability or impairment. It also is not necessary that the employer's perception of the individual be shared by other employers. The individual is covered by this part of the definition if (s)he can show that the employer "made an employment decision because of a perception of disability based on 'myth, fear or stereotype.. . .'" 29 C.F.R. p. 1630 app. S 1630.2(l); see also House Judiciary Report at 30-31.

EEOC Compliance Manual, Volume 2, EEOC Order 915.002, Section 902.8 (emphasis added)(as printed in BNA, Fair Employment Practice Manual 405:7279 (1995)). The EEOC's Interpretive Guidance to its rules also supports this view: "An individual satisfies the third part of the 'regarded as' definition of 'disability' if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have." EEOC, Americans With Disabilities Handbook I-35 (1991). The Interpretive Guidance also rejects the proposition that it must be shown that "others in the field" perceived the individual as being disabled. Id. These are persuasive authorities that it is the perception of impairment held by the Respondent employer, and not that of employers in general or of the general public, which is determinative in cases of perceived disability.

D. The Return of Other Employees to Their Full-Time Positions After Leaves for Cancer Does Not Establish That the Respondents Did Not Perceive Complainant Martin to Be Disabled When These Leaves Occurred Long After Martin Filed Her Complaint:

23. Respondents argue that they could not have perceived Complainant Martin to be disabled due to her cancer because other employees returned to their full-time positions after their leaves for cancer treatment were concluded. (Reply Brief at 10). These leaves, however, occurred long after the filing of the complaint in this case. See Finding of Fact Nos. 34. It has been long recognized by the courts and this Commission that substantial changes in employment practices or policies:

> "in the face of litigation are equivocal in purpose, motive, and performance." Reed v. Arlington Hotel, 476 F.2d 721, 724 (8th Cir. 1973)(quoting Jenkins v. United Gas Corporation, 400 F.2d 28, 33 (5th Cir. 1968) and citing Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir.1970). See also Teamsters v. United States, 431 U.S. 324, 341-42 (1977)("The company's later changes in its hiring . . . policies could be little comfort to the victims of its earlier discrimination and could not erase its previous illegal conduct").

Cristen Harms, XI Iowa Civil Rights Commission Case Reports 89, 123 (1992). By analogy, favorable post complaint treatment of employees with cancer tells us little about whether or not the Complainant was either discriminated against or perceived as disabled. If there had been evidence concerning the pre-complaint treatment of other employees with cancer, it might have had some probative value on this question.

E. Cancer Can Be a "Disability" or "Perceived Disability" Under the Iowa Civil Rights Act:

1. Cancer Can Be a Disability Under the Act:

24. The meaning of "disability" under the statute is a question of law. Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 526 (Iowa 1985). The legal question presented, then, under the statute and rules in effect in 1991, is whether cancer "can constitute a physical . . .condition of a person which constitutes . . . a substantial handicap." See Id. at 526-27; Iowa Code S 601A.2(4)(1991)(as amended to delete the "unrelated to such person's ability to engage in a particular occupation" language also applied in Consolidated Freightways at 526-27); 161 IAC S 8.26(1)-(3). This is a separate question from that of whether Complainant Martin had a protected disability on the basis that she was afflicted with cancer. See Consolidated Freightways, 366 N.W.2d at 527.

25. In determining whether cancer can be a disability under the statute, the Commission adopts the following definition of "cancer." Cancer is:

> [a] general term frequently used to indicate any of various types of malignant neoplasms, most of which invade surrounding tissues, may metastasize to several sites, and are likely to recur after attempted removal and to cause death of the patient unless adequately treated.

Stedman's Illustrated Medical Dictionary 216 (5th Unabridged Lawyers Ed. 1982). A "neoplasm" is a "new growth" or "tumor". Id. at 930. Official notice is taken of these definitions. Iowa Code S 17A.14. Fairness to the parties does not require that they be given an opportunity to contest these facts.

26. A physical impairment consisting of a malignant tumor which has the capacity to invade and destroy surrounding tissue, to metastasize to other areas of the body, to recur after removal, and to cause death unless properly treated, has an "inherent propensity to [substantially] limit one or more of the [affected] individual's major life activities independent of the perceptions of others." Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 527 (Iowa 1985). As such, in accordance with the Iowa Supreme Court's prior interpretation of the Commission rules on disability, and the 1991 statutory definition of disability, cancer can be a physical condition of a person which constitutes a substantial handicap, i.e. a "disability" under the Act. See id. at 527, 528 (citing Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470, 476-77 (Iowa 1983)); Iowa Code 601A.2(4)(1991).

27. The above mode of analysis follows that used by the Iowa Supreme Court to determine that alcoholism fell within the definition of disability as used in the Cedar Rapids human rights ordinance. See Consolidated Freightways at 526-28. The ordinance was, at that time, required to be consistent with the Iowa Civil Rights Act and was "almost identical" with respect to the Act's definition of disability. See id. at 526. The Commission rules and prior Iowa Civil Rights Act cases were relied upon in making the determination as to whether alcoholism was a disability. Id. at 526-28. The Court reversed the district court's "determination that the commission's finding that alcoholism is a disability was not supported by substantial evidence." Id. at 528. Part of the reason for the reversal is that an adjudicatory body may use dictionary definitions of a physical condition in determining whether that condition comes within the statutory definition of disability. Id. This is permitted as a form of judicial notice, see id.(citing e.g. Iowa R. Evid. 201(a)), and, therefore, in administrative proceedings, as official notice, of a legislative fact. See Iowa Code 17A.14.

2. Cancer Can Be A "Perceived Disability" Under the Act:

a. Limitation on "perceived disability" set forth in Annear:

28. Complainant Martin claims a perceived, not an actual disability. See Finding of Fact No. 2, 21. The pertinent perceived disability rule states "The term "is regarded as having an impairment" means: . . . c. Has none of the impairments defined to be "physical or mental impairments," but is perceived as having such an impairment." 161 IAC 8.26(5)(c). As previously noted, the Court in Annear v. State held that, in order for this

rule to be given effect, "it must be limited to situations involving a categorical organic disorder of the body. Cf. Sommers, 337 N.W.2d at 476." Annear, 454 N.W.2d at 875 (emphasis added). The court went on to hold that "[t]he definition may not be extended to differences of opinion over the degree of recovery from a disabling injury, notwithstanding a lack of reasonable basis for the employer's belief."Id.

b. The meaning of the phrase "situations involving a categorical. organic disorder of the body" is not certain.

29. The citation signal "Cf." means that Sommers "supports a proposition different from the main proposition but sufficiently analogous to lend support." Harvard Law Review Assn., Uniform System of Citation 9 (1981). "The citation's relevance will usually be clear to the reader only if it is explained [in a parenthetical]." Id. Unfortunately, the court did not explain the relevance of this cite to Sommers. Annear at 875. Therefore, there is some question about what the reference to "situations involving a categorical organic disorder of the body" means. Autry, Iowa Disability Discrimination in Employment: An Overview and Critique 40 Drake L. Rev. 305, 342-43 (1991). The complete phrase "categorical organic disorder of the body" is found in no statute, rule or case other than Annear. See Annear at 875. An examination of the Sommers case is necessary to resolve this question.

c. The Sommers discussion of the rule defining physical impairment.

30. The Sommers cite refers to the following paragraphs ruling on Sommers's claim that transsexualism is an actual physical disability:

> The implementing rule defines both physical and mental impairment. Sommers claims she has a medical condition that has its roots in physical or mental factors. Because her claim lacks further specificity, we will examine the relevant portions of each definition.
>
> The portion of the definition of "physical impairment" that is relevant here refers to a "physiological disorder or condition" or "anatomical loss." [Now at 161 IAC 8.26(2)(a)]. This definition is confined to the characteristics of the body organs and whether such organs are normal and healthy. Any impairment is substantial only if it substantially interferes with the person's ability to perform functions "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." [Now at 161 IAC 8.26(3)].
>
> . . .
>
> Under the implementing rule, a physical impairment relates to an organic disorder of the body. No claim is made that a transsexual has an abnormal or unhealthy body. The Commission could reasonably conclude that under its rule Sommers had no physical impairment.

Sommers at 476 (emphasis added).

d. Explication of the use of the word "categorical".

31. The Sommers court noted the vague, general, unspecified claim that transsexualism was "a medical condition that has its roots in physical or mental factors." Sommers at 476. There was no claim that "a transsexual has an abnormal or unhealthy body." Id. Therefore, Sommers's claim did not fall within the implementing rule defining physical impairment. Id. Apparently, this vague, unspecified claim of a physical disorder was not what the Annear court would later refer to as one of a"categorical organic disorder of the body." Annear at 875. It was not a "direct, explicit, express, unconditional" claim of a physical disorder.. I Compact Edition of the Oxford English Dictionary 355 (1971)(definition of "categorical").

e. Explication of the phrase"organic disorder of the body."

32. In Sommers, the Court's references to "organic disorder of the body," "an abnormal or unhealthy body," "characteristics of the body organs," and "body organs" were made while relying on and explaining the Commission's rule defining physical impairment. Sommers at 476 (explaining 240 IAC 5.6(2)(a), now 161 IAC 8.26(2)(a)). These references were used to characterize the rule without having to restate it or list all the body systems set forth in the rule. Sommers at 476. The rule lists various categories of body systems which may be affected by a "physiological disorder or condition,, cosmetic disfigurement, or anatomical loss." 161 IAC 8.26(2)(a). Thus, if it is shown, as provided by the rule, that a "physiological disorder or condition, cosmetic disfigurement, or anatomical loss affect[s] one or more of the . . . body systems [listed in the rule]", id., it constitutes a "physical impairment." Id.

33. Since the phrase "organic disorder of the body" was used with reference to the necessity of "a claim of an abnormal or unhealthy body," Sommers at 476, it is clear that "organic" as used in that phrase refers not only to disorders "relating to an organ," but to disorders "relating to [the] organism" or "the living individual." Stedman's Illustrated Medical Dictionary 993 (5th Unabridged Lawyers Ed. 1982)(definitions of "organic" and "organism"). This interpretation is consistent with the rule which addresses physical disorders "affecting one or more of the following body systems," some of which are "organs." 161 IAC 8.26(2)(a). It is also consistent with the statement "[t]his [rule] definition is confined to the characteristics of the body organs and whether such organs are normal and healthy." Sommers at 476. Given the plain language of the rule, it is clear the Court treats "body systems" and "body organs" as synonymous concepts. See Sommers at 475, 476. The phrase "body organs" does not appear in the rule. See id at 475 (quoting rule 240 IAC 6.1(2)(a) now 161 IAC 8.26(2)(a)).

34. "Disorder" as used in the phrase "categorical organic disorder of the body" and the rule, 161 IAC 8.26(2)(a), is a "disturbance of function, structure, or both resulting from a genetic or embryologic failure in development, or from exogenous factors such as poison,

injury, or disease." Stedman's Illustrated Medical Dictionary 414 (5th Unabridged Lawyers Ed. 1982).

f. Explanation of the limitation whereby the rule at 161 IAC 8.26(5)(c) is given effect only "in situations involving a categorical organic disorder of the body."

35. Unlike Sommers, Sommers at 476, the rule considered in Annear, Annear at 875, and this case is concerned with perceived physical impairment and not actual physical impairment. 161 IAC 8.26(5)(c). It may be given effect only "in situations involving a categorical organic disorder of the body." Annear at 875. The situations the court was referring to were ones where the perceived impairment does not involve a vague, unspecified claim of a perceived medical condition which has its roots "in physical or mental factors." Sommers at 476. The perceived impairment must be a disorder which, if it were real, would involve "an abnormal or unhealthy body." See id. This requirement could also be met by proof of a perception of a disorder which affects the body systems as set forth in the rule defining physical impairment. 161 IAC 8.26(2)(a). See Autry, Iowa Disability Discrimination in Employment: An Overview and Critique 40 Drake L. Rev. 305, 343 (1991)(possible contradiction between rule governing perceived disability where no actual impairment exists and phrase "situations involving a categorical organic disorder of the body" is resolved if the phrase refers to defendant's perception of plaintiff having such a disorder as opposed to requiring plaintiff to have the disorder).

g. Application to this case of the limitation to cases involving perceived disability of recurring cancer:

36. There are three reasons why a perception that a complainant had cancer or, as in this case, a recurring or future cancer, would be "a situation involving a categorical organic disorder of the body." Annear at 875. First, such a claim of a perceived impairment is not a vague or unspecified claim of impairment. See Sommers at 476. Second, a perception of a body with cancer is certainly a perception of an abnormal or unhealthy body. See id. Under the Consolidated Freightways analysis set forth above, cancer can be an actual physical disability. See Conclusions of Law Nos. 24-27. Third, under the definition of cancer set forth above, see Conclusion of Law No. 25, it is evident that it always affects some body system and, because of its propensity for metastasizing to other locations in the body, could affect any of them. (For example, the cancer which afflicted Complainant Martin in 1991 affected her lymphatic system. See Finding of Fact No. 9.) It would therefore fall within the rule defining physical impairment. See 161 IAC 8.26(2)(a).

h. Application to this case of the holding that "the definition may not be extended to differences of opinion over the degree of recovery from a disabling injury."

37. As previously noted, the definition of physical impairment "may not be extended to differences of opinion over the degree of recovery from a disabling injury." Annear at 875. This case is not concerned with an injury, but with cancer. See Finding of Fact No. 21. In any event, there is no indication that there was a difference of opinion over

whether or not the Complainant had recovered from her present cancer. See Finding of Fact No. 24A.

38. An accurate interpretation of this aspect of the court's ruling in Annear was set forth by one commentator:

> [t]he most plausible interpretation of the court's ruling is that a completely recovered and unimpaired person is not "disabled" just because his employer believes the person has not yet recovered. Under this reading the employer believes the employee is recovering but has not recovered enough to do the job. Thus, there is no perception of permanent or long-term disability, but merely a "difference of opinion" over the speed of recovery.

Autry, Iowa Disability Discrimination in Employment: An Overview and Critique 40 Drake L. Rev. 305, 343 (1991). Cf. Thompson v. City of Arlington, 838 F. Supp. 1137, 1152 (N.D. Tex. 1993)(placement of police officer on restricted duty until officer provides mental health records requested by employer to show she is qualified to return to duty "does not show that City regards her as having an impairment of the kind contemplated by ADA"); Paegle v. Dept. of Interior, 813 F. Supp. 61, 65 (D.D.C. 1993)(placement of officer on temporary, limited duty until expected recovery does not mean employer regarded him as disabled).

39. The perception here was that the Complainant's cancer would recur and cause future extended absences affecting her availability for work. See Finding of Fact No. 22-28, 30. This is precisely the type of situation anticipated by the Rehabilitation Act of 1973 and the administrative rules promulgated thereunder. Senator Humphrey's concern in this regard was set forth in his letter to the Secretary of Health, Education and Welfare, on March 14, 1977, to the Secretary of Health, Education and Welfare upon HEW's promulgation of the first rules implementing section 504, the nondiscrimination clause of the Rehabilitation Act:

> Early diagnosis and improved methods of treatment have lowered the recurrence rate of major forms of cancer. At the same time, a growing number of former cancer patients are seriously and unjustly impaired in their ability to fulfill personal, family, and community responsibilities by their inability to secure employment upon recovery. This situation is too frequently the result of irrational fears or prejudice on the part of employers or fellow workers.

123 Cong. Rec. 13515 (1977).

40. This letter was cited and quoted with approval by the United States Supreme Court when discussing the myths "that make it difficult for former cancer patients to secure employment." School Board of Nassau County v. Arline, 480 U.S. 273, 284 n.13 (1987). The court also cited a medical text which documented job discrimination against cancer

patients. Id. (citing Feldman, "Wellness and Work" in Psychosocial Stress and Cancer 173-200 (C. Cooper ed. 1984). One of the examples described in the text concerned the refusal to hire former cancer patients whose doctors could not guarantee the illness would not return. Psychosocial Stress and Cancer at 190. In passing the Rehabilitation Act of 1973, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Arline, 480 U.S. at 284. These Rehabilitation Act authorities are persuasive authority that the type of perceived disability discrimination which occurred in this case would also violate the Iowa Civil Rights Act. See Boelman v. Manson State Bank, 532 N.W.2d 73, 79 (Iowa 1994)(Rehabilitation Act cases persuasive); Probasco v. Iowa Civil Rights Commn, 420 N.W.2d 432, 435 (Iowa 1988)(Rehab. Act rules and cases persuasive).

41. Under either the direct language of Annear, Annear at 875, or the interpretation of a commentator, Autry, Iowa Disability Discrimination in Employment: An Overview and Critique 40 Drake L. Rev. at 343, this case is not the type of situation which the Annear decision indicated should not be covered by the rule. This case is, however, representative of the forms of discrimination practiced against cancer patients set forth in the sources cited in the Arline case, as discussed above. Arline, 480 U.S. at 284 n.13. See Conclusions of Law Nos. 39-40.

F. The Complainant Met the Legal Standards for "Perceived Disability": She Was a Substantially Handicapped Individual As She Was Perceived as Having a Physical Impairment Which Substantially Limited One or More Major Life Activities:

42. As previously noted, the Complainant was perceived as an individual with recurring cancer. It was inferred that Respondents' concern with the recurrence of the cancer was that it would cause her to miss work in the future for extended periods of time. See Finding of Fact No. 22, 30, 41. Complainant Martin had undergone surgery for cancer, had been hospitalized, and had then undergone outpatient radiation therapy. Her treatments necessitated an absence of sixteen weeks. The Respondents were aware of that treatment. See Finding of Fact No. 9, 32. Respondents perceived that Complainant Martin underwent chemotherapy, although she did not. Respondent McIvor also indicated that, at one point in her treatment, he was concerned that Complainant's ability to speak might be impaired even after the treatment was completed. See Finding of Fact No. 32. On August 12th, he suggested she apply for disability insurance. See Finding of Fact No. 11.

43. Under these circumstances, Complainant had a perceived disability. She was perceived by her employer to have a "physical condition . . . which constitutes a substantial handicap." Iowa Code S 601A.2(4)(1991). Expressed in terms of the applicable rules, she was a "substantially handicapped person," 161 IAC 8.26(1), who was "regarded as having," id., or "perceived as having," id. at 8.26(5)(c), a "physical . . . impairment which substantially limits one or more major life activities," id. at 8.26(2)(a), even though she then had no such impairment. See id. at 8.26(5)(c).

44. As previously discussed, a perception of recurring cancer is a perception of physical impairment under the Act. See Conclusion of Law No. 36. It would usually constitute a perception of a substantial handicap which substantially limits one or more life activities. See Conclusion of Law No. 43. "[T]here is little question that cancer history raises barriers to employment opportunities which are unrelated to a person's qualifications." Burris v. City of Phoenix, 2 A.D. Cas. 1251 (Az. Ct. App. 1993). "[T]he attitude of employers . . . toward [a] previous impairment may result in an individual experiencing difficult in securing retaining, or advancing in employment. [T]hose who have had . . . cancer often experience such difficulty." 41 C.F.R. 60-741.54 (App. A)(OFCCP affirmative action rules under the Rehabilitation Act).

1. The Perception That Complainant Had A Recurring Cancer Which Would Cause Future Extended Absences From Work Is a Perception of a "Substantial Handicap.":

45. "Any impairment is substantial only if it substantially interferes with the person's ability to perform functions 'such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working,'" Sommers v. Iowa Civil Right Commission, 337 N.W.2d 470, 476 (Iowa 1983)(quoting rule 6.1(2)(b), now 8.26(2)(b)), or other "major life activity." See 161 IAC 8.26(2)(b).

46. A disability which actually caused extended absences from work would substantially interfere with work. This is so because it would limit the employee's "overall ability to work or learn." Henkel Corp. v. Iowa Civil Rights Commission, 471 N.W.2d 806, 810 (Iowa 1991). Extended absences from work would interfere with a wide range of jobs. See Falczynski v. Amoco Oil Co., 533 N.W.2d 226, 232 (Iowa 1995). A disability which caused repeated extended absences from work could not be fairly described as one which disqualified an individual from "one particular job for one particular employer." Probasco v. Iowa Civil Rights Comm., 420 N.W.2d 432, 436 (Iowa 1988). It is "substantially limiting within our statute." Id. Even where there is no prior history of cancer, an employee who is terminated because his genetic profile indicates an increased susceptibility to cancer would be regarded as having a substantially limiting impairment. Cf. EEOC Compliance Manual, Volume 2, EEOC Order 915.002, Section 902.8 (emphasis added)(as printed in BNA, Fair Employment Practice Manual 405:7280 (1995)(applicant denied position due to such profile). The perception by the Respondents that Complainant Martin was at risk for future cancer which would cause extended repeated absences from work demonstrates that Complainant Martin is a "substantially handicapped person." 161 IAC 8.26(1).

2. The Combination of the Hospitalization and Extensive Treatment Undergone by Complainant Martin, and the Beliefs Held About Her Treatment and Condition by the Respondents Support the Finding That She Was Perceived As Being Disabled and, Therefore, Had a Substantial Handicap:

47. The evidence of Martin's hospitalization and treatment, of the Respondents' awareness of that treatment, and of the Respondent's beliefs concerning that treatment and her condition all support the conclusion that she was perceived as being substantially

handicapped. In the Arline case, the United States Supreme Court found that the plaintiff's tuberculosis "was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her treatment." School Board of Nassau County v. Arline, 480 U.S. 273, 317 (1987). The record here establishes not only hospitalization of the Complainant, but also extensive radiation treatment, both of which were known by Respondents. The record also establishes a belief by Respondent McIvor that she had undergone chemotherapy, and a concern that her speaking would be impaired after the treatment was concluded. In addition McIvor suggested she check out disability insurance. See Conclusion of Law No. 42. This evidence is sufficient to show that complainant was perceived as being disabled. 161 IAC SS 8.26(1), (5)(c). She was a substantially handicapped person, see Iowa Code S 601A.2(4)(1991)("substantial handicap"); 161 IAC S 8.26(1)("'substantially handicapped person' shall mean any person . . . regarded as having such impairment"), and "disabled" for the purposes of the Act. See Frank v. American Freight Systems, Inc., 398 N.W.2d 797, 800 (Iowa 1987)

V. CERTAIN DEFENSES AND CLAIMS WERE WAIVED BY THE PARTIES:

A. Respondent's Failure to Raise the Mixed Motive or Same Decision Defense on Brief or On It's Pleadings Waives the Defense:

48. Respondent has failed to raise the "mixed motive" or "same decision" defense on brief or on in its pleadings. This defense may arise "[w]here direct evidence [of discrimination] is presented and the employer suggests other factors [i.e. motives in addition to discrimination] influenced the decision." Landals v. George A. Rolfes Company, 454 N.W.2d 891 (Iowa 1990)(cited in Civil Service Commission v. Iowa Civil Rights Commission, 522 N.W.2d. 82, 88 (Iowa 1994). "[T]he employer [then] has the burden of proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the improper factor." Id. For the reasons stated below, the failure of Respondent to raise this defense on brief or on pleadings constitutes either a waiver of the defense or an admission that it has no mixed motive defense and that the only defenses it has are those which are asserted on brief and in it's pleadings.

49. First, since the Respondent has asserted only certain defenses on brief or in its pleadings, it is limited to those defenses. Cf. Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991)(citing Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)(employer bound to reasons for termination set forth on brief). Larson was an unemployment insurance case. Id. The Court held that an employer was bound by the reasons for termination of an employee which were stated in its brief filed with the Employment Appeal Board. Id. Since the employer had stated that the employee was terminated for inability to do work, a reason which would not disqualify the employee for benefits, it was bound by this statement. Id. Based on this admission, benefits were granted, although the employer attempted to argue that the employee had been terminated for misconduct. Id.

50. Second, the Respondent's failure to urge a defense before the administrative law judge constitutes a waiver of that defense. See 161 IAC 4.3(15) (formerly 240 IAC 1.9(12)("Any objection not duly made before the hearing officer shall be deemed waived"). Cf. Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 382 (Iowa 1986)(citing e.g. 240 IAC 1.9(12)(error not preserved at the Commission level is waived--issue must be raised before the agency).

51. Third, the defenses which are offered by Respondent are not consistent with the theory of a mixed motive case. When, as here, a complainant alleges discrimination and a respondent to a charge asserts there is "no discriminatory actuation," Callan v. Confederation of Oregon School Administrators, 317 P.2d 1252, 57 Fair Empl. Prac. 1696, 1698 (Ore. Ct. App. 1986), the case is "not a mixed motive case." Id.

B. Respondent Has Waived the Defense That Complainant Failed to Mitigate Her Damages As Such Defense Is Not Discussed on Brief:

52. Although the affirmative defense that Complainant failed to mitigate her damages was raised in the Respondent's prehearing conference form, it was not addressed on brief by Respondent. Therefore, it has been waived. See Conclusions of Law Nos. 49-50.

C. Complainant Has Waived any Claim Based on the Theory That Respondent Failed to Reasonably Accommodate Complainant Martin:

53. Although the claim that Respondent failed to reasonably accommodate the Complainant was raised in the Complainant's prehearing conference form, it was not addressed on brief by Complainant. Therefore, it has been waived. See Conclusions of Law Nos. 49-50.

53. Failure to make reasonable accommodation is recognized as a theory of employment discrimination which is separate and independent from disparate treatment theory. Rancour v. Detroit Edison Company, 388 N.W.2d 338, 341-42 & n.2 (Mich. App. 1986)(disability case distinguishing between 'failure to accommodate theory" and "discrimination theory"); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 1, 61-69, 81-87 (2nd ed. 1989)(discussion of reasonable accommodation and disparate treatment theories). The claim that Complainant Martin was subjected to disparate treatment was addressed in both the Complainant's and the Commission's briefs and will be considered.

VI. THE ANALYSIS SET FORTH IN BOELMAN V. MANSON STATE BANK IS NOT APPROPRIATE FOR THIS CASE:

54. It is undisputed that Complainant Martin's absence was due to cancer experienced by her in 1991. See Finding of Fact No. 41. If the claim had been made that this cancer was an actual disability, then the fact McIvor told Complainant Martin that she was replaced due to her absence would be sufficient to establish a prima facie case under the analysis

set forth in the Boelman case. See Boelman v. Manson State Bank, 522 N.W.2d 73, 77 (Iowa 1994). Since the termination would be based on conduct (the absence) causally connected to Complainant's disability, it would be considered to be based on the disability. See id.; Teahan v. Metro-North Commuter RR. Co., 951 F.2d 511, 517 (2nd Cir. 1991). But the claim is not made here that the cancer in 1991 was an actual disability or that such actual disability was relied on by Respondents. The claim here is that the future occurrence of the cancer constituted a perceived disability. See Finding of Fact No. 21. Although shown by the evidence, reliance on future recurrence of cancer is not admitted as a reason for Complainant's termination or replacement by the Respondents. See Trial Brief and Reply Brief. Because this case focuses on the claim of whether "the plaintiff was discharged because of [her perceived] disability" and not "whether the plaintiff's disability and its consequences make the plaintiff unqualified for the position," the Boelman analysis is not appropriate for this case. Boelman v. Manson State Bank, 73, 79 (Iowa 1994).

55. The two methods of analysis which are appropriate for proving disparate treatment in this case, the direct evidence method and the McDonnell-Douglas method are utilized as set forth below.

VII. THE DIRECT EVIDENCE METHOD OF PROVING DISPARATE TREATMENT:

56. "Direct evidence" is that "evidence, which if believed, proves existence of [the] fact in issue without inference or presumption." It is "that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect". BLACK'S LAW DICTIONARY 413-14 (1979). Either policies which on their face call for consideration of a prohibited factor or statements by relevant managers reflecting bias constitute direct evidence of discrimination. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 477-78 (2nd ed. 1989).

57. Examples of direct evidence that a protected class status is a motivating factor in an employment decision include comments by decisionmakers expressing a preference for employees who are members of a particular protected class or comments indicating that stereotypes of members of a particular protected class played a role in the challenged decision or practice. See e.g. Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 288 (1989)(promotion); Barbano v. Madison County, 922 F.2d 139, 143, 54 Fair Empl. Prac. Cas. 1287, 1290, 1292 (2nd Cir. 1990)(hiring); Buckley v. Hospital Corporation of America, 758 F.2d 1525, 1530 (11th Cir. 1985)(discharge); Storey v. City of Sparta Police Department, 667 F. Supp. 1164, 45 Fair Empl. Prac. Cas. 1546, 1551 (M.D. Tenn. 1987)(hiring).

58. The proper analytical approach in a case with direct evidence of discrimination is, first, to note the presence of such evidence; second, to make the finding, if the evidence is sufficiently probative, that the challenged practice discriminates against the complainant because of the prohibited basis; third, to consider any affirmative defenses of the respondent; and, fourth, to then conclude whether or not illegal discrimination has occurred. See Trans World Airlines v. Thurston, 469 U.S. 111, 121-22, 124-25, 105 S.

Ct. 613, 83 L.Ed. 2d 523, 533, 535 (1985)(Age Discrimination in Employment Act)(evidence sufficiently probative as policy was facially discriminatory; practice discriminated on basis of age; affirmative defenses rejected; violation of ADEA found). With the presence of such direct evidence, the analytical framework, involving shifting burdens of production, which was originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), and subsequently adopted by the Iowa Supreme Court, e.g. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982); Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 530 (Iowa 1985), is inapplicable. Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 473, 476 (2nd ed. 1989).

59. The reason why the McDonnell Douglas or "pretext" or "circumstantial evidence" order and allocation of proof is not applicable where there is direct evidence of discrimination, and why the employer's defenses are then treated as affirmative defenses, i.e. the employer has a burden of persuasion and not just of production, is because:

[T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination. Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring). See also Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990).

60. In this case, there is direct evidence in the record that perceived disability of cancer which would occur or recur in the future was the motivating factor in Respondents' termination and replacement of the Complainant. See Findings of Fact Nos. 28, 30, 40.

61. After careful examination, this direct evidence has been found to be sufficiently probative to establish the alleged perceived disability discrimination. See Findings of Fact Nos. 230, 43. The statements about the Complainant's cancer were "'[c]omments which . . . demonstrate a discriminatory animus in the decisional process' [and] were uttered by [an individual] closely involved in employment decisions." Radabaugh v. Zip Feed Mills, 997 F.2d 444, 62 Fair Empl. Prac. 438, 441 (8th Cir. 1993)(quoting Price-Waterhouse, 490 U.S. at 278 (O'Connor, J. concurring). They could hardly be characterized as "'stray remarks in the workplace,' 'statements by non- decisionmakers', or 'statements by decisionmakers unrelated to the decisional process.' Id. These remarks represent a myth or stereotype involving victims of cancer, i.e. the myth that the cancer will necessarily return. See Conclusions of Law Nos. 39-40.

62.. The inquiry, however, does not end there, for the affirmative defenses of the Respondent, if any, must be examined. Trans World Airlines v. Thurston, 469 U.S. 111,

121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985). Examples of possible affirmative defenses which address direct evidence of discrimination include (a) that the protected class status (e.g. perceived disability in this case) is a bona fide occupational qualification (BFOQ) for the position, see e.g. id., 469 U.S. at 124, 105 S. Ct. at ___, 83 L.Ed. 2d at 535; or, (b) the "mixed motive" or "same decision" defense. See Conclusion of Law No. 48. Since the Respondent failed to raise any such affirmative defense, it's liability for discrimination is established. This reasoning accounts for the main ruling on liability in this case.

VII. RULING IN THE ALTERNATIVE: MCDONNELL-DOUGLAS DISPARATE TREATMENT ANALYSIS:

A. Reason for Alternative Ruling:

63. An alternative method for proving disparate treatment, the McDonnell-Douglas method is also being applied in this case. As noted above, it has been held that the direct evidence method of proof is more appropriate than the McDonnell-Douglas analysis when direct evidence is relied on. Although the direct evidence method was relied upon by none of the parties, it is only a different method of proving disparate treatment, not a different claim. Therefore, it is within the province of the adjudicator to independently determine whether it was the more appropriate method of proof as it would be to determine any other question of law. "In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. . . . . The parties do no more than to assist, they control no part of the process." Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 270-71 (1944)(quoted in Fed. R. Evid. 201 advisory committee note). Nonetheless, the McDonnell-Douglas method of analysis is also being applied because it is addressed on their briefs by the Complainant, the Commission, and the Respondents.

B. Distinction Between "Burden of Persuasion" and "Burden of Production:

64. In order to understand the McDonnell-Douglas order and allocation of proof, it is necessary to note the distinction between "burden of persuasion" and "burden of production":

65. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding was on the Commission to persuade the finder of fact that disability discrimination has been proven. See Iowa Code S 216.15(7)(burden of proof on Commission). Of course, in discrimination cases as in all civil cases, the burden of persuasion is "measured by the test of preponderance of the evidence," Iowa R. App. Pro. 14(f)(6).

66. 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).

C. Summary of the Order and Allocation of Proof In Disparate Treatment Cases Where the McDonnell-Douglas Analysis is Used:

67. The order and allocation of proof known as the "pretext," or "McDonnell-Douglas" method was described in the Dorene Polton case. Although the cases refer to the complainant's burdens of establishing a prima facie case and pretext, those burdens are borne here by the Commission as this proceeding is before this agency and not a court. Iowa Code S 216.15(6):

> 25. In the typical discrimination case, in which the Complainant uses circumstantial evidence to prove disparate treatment on a prohibited basis, the burden of production, but not of persuasion, shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 448 (Iowa Ct. App. 1981). These shifting burdens of production "are designed to assure that the [Complainant has] his day in court despite the unavailability of direct evidence." Trans World Airlines v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed. 2d 523, 533 (1985).
>
> 26. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). This showing is not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).
>
> 27. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, non-discriminatory reason for its action. Id.; Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). If the Respondent does nothing in the face of the presumption of discrimination which arises from the establishment of a prima facie case, judgment must be entered for Complainant as no issue of fact remains. Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). If Respondent does produce evidence of a legitimate non-discriminatory reason for its actions, the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).
>
> 28. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran

> Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981)).
>
> 29. This burden of production may be met through the introduction of evidence or by cross- examination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981). The Complainant's initial evidence and inferences drawn therefrom may be considered on the issue of pretext. Id. at n.10.

Dorene Polton, 11 Iowa Civil Rights Commission Case Reports 152, 162 (1992).

D. Complainant's Prima Facie Case:

68. The McDonnell-Douglas case set forth a specific pattern of facts which, if proven, establish a prima facie case of discrimination. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973). However, it is well recognized that decision:

> did not purport to create an inflexible formulation. . . . 'The facts necessarily will vary in [employment discrimination] cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." . . . The importance of McDonnell-Douglas lies not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any [employment discrimination] plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396, 429 (1977)(citing and quoting McDonnell-Douglas Corp. v. Green, 411 U.S. at 802 n.13)).

69. The burden of establishing a prima facie case of discrimination under the disparate treatment theory is not onerous. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The Complainant is merely required to produce enough evidence to permit the trier of fact to infer that the Respondent's action was taken for a discriminatory reason. Id. at 254 n.7. The Complainant did so in this case through production of evidence indicating that a concern about Complainant's future episodes of cancer motivated her termination and replacement. See Findings of Fact Nos. 30, 41.

E. Respondents' Articulation, Through the Production of Evidence, of Legitimate Non-Discriminatory Reasons for Complainant's Termination and Replacement:

70. In order to rebut the Complainant's prima facie case, a Respondent must introduce admissible evidence which would allow the finder of fact to rationally conclude that the challenged decision was not motivated by discriminatory animus. Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981). The Respondent need not persuade the finder of fact that it was actually motivated by the proffered reasons. Id. Nonetheless, the Respondent must produce evidence that "[Complainant] was discharged for a legitimate, nondiscriminatory reason." Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). This burden cannot be met "merely through an answer to the complaint or through argument of counsel." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed. 2d. 207, 216 n.9 (1981)). If a Respondent fails to state a sufficient reason to meet this burden, the Complainant "need only prove the elements of the prima facie case to win." Loeb v. Textron, 600 F.2d 1003, 1018, 20 Fair Empl. Prac. Cases 29, 40 n.20 (1st Cir. 1979). It was found that there was sufficient evidence in the record to rebut the prima facie case. See Finding of Fact No.45.

F. Respondent's Reasons Shown to Be Pretexts for Discrimination:

71. There are a variety of ways in which it may be shown that Respondent's articulated reasons are pretexts for discrimination, not all of which are enumerated below. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978); La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Cas. 913, 922 n.6 (7th Cir. 1984).

72.

> 30. [Pretext may be proven] by evidence showing:
>
> (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the [challenged employment action], or (3) that the proffered reasons were insufficient to motivate the [challenged employment action].
>
> Bechold v. IGW Systems, Inc., 817 F.2d 1282, 43 Fair Empl. Prac. Cas. 1512, 1515 (7th Cir. 1987).

Ruth Miller, 11 Iowa Civil Rights Commission Case Reports 26, 48 (1990). Pretext in the instant case was demonstrated by findings of fact indicating that the reasons articulated by Respondent did not actually motivate the discharge or were insufficient to motivate the termination under the circumstances. See Finding of Fact No. 47-60, 61-62, 68-79.

73.

> 31. In addition, "[t]he reasonableness of the employer's reasons may . . . be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext." Loeb v. Textron, Inc., 600 F.2d 1003, 1012, 20 Fair Empl. Prac. Cas. 29, 35 n.6 (1st Cir. 1979). The focus, however, is on the employer's motivation and not its business judgment. Id.

Id. at 48-49.

74. In a pretext case, the"factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons even if no evidence undermining those remaining rationales in particular is available." Fuentes v. Perskie, 32 F.3d 759, 65 Fair Empl. Cas. 890, 894 at n.7 (3rd Cir. 1994). In addition, "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action" may support the conclusion that such reasons are "unworthy of credence" and therefore pretexts for discrimination. Id. at 894. See Findings of Fact No. 65-75A. The employer's failure to adequately investigate the facts (e.g. Complainant's anticipated date of return to work) before terminating an employee or inconsistent statements or actions (e.g. letting Complainant believe she is on leave when she has actually been replaced) may be probative on the issue of pretext. See Findings of Fact Nos. 35-39, 47, 76-79).

75. An ultimate finding of discrimination, as made in this case, may be supported by:

> the combination of (1) the inference (not the presumption) of discrimination established by the evidence which demonstrated a prima facie case and (2) a determination that the employer's articulated reasons are false or "unworthy of credence". . ..

Maxine Boomgarden, 12 Iowa Civil Rights Case Reports 31, 50 (1993) (citing St. Mary's Honor Center v. Hicks, 509 U.S. ____, 113 S.Ct. 2447, 125 L.Ed. 2d 407, 418-19 (1993)).

76. Under Hicks "a factfinder . . . is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more" Washington v. Garrett, 10 F.3d 1421, 1433, 63 Fair Empl. Prac. Cas. 540, 549 (9th Cir. 1993). See also Anderson v. Baxter Healthcare Center, 13 F.3d 1120, 63 Fair Empl. Prac. Cas. 1016, 1019 & n.3 (7th Cir. 1994)(rejecting as dicta language in Hicks indicating that anything more than a prima facie case and disbelief of employer's reasons is required to show discrimination).

77. In pretext cases, "the rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct, when it noted that, upon such rejection, 'no other proof of discrimination is required.' 970 F.2d at 493." Id., 62 Fair Empl. Prac. Cas. at 100. While

this Commission is not legally compelled to find discrimination when the employer's reasons are disbelieved, it may do so, see id., and has done so in this case.

78. Pretext has also been shown by direct evidence persuading the Commission that discrimination was more likely than not the true explanation for the termination and replacement of Complainant Martin. See Conclusion of Law No. 67. .

79. Thus, under the McDonnell-Douglas analysis, Complainant has met her burden of persuasion with regard to establishing disability discrimination in violation of Iowa Code section 601A.6 (now S 216.6).

X. REMEDIES:

80.

> Violation of Iowa Code section 216.6 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 § 216.15(8) (1993). 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.

Maxine Boomgarden, 12 Iowa Civil Rights Case Reports at 58.

A. Compensatory Damages: Back Pay:

1. Purposes of Back Pay:

81.

> 77. The award of back pay . . . in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a back pay 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, back pay 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 back pay in the present case.

Maxine Boomgarden, 12 Iowa Civil Rights Case Reports at 58.

2. Principles to Be Followed In Computing Back Pay:

82. The following principles were followed in determining Complainant Martin's back pay and benefit amounts:

> 78. . . . [T]wo basic principles [are] 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." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 530-531 (Iowa 1990). "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.

Maxine Boomgarden, 12 Iowa Civil Rights Case Reports at 59. Also of importance was the requirement that this Commission adhere to the factual stipulations of the parties. See Conclusion of Law No. 3.

C. Compensatory Damages: Emotional Distress:

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

83. The following principles were applied in determining whether and what amount of damages for emotional distress should be awarded: In considering the question of emotional distress damages, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures for more than a century," Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971).

84. "[T]he real purpose behind a civil rights award is to make the person whole for an injury suffered as a result of unlawful employment discrimination." Allison-Bristow v. Iowa Civil Rights Commission, 461 N.W.2d 456, 459 (Iowa 1990). A victim of discrimination is to receive "a remedy for his or her complete injury," including damages for emotional distress. Hy-Vee at 525-26.

85. The Iowa Supreme Court's observations on the emotional distress damages resulting from wrongful discharge are applicable to 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).

86. Other courts have also made observations which apply to this case:

> Evidence of distress was received. That distress is not unknown when discrimination has occurred. . . . But as the trial progressed it became more apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. . . . Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That . . . is perhaps the injury which is felt the most and the one which is the greatest.

Belton, Remedies in Employment Discrimination Law 408 (1992)(quoting Humphrey v. Southwestern Portland Cement Company, 369 F. Supp. 832, 834 (W.D. Tex. 1973).

87.

> Emotions are intangible but are no the less perceptible. The hurt done to feelings and to reputation by an invasion of [civil] rights is no less real and no less compensable than the cost of repairing a broken window pane or a damaged lock. Wounded psyche and soul are to be salved by damages as much as the property that can be replaced at the local hardware store.

Id. (quoting Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985)(quoting Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979)).

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

88. 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)), "humiliation, wounded pride, and the like." Niblo v. Parr Mfg. Co., 445 N.W.2d at 355.

3. Liberal Proof Requirements for Emotional Distress Are Consistent With the Requirement That The Statute Is To Be Liberally Construed to Effectuate Its Purpose:

89. Emotional distress damages must be proven. Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980). 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).

90. Disability discrimination in employment violates:

> not only a statute but a strong public policy underlying that statute. . . . [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 Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990)(emphasis added).

4. Emotional Distress May Be Proven By Testimony of A Complainant and Members of Her Family:

91. "The [complainants'] own testimony may be solely sufficient to establish humiliation or mental distress." Williams v. TransWorld 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). Of course, testimony of a complainant's family members may also be supportive of a finding of emotional distress. See Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980).

5. Evidence of Complainant's Economic Loss, Loss of Work, Near Depression, and Tearfulness In This Case Helps Establish Emotional Distress Although Such Damages Can Be Awarded In the Absence of Evidence of Such Economic Loss or Medical Evidence of Physical or Mental Impairment:

92. 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). There was, however, substantial financial loss in this case as indicated by the back pay figures. This evidence of economic loss, loss of work, tearfulness and near depression by the Complainant, may also be considered when assessing the existence or extent of emotional distress. See Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980)(impact on work); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988)(economic loss, depression).

6. Determining the Amount of Damages for Emotional Distress:

93.

> [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)).

94. 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), there are 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). 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).

95. Like back pay, the reasonably certain prospect of an emotional distress damages award, when such damages are proven, serves to encourage employers to evaluate their own procedures to ensure they are nondiscriminatory. See id. at 61. Cf. Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975)(back pay).

96.

> 45. 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).

D. Interest:

1. Pre-Judgment Interest:

98. The Iowa Civil Rights Act allows an award of actual damages to persons injured by discriminatory practices. Iowa Code § 601A.15(8)(a)(8). Pre-judgment interest is awarded in discrimination cases as "an element of complete compensation." Loeffler v.

Frank, 486 U.S. 549, 46 Fair Empl. Prac. Cas. 1659 (1988). 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 their employment ended, pre-judgment interest should be awarded on the back pay. Such interest should run from the date on which back pay would have been paid if there were no discrimination. Hunter v. Allis Chalmers Corp., 797 F.2d 1417, 1425-26 (7th Cir. 1986)(common law rule). 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).

2. Post-Judgment Interest:

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

E. Hearing Costs:

100. 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).

101. Since the Commission and the complainant have prevailed in this case, 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).

X. CREDIBILITY AND TESTIMONY:

102. In addition to other factors mentioned in the findings of fact on credibility, the Administrative Law Judge and the Commission have been guided by the following principles:

> [T]he ultimate determination of the finder of fact "is not dependent on the number of witnesses. The weight of the testimony is the important factor." Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957). In determining the credibility of a witness and what weight is to be given to testimony, the factfinder may consider the witness' "conduct and demeanor. . . [including] the frankness, or lack thereof, and the general demeanor of witnesses," In Re Moffatt, 279 N.W.2d 15, 17-18 (Iowa 1979); Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957), as well as "the plausibility of the evidence. The [factfinder] may use its good judgment as to the details of the occurrence . . . and all proper and reasonable deductions to be drawn from the evidence." Wiese v. Hoffman, 249 Iowa 416, 424-25, 86 N.W.2d 861 (1957).
>
> Testimony may be unimpeached by any direct evidence to the contrary and yet be so . . . inconsistent with other circumstances established in the evidence, . . . , as to be subject to rejection by the . . . trier of the facts.
>
> . . .
>
> The [factfinder] . . . might well scrutinize closely such testimony as to its credibility, taking into consideration all the circumstances throwing light thereon, such as the interest of the witnesses, remote or otherwise.

Kaiser v. Strathas, 263 N.W.2d 522, 526 (Iowa 1978)(citations omitted).

103. The factors cited above, such as consistency with the other circumstances in the record, interest, conduct and demeanor have been used in determining credibility in this case.

104. "Deference is due to hearing officer [now administrative law judge] decisions concerning issues of credibility of witnesses." Peoples Memorial Hospital v. Iowa Civil Rights Commission, 322 N.W.2d 87, 92 (Iowa 1982)(citing Bangor and Aroostook Railroad Co. v. ICC, 574 F.2d 1096, 1110 (1st Cir.), cert. denied, 439 U.S. 837, 99 S.Ct. 121, 58 L.Ed2d 133 (1978)(deference is due by reviewing court to ALJ findings on credibility even when agency has reached a contrary decision)).

105. Such deference is given because the administrative adjudicator who views the witnesses and observes their demeanor at the hearing is "in a far superior position to determine the question of credibility than is this court." Libe v. Board of Education, 350 N.W.2d 748, 750 (Iowa Ct. App. 1984). "Factual disputes depending heavily on the credibility of witnesses are best resolved by the trial court" Capital Savings & Loan Assn. v. First Financial Savings & Loan Assn., 364 N.W.2d 267, 271 (Iowa Ct. App. 1984)(quoted in Board v. Justman, 476 N.W.2d 335, 338 (Iowa 1991)). See Anderson v. City of Bessemer City, 470 U.S. 564, 575, 37 Fair Empl. Prac. Cas. 396 (1985).

DECISION AND ORDER:

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Kathrine Martin, and the Iowa Civil Rights Commission are entitled to judgment because they have established that Complainant Martin's termination and replacement by the Respondents J. Des McIvor and Northeast Iowa Mental Health Center were in violation of Iowa Code Section 601A.6 (now 216.6).

B. Complainant Martin is entitled to a judgment of twelve thousand eight hundred forty dollars and twenty- five cents ($12,840.25) in back pay for the loss resulting from her termination.

C. Complainant Martin is entitled to judgment in the following amounts for the benefits indicated:

1. Retirement Plan Contributions: One thousand two hundred eighty-four dollars and three cents ($1,284.03).

2. Health Insurance Premiums: Two thousand two hundred eighty-nine dollars and fifty-eight cents ($2,289.58).

3. Education Reimbursement Program: Four hundred twenty dollars ($420.00).

D. Complainant Martin is entitled to a judgment of fifteen thousand dollars ($15,000.00) in compensatory damages against Respondents for the emotional distress sustained as a result of the discrimination practiced against her.

E. Interest, at the rate of ten percent per annum, shall be paid by the Respondents to Complainant Martin on her awards of back pay and benefits, as set forth in paragraphs B and C of this order, commencing on the date payment would have been made if Complainant had not been terminated and continuing until date of payment.

F. Interest, at the rate of ten percent per annum, shall be paid by the Respondents to Complainant Martin on her award of compensatory damages for emotional distress, commencing on the date this order becomes final and continuing until date of payment.

G. Complainant's seniority shall be restored. Her personnel records shall indicate that Complainant's hire date is March 12, 1990. Complainant shall receive one additional day of personal leave, 15 days of accrued vacation leave, and 12 days of accrued sick leave or permanent disability leave (up to the limits indicated in the personnel policy) to reflect the year (8/91-8/92) she was off work. Her vacation shall accrue under the personnel policy as if she had been continuously employed since March 12, 1990.

H. Within 45 calendar days after the date this order becomes final, 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.

I. 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. This order is final in all respects except for the determination of the amount of the attorney's fees.

J Respondents are assessed all hearing costs allowed by Commission Rule 4.7(3) 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.

K. Respondents are hereby ordered to cease and desist from any further practices of disability discrimination in employment.

L. Respondent Northeast Iowa Mental Health Center shall post, within 60 days of the date of this order, in conspicuous places at its locations at Oelwein and Decorah, Iowa, in areas readily accessible to and frequented by employees, the notice, entitled "Equal Employment Opportunity is the Law," which is available from the Commission.

M. Respondent Northeast Iowa Mental Health Center (NEIMHC) shall amend its personnel policies, within 180 days of the date of the final order in this case, to include written policies to be developed by Commission staff on sick leave, and other leave for illness or disability, which shall be designed to prevent future instances of disability or perceived disability discrimination. Respondent NEIMHC shall cooperate in the development of such policies. In the event, in the sole judgment of the Commission's

representative, agreement cannot be reached on the language of such policy, the version drafted by the Commission shall be adopted by the Respondent.

N. Respondent Northeast Iowa Mental Center 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 G, L and M of this order.

Signed this the 11th day of September, 1995.

_____

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

FINAL DECISION AND ORDER

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

IT IS SO ORDERED.

Signed this the 27th day of October, 1995.

_____

Dale Repass
Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319

Note: The Respondents agreed to pay $40000.00 to the Complainant for all damages and attorney's fees. The Respondents also agreed to restore Complainant's seniority rights and to cause her personal records to show that her hire date was March 12, 1990. The Respondents did file a petition for judicial review on other matters which resulted in a limited remand from Winneshiek County District Court as the Commission did not have authority to develop leave policies for the Respondent. The remand resulted in the following new final order:

FINAL ORDER

On February 28, 1997 the Iowa Civil Rights Commission, at its regular meeting considered the matter of Northeast Iowa Mental Health Center (NEIMHC) v. Iowa Civil Rights Commission, Martin, CPE09-91-21510, on remand from the Iowa District Court

for Winneshiek County. Upon further consideration of the matter and the order of the court, the Commission amended its final order by deleting that portion of paragraph M that provided that the Iowa Civil Rights Commission shall develop policies and provides, instead, that personnel policies will be developed by NEIMHC.

The amendment to paragraph M is as follows:

M. Respondent Northeast Iowa Mental Health Center (NEIMHC) shall amend its personnel policies with regard to sick leave and other leave for illness or disability to prevent future instances of disability or perceived disability discrimination within 180 days of the date of the final order in this case. [The remainder of the original paragraph M is stricken].

IT IS SO ORDERED.

Issued this 28th day of February, 1997.

_____
DON GROVE, Executive Director, for
BERNARD BIDNE, Iowa Civil Rights Commission Chairperson