TAMMY R. COLLINS and LARRY W. COLLINS, Complainants, and IOWA CIVIL RIGHTS COMMISSION,
vs.
HOWARD C. FLOOK, Respondent.

CP# 09-91-21524
CP# 09-91-21525

SUMMARY

This matter came before the Iowa Civil Rights Commission on the Complaint, alleging discrimination in housing on the basis of race, filed by Complainants Tammy and Larry Collins against the Respondent Howard Flook.

Complainants Larry and Tammy Collins allege that Respondent Flook failed to rent to them because they are a mixed race couple and indicated that he would not rent to Blacks.Larry is Black. Tammy is White. Through their complaints, they allege that they were subjected to different treatment on the basis of race.

A public hearing on this complaint was held on September 15, 1992 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the offices of the Iowa Civil Rights Commission in Des Moines, Iowa. The Respondent was represented by Gregory Peterson, Attorney. The Iowa Civil Rights Commission was represented by Rick Autry, Assistant Attorney General. The Complainants, Larry Collins and Tammy Collins, were not represented by counsel. The Commission's Brief and the Respondent's Brief were both received on November 13, 1992. Complainants Tammy and Larry Collins proved their allegations of discrimination in housing because of race under the disparate treatment theory. The proof was in the form of direct evidence of discrimination, including admissions by Flook in his testimony at hearing and his investigation interview, that he refused to rent to the Complainants because they were an interracial or mixed race couple.

In a case, such as this one, where discrimination is proven primarily by direct evidence, the Respondent cannot rebut the Complainant's initial case merely by offering evidence of legitimate, non-discriminatory reasons. That lighter burden of production only applies to "pretext" cases which rely on circumstantial evidence to prove discrimination. Rather, Respondent must not only produce such evidence, but must prove, by the greater weight of the credible evidence, (1) that it actually relied on independent, lawful reasons at the time of the alleged discrimination, and (2) that those reasons, standing alone, would have resulted in the denial of the rental. It is not enough to show that denial of the rental for such reasons would have been justified. The Respondent must **prove** that the denial would have happened for the stated reasons in the absence of discrimination. See Conclusion of Law No. 14.

The Respondent offered two other reasons for failure to rent to the Collinses. The first reason offered by Respondent is that it believed the Complainants were not married. (The Respondent admits, on brief, that Complainants are, in fact, married). The second is that the living space in the apartment was too small for their family. Respondent has not met its burden of persuasion

with regard to either reason. It has proved neither that these reasons were actually relied on nor that they independently would have resulted in denial of rental in the absence of the admitted and proven race discrimination. Indeed, the evidence suggests these reasons are false. See Findings of Fact Nos. 14-21. See Conclusion of Law No. 14.

Remedies awarded include a cease and desist order, reporting requirements, $15,000 for Tammy Collins, and $15,000 for Larry Collins in emotional distress damages, and interest.

FINDINGS OF FACT:

I. Jurisdictional and Procedural Facts:

A. Subject Matter Jurisdiction:

1. The Complainants allege Respondent refused to rent them an apartment because Mr. Collins and the children are black. (Notice of Hearing-Complaints). By alleging they were refused this apartment for this reason, both Complainants have alleged that they suffered loss or damage and that their legal rights to fair housing have been denied due to race discrimination in housing. Both of them, therefore, have alleged they were aggrieved by such racial discrimination. This is sufficient to bring their complaints within the subject matter jurisdiction of the Commission. See Conclusions of Law Nos. 1-4.

B. Procedural Matters:

2. Certain statutory prerequisites for hearing, such as filing, service, and investigation of the complaints, probable cause finding, election to not proceed in district court, determination to bypass conciliation, and notification of failure of conciliation have been met as admitted by Respondent. (CP. EX. # 1, 2). The complaints filed by Mr. and Mrs. Collins were also timely filed as they were filed on the same day as the alleged discrimination. (Notice of Hearing-Complaints; CP. EX. # 1, 2).

II. Background:

3. Larry and Tammy Collins are a married couple with three children Leo, Larry, and Treva. Their children's ages at time of hearing, in September of 1992, were, respectively, four, three, and one. Larry is Black. Tammy is White. (Tr. at 5-6, 26, 27, 44, 101-02). Mr. Collins is a veteran. (Tr. at 10, 46). In September of 1991, the family was living at the Catholic Worker House, a shelter for the homeless in Des Moines, Iowa. (Tr. at 6, 11, 45, 46). They had stayed at the shelter for three months while looking for an apartment. (Tr. at 11, 26). The Collinses are originally from Oklahoma. (Tr. at 50).

4. On Sunday, September 22, 1991, Mrs. Collins attended church. On her way back to the shelter, she saw a sign in front of a house at 515 Franklin Street indicating that an apartment was for rent. (Tr. at 6, 45). She talked to the Respondent Howard Flook, the owner, who told her he had an apartment for rent at 511 Franklin Street. (Tr. at 6, 7, 85).

5. Mrs. Collins informed him that she had a husband and children. (Tr. at 7). She was showed the apartment by Roger Popken, Flook's maintenance man. (Tr. at 8, 74). (At this time, Popken noticed Mrs. Collins had mixed race children. He later informed Flook of that fact.) (Tr. at 75). She then informed Flook that she was interested. She gave Flook the names of her references. Respondent Flook said he would rent it to her. She said she would get the key the next day when she paid the rent. (Tr. at 7-9). She informed Flook that she intended to pay the rent with a Veterans Administration voucher, as her husband was a veteran. (Tr. at 10, 46).

6. Mrs. Collins returned to the shelter and informed her husband that she had found an apartment. (Tr. at 10, 45). On the next day, the 23rd, the Collinses obtained a VA voucher. (CP. EX. # 3; Tr. at 11, 46-47). That morning, Mr. and Mrs. Collins and their children went to 511 Franklin to obtain Flook's full name for the voucher. (Tr. at 11-12, 47). Mr. Flook was either not there or did not come to the door. Nonetheless, the Collinses filled out the voucher based on his name at the mailbox at 515 Franklin. (Tr. at 12, 47-48). The first name is, however, misspelled on the form. (CP. EX. # 3). After looking at the apartment through the window, the family left. (Tr. at 47).

7. Mrs. Collins spoke to Respondent Flook on the telephone later that same day and informed him she had the voucher. (Tr. at 12). She then returned to his residence alone. (Tr. at 13, 48). Both Flook and Popken were in the area. (Tr. at 13, 74). Flook was in the front yard, going toward his car when Mrs. Collins drove in and presented the voucher. (Tr. at 13, 75). After stating he had not believed she would get the voucher, Flook informed her "I would rent to you, but I'm not going to". (Tr. at 14).

III. Direct Evidence of Discrimination:

A. Respondent Howard Flook Informed Mrs. Collins He Would Not Rent to Her Because She Had "Nigger Kids and a Nigger Husband":

8. In light of the overwhelming direct evidence in the record, set forth below, it is found that race was the reason Respondent Flook failed to rent to the Collinses. When Respondent Flook told Mrs. Collins that he was not going to rent to her, she inquired why not. He told her, "because you have nigger kids and a nigger husband." Mrs. Collins responded by saying "Excuse me." Flook stated that he had troubles with "niggers". Flook told her that they had put holes in the walls and had other "niggers" around and had fights. Mrs. Collins said "Thank you. Have a good day," and left. (Tr. at 14).

B. Respondent Howard Flook Admitted In His Testimony At Hearing That One Reason He Did Not Rent To The Collinses Was That Theirs Was a Mixed Race Marriage:

9. During his testimony at hearing, Howard Flook, while denying the use of the word "nigger", did credibly testify and admit that one reason he had for refusing to rent to Mr. and Mrs. Collins was because their marriage was "a mixed race marriage." (Tr. at 88-89, 99).

C. Respondent Howard Flook Also Admitted that Race Discrimination Was A Factor In Denying Housing to the Collinses During His Investigation Interview. (The Truth and Accuracy of the Interview Transcript Are Also Admitted By Respondent Flook):

10. Respondent Howard Flook also admitted, in his response to requests for admissions, that the transcript of the taped investigation interview between him and Commission investigator Larry Lockman held on or about October 1, 1991 "is a true and accurate transcription of the conversation." (CP. EX. # 1, 2). **The truth and accuracy of this transcript, therefore, for reasons statedin the conclusions of law, are "conclusively established" in this proceeding for statements in it which are not contested by the complainants or the Commission in its prosecutorialcapacity.** The Respondent is bound by its admission of the truth and accuracy of such statements. See Conclusions of Law No. 5-6.

11. **The truth and accuracy of the following portions of the transcript is established with respect to the admissions that race or the interracial or "mixed couple" status of the Collinseswas the reason that Respondent Flook refused to rent to them:**

> Q. [By Lockman]: Could you tell me the conversation you had with her, what she said, what you said?
>
> A. [By Flook]: Well, she was wanting an apartment and I told her we had...she knew cause she'd seen in the paper that we had this apartment for rent. And so she wanted to rent it.
>
> Q. [By Lockman]: Is that all she said?
>
> A. [By Flook]: That's about all as far as I remember that's about all she said.
>
> Q. [By Lockman]: Well, what did you say to her renting it?
>
> A. [By Flook]: Well, . . . **I agreed to her renting it until** a . . . **I find out that** . . . that . . . **she was** . . . **mixed** . . . Well, it isn't a marriage. I don't think she's married. **She has a colored husband,** a colored man with her wasn't a husband I don't think. I think he's just living with her.
>
> Q. [By Lockman]: **Okay, so you were gonna rent it to her until you found out she had this Black man with her**?
>
> A. [By Flook]: **That's right.**
> Q. [By Lockman]: And what was wrong with that?
>
> A. [By Flook]: Well, **I've had trouble with the... the coloreds** and I . . . and I've...so **I...I wanna stay away from it...trouble as much as I can and so that's the reason I didn'trent to her.**

(CP. EX. 2 [Attachment 1, pages 4-5]).

Q. [By Lockman]: **[H]ave you ever rented to a Black person before?**

A. [By Flook]: Well, I rented to a white person that...that took all...took a lot of Blacks in and took...she took most all of 'em in as far as that goes. They had a party there about every night and I had to get rid of her.

Q. [By Lockman]: So since that occasion.

A. [By Flook]: But we have rented, we haven't rented to any...**I never rented to a colored... colored person before because...we...we...other tenants don't...don't go along withthat too good and so I didn't rent it to her.**

Q. [By Lockman]: The other tenants don't go along with that?

A. [By Flook]: No.

(CP. EX. 2 [Attachment 1, pages 5-6]).

Q. [By Lockman]: Okay. And you saw this Black man with her and you knew that he wouldn't be a good tenant?

A. [By Flook]: Well, **I've had trouble with the Blacks tearing up the apartments and that's the reason I didn't put her in there.**

Q. [By Lockman]: Now is there any Blacks you would rent to ?

A. [By Flook]: Well, there might be, I don't know.

Q. [By Lockman]: How would you determine that?

A. [By Flook]: Well if I knew...if they was around and. . . they were good tenants someplace else or...or if they were the right kind of people, I'd rent to 'em, sure.

Q. [By Lockman]: Did you ask her for references?

A. [By Flook]: No, I didn't ask her for references?

Q. [By Lockman]: Okay. **So you based that decision solely upon her being with that Black man, is that correct?**

A. [By Flook]: **Well, that was the most of it, yeah.**

Q. [By Lockman]: So you never rented to a Black person before?

A. [By Flook]: No. I don't remember ever renting to one.

Q. [By Lockman]: So your place [is] on Franklin, is that close to Sixth Avenue?

A. [By Flook]: Not too far from it.

Q. [By Lockman]: So you're in the middle of a ghetto and you've never rented to a black person?

A. [By Flook]: Well, not a Black person alone, no I haven't.

Q. [By Lockman]: And how long have you owned these places?

A. [By Flook]: Well, I owned one twenty some years and the others not quite that long.

(CP. EX. 2 [Attachment 1, page 7]).

Q. [By Lockman]: Okay. Well, you're just assuming that these people are gonna cause you trouble because of the color of their skin.

A. [By Flook]: No. I'm not assuming that at all, but I've had experience with that.

Q. [By Lockman]: Okay. And you've had no experiences with white people that's torn up your apartments?

A. [By Flook]: Yes. I've had experiences with white people.

Q. [By Lockman]: And you still rent to white people?

A. [By Flook]: I rent to white people.

(CP. EX. 2 [Attachment 1, page 8](emphasis added)).

D. Other Credible Evidence In the Record Demonstrates That Race Was A Factor In Respondent's Denial of Housing to the Collinses:

12. In addition to the credible testimony of Mrs. Collins and admissions of Respondent Flook, which have been set forth or cited in transcript references above, there is other direct evidence of discrimination. Roger Popken testified that Respondent Flook informed him that he would not accept the VA voucher from the Complainants because they were a racially mixed couple, and Flook had problems with such couples in the past. (Tr. at 76-78).

IV: The Respondent Has Not Proven By a Preponderance of the Evidence That, In the Absence of Racial Discrimination, He Would Have Refused to Rent to The Collinses Because He Believed They Were Not Married:

A. Respondent Admits, On Brief, That The Collinses Are, In Fact, Married:

13. While asserting, on brief, that the Collinses were rejected because Respondent Flook believed they were not married, Respondent repeatedly refers to them, on brief, as a married couple. (Respondents Brief at 2, 3, 4, 5). At one point, the brief expressly states "Complainants do have an interracial marriage. . .". (Respondent's Brief at 5). For reasons stated in the Conclusions of Law, this admission is binding on the Respondent and on the Commission in its adjudicative capacity. See Conclusions of Law Nos. 7-8.

B. The Contention That Respondent Flook Denied Housing to the Collinses Based on the Belief that Mr. and Mrs. Collins Were Not Married Is Not Supported By the Greater Weightof the Evidence:

14. On September 22, 1991, when Complainant Tammy Collins first talked to Respondent Flook about renting the apartment, she informed him that she had a husband and children. (Tr. at 7). She never told Flook that they were not married. (Tr. at 101).

15. For reasons set forth more fully in the findings of fact on credibility, it is clear that the Collinses' recollection of events is far more accurate than that of Respondent Flook. See Findings of Fact Nos. 22-23, 25-26. Therefore, Flook's assertion that Mrs. Collins told him that she and Mr. Collins were unmarried is not credible. (Tr. at 86, 95). It follows that his assertion that one reason for not renting to the Collinses is because they were not married is also untenable. (Tr. at 91, 92, 99). Flook admitted he never told Mrs. Collins she would not rent to them because they were not married. (Tr. at 92-93). Respondent Flook's statement to Mrs. Collins that he would not rent to her "because you have nigger kids and a nigger husband" reflects both his realization that Mrs. Collins was married and his true reason for his rejection of the Collinses. (Tr. at 14).

16. Roger Popken gave contradictory testimony on this issue. He stated at one point that, at the time he showed the apartment to Mrs. Collins, he thought she was unmarried. His testimony does not reveal why he believed this. (Tr. at 79). At another point, he admits that he did not know, at the time of the refusal to rent to the Collinses, if the Collinses were married or not. (Tr. at 77). His testimony on this issue is, therefore, not credible.

17. The greater weight of the credible evidence supports neither (1) the contention that the belief that the Collinses were unmarried was actually relied on as part of the reason for their rejection at the time of the rejection by Respondent Flook, nor (2) the proposition that such reason, standing alone, would have resulted in denial of the rental property to the Collinses.

C. The Contention That Respondent Flook Denied Housing to the Collinses Based on the Belief that the Collins' Family Was Too Large Is Not Supported By the Greater Weight of the Evidence:

18. Respondent Flook asserts that he refused rental to the Collinses because their family was too large for the apartment. (Tr. at 90). However, he did not know whether he had ever informed Mrs. Collins of this reason. (Tr. at 93). There is no evidence in the record that he did so. There is nothing in the "nigger kids and a nigger husband" reason he did give to indicate this was actually a concern. (Tr. at 14).

19. The apartment contained two bedrooms, a living room, a dining room, a kitchen, a bathroom, a hallway and two bedrooms. (CP. EX. # 2 (attachment 8 at p. 4); Tr. at 8). According to the investigative report, it would have been permissible for two persons to sleep in each bedroom, with the fifth in the living room. (CP. EX. # 2 (attachment 8 at p. 4)). At the time of hearing, Roger Popken had moved to that apartment. His eight year old son was sleeping in the living room of that apartment. (Tr. at 81, 83-84). There was room for five people in that apartment.

20. Finally, Flook claims that he saw how many people were in Mrs. Collins' family by seeing how many there were in her car on her very first visit. He claimed that, at that time, he decided her family was too large. (Tr. at 95). This testimony is not credible in light of his initially offering her the opportunity to rent the apartment, and of his silence at the time she informed him she was going to get a VA voucher for the rental payment. See Finding of Fact No. 5.

21. The greater weight of the credible evidence supports neither (1) the contention that the belief that the Collins family was too large for the apartment was actually relied on as part of the reason for their rejection at the time of the rejection by Respondent Flook, nor (2) the proposition that such reason, standing alone, or in combination with the "unmarried couple" reason would have resulted in denial of the rental property to the Collinses.

21A. The greater weight of the credible evidence shows that race, including the status of Complainants as an interracial couple, the status of Larry Collins as a Black man, and the status of their children as interracial persons, was the sole and true reason for the denial, by Respondent Howard Flook, of the apartment sought by Complainants. The evidence also shows that Respondent Flook directly indicated that Black or mixed race persons were not acceptable as tenants. See Findings of Fact Nos. 8-21.

V. Credibility:

22. Respondent Howard Flook was not a credible witness with respect to statements which were not admissions against interest or supported by other indicia of reliability. Flook's memory, at hearing, of important events was obviously flawed. He stated that he was not sure whether he or Roger Popken talked to Mrs. Collins when she returned with the voucher. He was not sure about what was said or whether he was even there. (Tr. at 88). During his testimony, he was found to be reviewing notes he had made, apparently prior to the hearing. (Tr. at 93). He also had difficulty recalling the specifics of his conversation with Larry Lockman, the Commission investigator. (Tr. at 96-98). He repeatedly stated that he could not remember back to the time of that conversation, which was on October 1, 1991. (CP. EX. # 1; Tr. at 98-99). It was also clear from his manner and demeanor that he had a difficult time remembering, although at one point he did testify that he could remember events of a year prior to the hearing, the time of the denial of rental to the Collinses.

23. In addition, while Respondent has admitted the truth and accuracy of the transcripts of the tape recorded investigation interview, Respondent Flook repeatedly asserted that he could not (independent of reference to the tape and transcript) "remember the full context" of various portions of the interview. (CP. EX. # 1). Finally, Flook's testimony, in some respects previously

noted above, is not plausible as it is not consistent with the greater weight of the evidence. See Findings of Fact Nos. 15, 20.

24. Roger Popken's testimony was credible in some respects. Yet, it was clear from his nervousness and demeanor that he found it difficult to testify against his employer and landlord, Respondent Flook. Given his contradictory testimony on his knowledge of the marital status of the Collinses, that testimony was not credited. See Finding of Fact No. 16.

25. Based on their demeanor, their clearer recollection of events, the internal consistency of their testimony and its consistency with the greater weight of the evidence, the testimony of Tammy and Larry Collins is credible in all respects but one. Their testimony that there was measurable snow while they were living in their car in Iowa in the two to three week period after their rejection on September 1991 is not credible. (Tr. at 28-29, 49, 62-64). Their testimony that, although it was warm on September 23rd, there were periods of cold, particularly at night, during their time living in the car, is, however, credible. (Tr. at 28, 62, 63).

26. Of course, the point at which weather is "cold" is to some degree a subjective judgment which may depend on one's experience and whether one is sleeping outdoors, in a car, or in a heated building. It appears that the statements about the snow are simply a result of confusion of that time with other experiences involving snow. It is not the impression of the Administrative Law Judge that these statements are willfully false. Nor does the presence or absence of snow materially affect the outcome of this case.

27. Official notice is taken of the following high and low temperature and precipitation amounts for the period of September 23-October 14, 1991 which are capable of certain verification through weather reports published in the Des Moines Register for that period. These reports are impartial compilations of statistics. Fairness to the parties does not require that they be given the opportunity to contest these facts:

Date	High	Low	Precipitation
09/23/91	69	38	0"
09/24/91	65	47	0"
9/25/91	73	39	0"
9/26/91	66	38	0"
9/27/91	65	45	Trace
9/28/91	72	40	0"
9/29/91	87	52	0"
9/30/98	74	49	0"
10/1/91	83	42	0"
10/2/98	77	56	0"
10/3/91	62	47	0.05"
10/4/91	50	45	1.17"
10/5/91	48	36	0.01"
10/6/91	53	33	0.0"
10/7/91	70	29	0.0"

10/8/91	79	54	0.0"
10/9/91	74	47	0.0"
10/10/91	68	42	0.0"
10/11/91	74	53	0.0"
10/12/91	64	42	0.0"
10/13/91	64	46	0.0"
10/14/91	56	40	0.0"

VI.Emotional Distress:

28. Both Tammy Collins and Larry Collins suffered severe emotional distress as a result of the discrimination inflicted on them by Respondent Flook. Mrs. Collins's initial reaction to being informed that she was not being rented the apartment because of her "nigger kids and a nigger husband" was to say "thank you" and leave. See Finding of Fact No. 8.

29. At first blush, this reaction may seem contradictory to a claim of distress. However, this reaction may support, not contradict a claim of distress. Knowledge of the effects of discrimination is within the specialized expertise of the Commission. Official notice is taken that the initial reaction of a victim of overt racial discrimination may be one of acute embarrassment and of a desire to immediately withdraw from the situation. In response to the overt act, the victim may say "thank you" and immediately leave, as opposed to becoming engaged in a discussion or argument. In a similar prior case before this Commission, a Black woman was told she was being refused day care for her infant son because "We are not going to mix races." Her initial response was to say "Okay. Thank you," and leave. Diane Humburd, 10 Iowa Civil Rights Commission Case Reports 1, 2 (1989). Fairness to the parties does not require that they be given the opportunity to contest these facts.

30. When Tammy Collins came back to the homeless shelter she was crying because she didn't get the apartment and because of what Flook had said. Larry Collins, too, broke into tears upon hearing of these events. (Tr. at 14- 15, 48, 51).

31. The emotional impact on the Collinses was especially traumatic for two reasons: First, they were all excited and happy with the apartment. When the Collins family looked at the apartment together through the window, earlier that same day, they repeatedly commented to each other on how nice it was. They understood that they were finally going to have a real home. (Tr. at 10, 45, 47).

32. Second, the Collins family, based on the prior understanding with Flook that they would have the apartment once they presented the voucher, had checked out of the homeless shelter. Someone else had taken their place and there was no more room at the shelter. (Tr. at 15).

33. Tammy, Larry, Leo, Larry (the son), and Treva Collins had to live in the family car, a station wagon, for two to three weeks. This involved all the attendant stresses and strains inherent in caring for three small children, ages eight weeks, two years and three years. (Tr. at 6, 16, 49). After this time, the Collinses were able to get adequate shelter. (Tr. at 71-72).

34. Tammy Collins credibly testified that she was and still is heartbroken over being rejected for the apartment due to race. (Tr. at 16). She worries about her children suffering race discrimination in the future. She remembers how they had to suffer living in the car. (Tr. at 19-20). Tammy Collins often thinks about the day Respondent Flook rejected her voucher and what he said "No nigger kids, no nigger husband." (Tr. at 20).

35. Tammy Collins has had nightmares about this incident. "I sleep very lightly now, I toss and turn." Before this incident, Mrs. Collins "was a very hard, tight sleeper." (Tr. at 21). She believes this incident shall affect her for the rest of her life. (Tr. at 22).

36. When Larry Collins found out what had been happened, he was angered and hurt. (Tr. at 48). "I was humiliated, I was hurt, and I felt like, hey, I was a dog or something." "[I cried] [b]ecause we got put outdoors. We left a place--we thought we had a place to live, and after he did not rent the place to us, it put us in the cold." (Tr. at 51).

37. Every day, Larry Collins worries that, because of racism, his children "are going to have it harder than I'm having it right now." (Tr. at 53-54). He did not have these concerns prior to this incident. (Tr. at 54).

38. When Larry Collins is among white persons, he now asks himself the question, "Do these people . . . feel the same way that Mr. Howard Flook did?". Due to this incident, he now feels that, as a Black man in Iowa, he will be treated "[l]ike a dog out on the street." (Tr. at 55). "I feel out of place . . . [b]eing in a room with a bunch of white people." (Tr. at 57). He was comforted by the fact that a Black investigator was present in the hearing room while he testified. (Tr. at 55). He believes this incident will affect him for the rest of his life. (Tr. at 57).

39. Larry Collins's sleep is adversely affected by the incident with Respondent Flook "[b]ecause I got to go to bed thinking about this. I have to wake up thinking about this. It happens every day. It's to the point that once I feel just like crawling off in a hole somewhere because of what this man did." (Tr. at 53).

40. This incident has caused severe difficulties with the Collinses' marriage. Because of this incident, Larry Collins has often come to believe that all whites, including his wife, are alike in that they are prejudiced against Blacks. (Tr. at 17-18, 34, 66). This has resulted in fights, including one argument where Larry hit Tammy with a thrown coffee cup. (Tr. at 17, 52). The Collinses nearly got divorced due to arguments arising from the incident with Flook. (Tr. at 17-19, 52-53). Such arguments had not occurred prior to the incident with Flook. (Tr. at 18, 52-53). Since approximately July of 1992, the Collinses have been in interracial counseling, to aid them with the marital and other emotional problems resulting from the racial discrimination they suffered at the hands of Howard Flook. (Tr. at 21-22, 56). Although numerous areas were explored on cross-examination, there is no evidence in the record showing that other causes account for the complainants' emotional distress.

41. In light of the severity and duration of the ongoing emotional distress inflicted on Tammy Collins by Respondent Howard Flook, she is entitled to damages in the amount of fifteen thousand dollars ($15,000).

42. In light of the severity and duration of the ongoing emotional distress inflicted on Larry Collins by Respondent Howard Flook, he is entitled to damages in the amount of fifteen thousand dollars ($15,000).

VI: Respondent Flook's Assertions Regarding Limitations on Damages Are Not Only Contrary to Law, They Are Not Supported By Any Evidence In the Record:

43. On brief, it is claimed that damages should be reduced because "Respondent is without substantial assets" and that his "apartment buildings are both in a state of repair, and one was closed to the public at the time of hearing." (R. Brief at 4). There is absolutely no evidence in the record supporting either of the factual propositions stated. Basing a compensatory damages decision, in any respect, on such considerations would be contrary to law. See Conclusion of Law No. 33.

CONCLUSIONS OF LAW:

I. Jurisdiction and Procedure:

A. Subject Matter Jurisdiction:

1. 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). The Collinses' complaint is within the subject matter jurisdiction of the Commission as the allegations that Respondent Flook failed to rent to the Complainants due to race falls within the statutory prohibitions against unfair housing practices which the Commission has the power to hear and determine. Iowa Code *SS* 601A.8, .15 (now *SS* 216.8, .15).

2. Specifically, this case falls within the prohibitions of the following code sections:

> It shall be an unfair or discriminatory practice for any owner . . . of rights to housing . . .:
>
> 1. To refuse to . . . rent, lease . . . any . . . housing accommodation . . . to any person because of the race, color . . . of such person.
>
> . . .
>
> 3. To directly . . . in any . . . manner indicate . . . that the rental, lease, . . . of any housing accommodation . . . by persons of any particular race, color, . . . is unwelcome, objectionable, not acceptable, or not solicited.
>
> 4. To discriminate against the [prospective] lessee of any . . . housing accommodation . . . because of the race, color . . . of persons who may from time

> to time be present in or on the lessee's or owner's premises for lawful purposes at the invitation of the lessee as . . . relatives or in any similar capacity.

Iowa Code Section 601A.8 (1991).

B. Standing of the Complainants:

3. As this Commission has previously held: The Act allows "any person claiming to be aggrieved by a discriminatory or unfair practice" to file a complaint. Iowa Code § 601A.15. An aggrieved person is one who has "suffered loss or injury;. . . one who is injured in a legal sense, one who has suffered an injury to person or property," In Re Vetter's Estate, 297 N.W. 554, 556 (Neb. 1941)(cited in Ironworkers [Local No. 67 v. Hart, 191 N.W.2d 758 (Iowa 1971)] at 767); or whose "legal right is invaded by the act complained of." American Surety Co. v. Jones, 51 N.E.2d 122, 125 (Ill. 1943)(cited in Ironworkers at 767).Cristen Harms, 10 Iowa Civil Rights Commission Case Reports 89, 120 (1992).

4. As noted in the findings of facts, both Complainants have alleged and proven that they have standing as "aggrieved" parties, i.e. they have suffered loss and damage due to race discrimination in housing. See e.g. Findings of Facts Nos. 1, 8-12, 21A, 28-42. Complainants need only show that they are aggrieved due to race discrimination against themselves or others, it need not be discrimination due to that particular complainant's race. *See* Cristen Harms, 10 Iowa Civil Rights Commission Case Reports 89, 120 (1992)(citing Ironworkers Local No. 67 v. Hart, 191 N.W.2d 758, 766-67 (Iowa 1971)). The courts "consistently recogniz[e] [fair housing discrimination] standing in spouses . . . and other whites who were denied housing because they lived with blacks." R. Schwemm, Housing Discrimination Law, § 27.4(3), p. 27-36 (1990).

II. Effect of Admissions:

A. Admissions in Response to Requests for Admissions:

5. Requests for admissions are a discovery tool whereby one party submits a list of facts which it wants admitted by another party to a proceeding. See Iowa R. Civ. P. 127. The answering party responds serving written answers or objections upon the inquiring party. Id.

6. Any matter admitted is "conclusively established." Iowa R. Civ. P. 128. However, "[a] request for admissions, once admitted, only binds the party making the admission. The party requesting is free to prove facts in addition to, or contrary to, the admission." Poulsen v. Russell, 300 N.W.2d 289, 298 (Iowa 1981). This is why the admissions made by Respondent as to the truth and accuracy of the investigation interview transcript are conclusive only as to Flook's admissions that he discriminated against the Complainants due to their interracial status, and not as to other statements of fact which may be contested by the Commission or the complainant. See Findings of Fact Nos. 10-12.

B. Admissions on Brief:

7.

> When an allegation, which militates against the party making it, is made on pleadings or in a brief, and such allegation has not been withdrawn or superseded, it binds the party making it and must be taken as true by a court, administrative agency, or other finder of fact. *See* Grantham v. Potthoff-Rosene Company, 257 Iowa 224, 230-31, 131 N.W.2d 256 (1965)(cited in Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)). *See also* Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991).

Maxine Boomgarden, CP # 07-86-14926, slip. op. at 59 (Iowa Civil Rights Comm'n October 12, 1993).

8. Under the above principles, the Commission must take as true the Respondent's admission, on brief, that Complainants Tammy and Larry Collins are married. See Finding of Fact No. 13.

III. Official Notice:

9. Official notice was taken of several facts. See Findings of Fact Nos. 27, 29.

> Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Iowa Code § 17A.14(4). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980).

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 160 (1992).

10. The specialized knowledge which was noticed concerned the initial effects of overt discrimination on the victim. See Finding of Fact No. 29. The knowledge capable of certain verification which was noticed were the weather reports. See Finding of Fact No. 27. Such an impartial compilation of statistical data may be officially noticed. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 769 (Iowa 1971).

IV. Order and Allocation of Proof in Housing Discrimination Cases Under the Disparate Treatment Theory:

11. This case involves allegations of disparate treatment on the basis of race in housing:

> 4. The same orders and allocations of proof utilized in disparate treatment employment discrimination cases are also utilized in housing discrimination cases under the disparate treatment theory. R. Schwemm, Housing Discrimination Law and Litigation § 10.1 (1993); Pinchback v. Armistead Homes Corp., 907 F.2d 1447, Fair Hous. Fair Lend. (Looseleaf) § 15638 at p. 16273-74 (4th Cir. 1990). Disparate treatment theory focuses on whether the Complainant has been "intentionally singled out for adverse treatment on the basis of a prohibited criterion." Henson v. City of Dundee, 682 F.2d at 903.

> 5. Disparate treatment is shown when:The employer [or landlord in housing cases] . . . treats some people less favorably than others because of their race [or sex]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.
>
> Teamsters v. United States, 431 U.S. 324, 335- 36 n.15 (1977).

Darrell Harvey, CP # 04-90-19797, slip. op. at 34-35 (Iowa Civil Rights Comm'n January 28, 1994).

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

12. This case relies on the "direct evidence" order and allocation of proof:

> 6. "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).
>
> 7. Direct evidence that a protected class status, such as sex, is a motivating factor in housing policies and practices concerning tenants [or prospective tenants] would include comments by decisionmakers expressing either a preference for or an aversion to tenants [or prospective tenants] who are members of a particular protected class. *See* Dorene Polton, XI Iowa Civil Rights Commission Case Reports 152, 161 (1992)(apartment manager expressed hostility toward blacks as tenants and a preference for white tenants). *C.f.* Buckley v. Hospital Corporation of America, 758 F.2d 1525, 1530 (11th Cir. 1985)(supervisor's statements of surprise at longevity of staff members, of need for "new blood," of intent to recruit younger employees, and comment on plaintiff's "advanced age" causing stress was direct evidence of age discriminatory intent in discharge); Miles v. M.N.C. Corp., 750 F.2d 867, 36 Fair Empl. Prac. Cas. 1289, 1294-96 (11th Cir. 1985)(hiring official's statement that he had no black employees because they "weren't worth a sh--" was direct evidence of discrimination in failure to recall from layoff); Jackson v. Wakula Springs & Lodge, 33 Fair Empl. Prac. Cas. 1301, 1307 (N.D. Fla. 1983)(use of racial slurs by individual responsible for discharge is direct evidence of racial animus in termination); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 477-78 2nd ed. 1989)(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).
>
> 8. The proper analytical approach in a case with direct evidence of discrimination is, first, to note the presence of such evidence; second, to make the finding, if the

evidence is sufficiently probative, that the challenged practice discriminates against the Complainant because of the prohibited basis; third, to consider any affirmative defenses of the Respondent; and, fourth, to then conclude whether or not illegal discrimination has occurred. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 121-22, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533, 535 (1985)(Age Discrimination in Employment Act). **With the presence of such direct evidence, the analytical framework, involving shifting burdens of production, which was originally set forth in** McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), **and subsequently adopted by the Iowa Supreme Court**, *e.g.* Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982); Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 530 (Iowa 1985), **is inapplicable. Landals v. Rolfes Co**., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (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); Pinchback v. Armistead Homes Corp., 907 F.2d 1447, Fair Hous. Fair Lend. (Looseleaf) § 15638 at p. 16274-75 (4th Cir. 1990)(housing discrimination case); R. Schwemm, Housing Discrimination Law and Litigation § 10.2 n.15 (1993).

9. The reason why the McDonnell Douglas order and allocation of proof is not applicable where there is direct evidence of discrimination, and why the Respondent's defenses are then treated as affirmative defenses, i.e. the Respondent 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 [Respondent'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); R. Schwemm, Housing Discrimination Law and Litigation § 10.2 n.16 (1993)(direct evidence rarely available).

Darrell Harvey at 35-37.

13. In this case the direct evidence, of (a) statements by Respondent Flook to the effect that Tammy Collins would not be rented the apartment because of "her nigger husband and nigger kids," and (b) of admissions of discrimination against the Complainants by Flook are sufficiently probative to prove violations of the Act under the previously cited subsections of Iowa Code section 601A.8 (1991). See Conclusion of Law No. 2. See Findings of Fact Nos. 8-12, 21A.

14. The affirmative defenses of the Respondent, with respect to alleged unmarried status of Mr. and Mrs. Collins and to family size, have been considered and rejected. See Findings of Fact Nos. 14-21. Respondent failed to meet its burden of persuasion, which, under the direct evidence order and allocation of proof, requires it to prove by a preponderance of the evidence: (1) that it was actually motivated, in part, by the averred legal reasons at the time of the discrimination, Sabree v. Carpenters and Joiners, 921 F.2d 396, 54 Fair Empl. Prac. Cas. 1070, 1075 (1st Cir. 1990(citing Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 1791 (1989)); and, (2) "that it would have made the same decision even if it had not considered the improper factor." Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990). Illegal discrimination under Iowa Code section 601A.8 has occurred. See Conclusion of Law No. 2. See Finding of Fact No. 21A.

VI. Remedies:

A. Remedial Action:

15.

> Violation of Iowa Code section [601A.8 (1991)] 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 wornone.**'" Id. at 771.

Maxine Boomgarden, slip. op. at 88.

B. Compensatory Damages: Emotional Distress:

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

16. 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).

17. These words of the Iowa Supreme Court are a pale reflection of the sacrifice and struggle of those in the civil rights movement. Legislation was an end, not the beginning, of the Movement. Thousands of ordinary citizens, Black and White, risked all to end segregation and to ensure the passage of laws such as this Act. In the Movement, many marched, many were arrested, many were beaten, and far too many were murdered for their opposition to racism. By their sacrifice, the back of lawfully enforced segregation was broken. Nonetheless, "[b]igotry is again rearing its ugly head in this country." State v. McKnight**,** 511 N.W.2d 389 (Iowa 1994).

18. Racism, including race discrimination in housing, is a serious matter. It demands a substantial remedy. The Iowa Civil Rights Act was enacted, in part, to provide such a remedy. *See* Iowa Code SS 216.8, 216.15(8)(a)(8). To limit the remedy, in this case of blatant discrimination and proven emotional distress damage, to a mere "go and sin no more" injunction, is to belittle the sacrifice of thousands, to ignore the evidence, and to flout the will of the legislature.

19. **By 1978, it became clear to the legislature that the extremely limited remedies originally enacted in 1965 were woefully inadequate to carry out the remedial purposes of the act. Therefore, the actwas amended, effective January 1, 1979, to give the Commission the power to award "actual damages."** 1978 Iowa Acts ch. 1179 § 16. **These are synonymous with "compensatory damages". Thepurpose of such authority is not to remedy only out-of-pocket losses while ignoring proven emotional distress damages, but to "make whole" the victims of discrimination for all losses suffered as aresult of discrimination**. *See* Iowa Code § 216.15(8)(a)(8)(1993); Chauffers, Teamsters, and Helpers v. Iowa Civil Rights Commission, 394 N.W.2d 375, 382 (Iowa 1986).

20. **A victim of discrimination is to receive "a remedy for his or her complete injury," including damages for emotional distress.** Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990). **There is no "back pay" and often little or no out-of-pocket loss in housing discrimination cases. Therefore, denial of proven emotional distress damages in housing cases effectively deprives even the victims of the most blatant and damaging race discrimination of the compensation which is rightfully theirs.**

21. The Iowa Supreme Court's observations on the emotional distress damages resulting from wrongful discharge are equally applicable to the distress resulting from housing discrimination:

> **[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).

22. 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).

23.

> 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:

24. **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. **It is uncontradicted in the record that Larry and Tammy Collins suffered such distressdue to race discrimination.**

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

25. 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. Iowa R. App. Pro. 14(f)(6). Race discrimination in housing 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]. **Wetherefore 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 Caused by Discrimination is to Be Compensated:

26. **The emotional distress sustained by the Collinses is severe. Since even mild emotional distress resulting from discrimination is to be compensated, it is obvious that compensation**

must beawarded here. Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 73 (1990); Robert E. Swanson, 10 Iowa Civil Rights Commission Case Reports 36, 45 (1989); Ann Redies, 10 Iowa Civil Rights Commission Case Reports 17, 28 (1989). *See* Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525-26 (Iowa 1990)(citing Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 355 (Iowa 1989)(adopting reasoning that because public policy requires that employee who is victim of discrimination is to be given a remedy for his complete injury, employee need not show distress is severe in order to be compensated for it)).

5. Emotional Distress May Be Proven By Either Testimony of A Complainant Alone or Supported By the Testimony of a Spouse:

27. **"The [complainants'] own testimony [in this case is] 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 spouse may also be supportive of a finding of emotional distress, as it is here for both Mr. and Mrs. Collins. *See* Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980).

6. Evidence of Sleep Loss, Crying, and Counseling In This Case Helps Establish Emotional Distress Although Such Damages Can Be Awarded In the Absence of Evidence of Economic Loss or Physical or MentalImpairment:

28. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). Nonetheless, the evidence of crying and difficulties in sleeping in this case, by both of the Collinses, may 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); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988). Evidence of counseling for the distress resulting from discrimination also supports their claim. *See* Fellows at 676. See Findings of Fact Nos. 35, 39, 40.

7. Determining the Amount of Damages for Emotional Distress:

29.

> [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)).

30. 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). The Iowa District Court for Polk County recently awarded eighty thousand dollars ($80,000) to a sex discrimination plaintiff for emotional distress. Pamela Farren v. Super Valu Stores, Inc., Law No. Cl100-57791, slip op. at 22 (Polk Co. Dist. Ct. March 4, 1994). 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).

31. 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 employment processes to ensure they are nondiscriminatory. The consistent failure to award such proven damages will remove this incentive and may encourage discriminatory practices. *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).

32.

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

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 166 (1992).

33. Respondent has suggested, on brief, that certain facts about its financial status should be weighed when considering the amount of damages to be awarded. See Finding of Fact No. 43. Facts averred on brief, unless they militate against that party's position, are mere argument and not evidence in the record. *See* Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed.2d 207, 216 n.9 (1981). See Conclusion of Law Nos. 7- 8. These alleged facts cannot even be considered by the Commission for two reasons. First, there is no evidence in the record to prove these supposed facts. See Iowa Code § 17A.12(8). Second, **the ability of a party to pay damages is never an appropriate consideration in determining compensatory damages; this factor applies only to punitive damages.** *See e.g.*Belton, Remedies in Employment Discrimination Law 450 & n.151 (1992). Consideration of these facts would be clear legal error. There are, in any event, many protections in the law, effective on

enforcement in district court, which guard against the impoverishment of a judgment debtor. *See e.g.* Iowa Code Chapter 627 (exemptions).

34. Based on these principles, an award of $15,000.00 for Tammy Collins and $15,000.00 for Larry Collins constitutes reasonable compensation for the distress suffered.

8. The Commission Shall State Its Reasons For Any Denial or Modification of An Award of Emotional Distress Damages In the Form of Findings of Fact and Conclusions of Law:

35. **The Iowa Administrative Procedures Act requires the Commission,** as well other administrative agencies, **to set forth the reasons for its decisions in the form of written findings of fact andconclusions of law.** Iowa Code § 17A.16(1)(1993). *See* Ward v. Iowa Dept. of Transportation, 304 N.W.2d 236, 238 (Iowa 1981)(emphasizing the "crucial importance" of the requirement for findings of fact and conclusions of law.).

36. **It shall be the policy of the Commission from thisdate forward to abide by the legal requirement to state the reasons for any modifications or denial of emotional distress damage awards in theform of findings of fact and conclusions of law. The necessity for this is shown by the Fellows decision. In that case, the Iowa Supreme Court held that an extreme change in an emotional distressdamage award by this Commission was unreasonable and arbitrary action justifying reversal because there was no stated reason given by the Commission for the change.** Fellows v. Iowa Civil Rights Commission, 426 N.W.2d 671, 675 (Iowa 1988). **Striking the findings of fact and conclusions of law and entering a denial of an award are not sufficient to meet this requirement.** The Commission has authority to adopt this policy by means of this decision. Lenning v. IDOT, 368 N.W.2d 98, 102 (Iowa 1985).

37. The law requires findings of fact and conclusions of law on the issues for sound reasons:

> *There are three principal reasons for the findings requirement. The most obvious today is the overriding policy against government operating in secret.* Acts of agencies should be open, subject to comment and criticism. **Unexplained decisions** leave the public in the dark on the reasons that led to them. More important, **permitting them is an open invitation to arbitrary action. The obligation to give a reasoned decision is a substantial check upon misuse of power. A decision supported by specific findings is much less likely to be a product of caprice or careless consideration. Requiring articulation of the reasoning process evokes care on the part of the decider.**
>
> . . .
>
> In the second place, a losing party has a right to know why the case was lost. The requirement of findings meets the elementary demand of those injured by an agency decision to be told "the reason why." Findings serve as an explanation to the parties as to the basis. *Thirdly, and the reason most frequently emphasized, is the role of the findings requirement in facilitating judicial review; withoutthem a*

> *court cannot adequately perform its review function*. . . . **[Judicial] review . . . requires that the grounds upon which the administrative agency acted be clearly disclosed and adequatelysustained."** Schwartz, Administrative Law § 7.29 at 455-57 (1991)(emphasis added).

38. A fourth reason for meeting this legal requirement is to avoid the unfortunate misimpression that the Commission may be engaged in nullifying the legislature's intent that the victims of discrimination be fully compensated for whatever emotional distress they suffer. Nullification of the law occurs whenever an adjudicator, whether it be a judge, jury, or administrative tribunal, deliberately acts contrary to the law, thereby rendering it void. See BLACK'S LAW DICTIONARY 963 (5th ed. 1979). The decision to nullify the law may be based on a philosophical aversion to the law, a reluctance to apply it, or some other reason.

39. It is especially important for this Commission to avoid this misimpression because nullification of the law has a peculiarly ugly history with respect to civil rights. In his famous "I Have A Dream" speech, for example, Martin Luther King, Jr. referred to the "governor [of Alabama] having his lips dripping with the words of interposition and *nullification* . . ." From this point onward, therefore, reasons for modifying or denying emotional distress damage awards shall be stated in the form of findings of fact and conclusions of law.

VII. Credibility and Testimony:

40.

> 27. In addition to the factors in the findings on credibility . . . , the Administrative Law Judge has been guided by the following principles: First, . . . "[I]n the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." NLRB. v. Pittsburgh Steamship Company, 337 U.S. 656, 659 (1949) (rejecting proposition that consistently crediting witnesses of one party and discrediting those of the other indicates bias). Second, "[t]he trier of facts may not totally disregard evidence but it has the duty to weigh the evidence and determine the credibility of witnesses. Stated otherwise, the trier of facts . . . is not bound to accept testimony as true because it is not contradicted. In Re Boyd, 200 N.W.2d 845, 851-52 (Iowa 1972).
>
> 28. Furthermore, the 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).

29.

> Evidence on an issue of fact is not necessarily in equilibrium because the witnesses who testify to the existence of the fact are directly contradicted by the same number of witnesses, even though there is but a single witness on each side and their testimony is in direct conflict.
>
> . . .
>
> Numerical preponderance of the witnesses does not necessarily constitute a preponderance of the evidence so as to require a contested question of fact to be decided in accordance therewith. . . . [T]he intelligence, fairness, and means of observation of the witnesses, and various other recognized factors in determining the weight of the evidence . . . should be taken into consideration. . . . It is, of course, well recognized that the preponderance of the evidence does not depend upon the number of witnesses.

Id., 249 Iowa at 425, 86 N.W.2d 861.

Darrell Harvey, CP # 04-90-19797, slip. op. at 44-45 (January 28, 1994).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainants Larry and Tammy Collins and the Iowa Civil Rights Commission have proven the Collinses' allegations of race discrimination in housing by the greater weight of the evidence.

B. Complainant Larry Collins is entitled to judgment for compensatory damages for emotional distress in the sum of fifteen thousand dollars.

C. Complainant Tammy Collins is entitled to judgment for compensatory damages for emotional distress in the sum of fifteen thousand dollars.

D. Interest at the rate of ten percent per annum shall be paid to Complainants by Respondent on the awards for emotional distress commencing on the date this decision becomes final, whether by operation of law or Commission decision, and continuing until date of payment.

E. Respondent Flook shall post, within 60 days of the date this order becomes final, in conspicuous places at each of his apartment buildings in Iowa, in areas readily accessible to and

frequented by tenants and visible to prospective tenants, at least two copies per building of the poster, entitled "Fair Housing Opportunity" which is available from the Commission.

F. Respondent Flook shall review the latest edition of the "Fair Housing Guide" or successor publication available from the Commission.

G. Respondent Flook shall maintain, until May 1, 1995, a log of all prospective tenants indicating the name, address, and race of the prospective tenants and date the tenants expressed interest in, and/or were shown the apartment, whether or not they were interested in the apartment after it was shown, and whether or not they rented the apartment. A copy of this log and any leases for housing properties shall be sent to the Commission on request.

H. Respondent Flook shall cease and desist from committing any further racial discrimination in his rental of housing accommodations.

Signed this the 29th day of April, 1994.

Donald W. Bohlken
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple Street
Des Moines, Iowa 50309
515-281-4480
FAX 515-242-5840

* Through inadvertent error, the Fellows case is cited as an Iowa upreme Court opinion. It is actually a decision of the Iowa Court of Appeals.

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 with all the modifications set forth in the Commission's Exceptions to the Proposed Decision and Order filed on June 8, 1994. The proposed decision and order, as so modified, is hereby incorporated in its entirety as if fully set forth herein.

IT IS SO ORDERED.

Signed this the 24th day of June, 1994.

Sally O'Donnell
Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319

NOTE: MODIFICATIONS:

1. The following finding of fact was inserted after finding of fact 21A:

> 21B. Respondent Howard Flook showed a willful and wanton disregard for the rights of the Complainants by his flagrant discrimination against them. This act of discrimination was directed specifically at these Complainants.

2. The following was inserted after conclusion of law 39:

> VII Civil Penalty
>
> 39A. Since July 1, 1991 the Commission has been authorized to award a civil penalty where housing discrimination is proved. Iowa Code §216.15A(11)(b); 91 Acts ch 184 §10 (signed into law May 17, 1991). In cases of first time offenders the Commission is authorized to award a maximum of $10,000. The purpose of a civil penalty is to "vindicate the public interest." Code §216.15(11).
>
> 39B. Howard Flook's violation of the Iowa Civil Rights Act in this case was flagrant. He showed a willful and wanton disregard for the right of Larry and Tammy Collins to be free from discrimination. See Finding of Fact 21A, 21B. A civil penalty in the amount of $2,000 for this act of discrimination against these complainants is fully justified in order to vindicate the public interest. Although there are two complainants injured by this act there is only a single act to penalize. Thus only a single civil penalty in the amount of $2,000 is being imposed.

3. The heading on page 34 was renumbered from VII to VIII.

4. The decision and order was modified by inserting the following after paragraph H:

> 1. Respondent Flook is assessed a single civil penalty in the amount of $2,000.

5. The decision and order was modified by inserting the following after paragraph 1:

> J. Respondent Flook is assessed all hearing costs allowed by commission rule 4.7(3) (effective March 25, 1992) 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.

6. Conclusion of Law 36 was modified to read as follows:

> 36. It is the policy of the commission where emotional distress damages are sought to state the reasons for any denial of emotional distress damage awards in the form of findings of fact and conclusions of law. Striking the findings of fact

and conclusions of law and entering a denial of an ward are not sufficient to meet this requirement. The Commission has authority to adopt this policy by means of this decision. Lenning v. IDOT, 368 N.W.2d 98, 102 (Iowa 1985).

7. Conclusion of Law 39 was modified to read as follows:

> 39. It is especially important for this Commission to avoid this misimpression because nullification of the law has a particularly ugly history with respect to civil rights. In his famous "I Have A Dream" speech, for example, Martin Luther King Jr. referred to the "governor [of Alabama] having his lips dripping with the words of interposition and *nullification* ..." From this point onward, therefore, reasons for denying emotional distress damage awards shall be stated in the form of findings of fact and conclusions of law.