BEFORE THE IOWA CIVIL RIGHTS COMMISSION

RONALD E. NICOL, Complainant,
VS.
BUCHANAN COUNTY SHERIFF'S DEPARTMENT and BUCHANAN COUNTY BOARD OF SUPERVISORS, Respondents.

CP # 10-85-13693

COURSE OF PROCEEDINGS

This matter came before the Iowa Civil Rights Commission on the amended Complaint filed by Ronald Nicol against the Respondents Buchanan County Sheriff's Department and the Buchanan County Board of Supervisors alleging discrimination on the bases of age and disability in employment.

Mr. Nicol alleges that he was compelled to resign from his position as deputy sheriff because Respondents would not accommodate his disability and because of several actions of harassment taken due to his disability by the Respondents. These actions were the Sheriff's attempts to obtain doctor's statements setting forth the complainant's capabilities; the sheriff's reaction to the doctor's statement first provided by Complainant; reprimands of the Complainant for failure to wear his uniform and for improper service of papers, and removal of Complainant's rank as captain. By his amended complaint, Complainant asserted that Respondents' actions were also taken due to his age and alleged another action by the Respondents, i.e. that the Sheriff had, due to his age and disability, suggested that he retire from employment.

A public hearing on this complaint was held on August 10, 1989 before the Honorable Donald W. Bohiken,Administrative Law Judge,at the Conference Room of the Buchanan County Courthouse in Independence, Iowa. The Respondent was represented by Allan Vander Hart, Buchanan County Attorney. The Iowa Civil Rights Commission was represented by Rick Autry, Assistant Attorney General.

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

The Iowa Civil Rights Act requires that the existence of disability and age discrimination be determined in light of the record as a whole. See Iowa Code § 601A.15(8) (1989). Therefore, all evidence in the record and matters officially noticed have been carefully reviewed. The use of supporting transcript and exhibit references should not be interpreted to mean that contrary evidence has been overlooked or ignored.

In considering witness credibility, the Administrative Law Judge has carefully scrutinized all testimony, the circumstances under which it was given, and the evidence bolstering or detracting

from the believability of each witness. Due consideration has beer. given to the state of mind and demeanor of each witness while testifying, his or her opportunity to observe and accurately relate the matters discussed, the basis for any opinions given by the witness, whether the testimony has in any meaningful or significant way been supported or contradicted by other testimony or documentary evidence, any bias or prejudice of each witness toward the case, and the manner in which each witness will be affected by a particular decision in the case.

FINDINGS OF FACT

1. The Complainant, Ronald E. Nicol, filed a verified complaint CP # 10-85-13693 with the Iowa Civil Rights Commission, on October 18, 1985, alleging violation of Iowa Code section 601A.6 which prohibits discrimination in employment on the basis of disability. (Complaint, Tr. at 224-25). The complaint was subsequently amended on October 13,1986 to allege age discrimination in employment. (Amended Complaint, Tr. at 224-25). The last date of incident stated in the complaint is September 9, 1985. Official Notice is taken of the fact that there are thirty- nine days between September 9, 1985 and October 18, 1985. Fairness to the parties does not require they be given an opportunity to contest this fact.

2. The complaint was investigated. After probable cause was found, conciliation was attempted and failed. (Notice of Hearing; Tr. at 225). Notice of Hearing was issued on March 15, 1988. An order providing for a continuance until a new Administrative Law Judge was assigned to hear the case was issued on September 7, 1988. The final hearing date was set by an order dated March 29, 1989.

Background of Complainant Nicol:

3. As of the date of the hearing, August 10, 1989, Complaint Nicol was 55 years old. (Tr. at 6). Complainant began his employment as a deputy with the Buchanan County Sheriff's Department in 1972. (Tr. at 7). Prior to 1980, he did civil work, supervised records, and some patrol. (Tr. at 13). By the fall of 1984, he was doing the majority of the civil work, supervising records, some limited jail responsibilities and no routine patrol work. The major part of his work by then was civil work. (Tr. at 13-15, 42-43).

4. In 1980, Complainant Nicol was diagnosed as having multiple sclerosis, a neurological disorder. (Cp. Ex. 5; Tr. at 10-1 1, 124). As of March 22, 1985, the disease caused a limp which limited him to walking 1/2 to 1 block at a time. He had trouble climbing stairs and required an arm rail at times to accomplish that action. He wore a foot drop brace. He could not perform strenuous activities. (Cp. Ex. 6, 7). Civil work required that the Complainant walk from his car and, occasionally, to climb stairs. (Tr. at 9). By March 1985, Complainant had requested that Deputy Hansel to do the stair climbing for him. Deputy Hansel was willing
to cooperate with this proposal. (Tr. at 9).

5. During the course of his multiple sclerosis, the Complainant has sustained exacerbations of the disease which are events characterized by physical symptoms such as an increased limp, increased loss of balance, and confused speech and thought. (Tr. at 11). Once an exacerbation

has occurred, various effects of the multiple sclerosis will have worsened and will not get better. (Tr. at 12, 78-79). These exacerbations may be caused by stress.(Cp. Ex. 6; Tr. at 1 1).
6. In March of 1985, the Complainant had an exacerbation after answering two accident calls in one day. (Tr. at 12, 68-70). Within three days of that incident, he went on sick leave and, subsequently, on vacation leave through September of 1985. (R. Ex. C, D; Tr. at 15-16, 68- 70). Effective September 10, 1985, Complainant resigned from his position as deputy sheriff as part of a settlement of appeals filed by the Complainant with the Civil Service Commission in response to letters issued by Sheriff Leonard Davis in February 1985. One of these letters was a reprimand and one indicated that the Complainant's rank was being reduced from Captain to Deputy. (C. Ex. 1, 2; R. Ex. C).

7. In return for the resignation, Buchanan County withdrew all letters and reprimands which were the subject of the appeal and confirmed that the Complainant's rank was that of Captain. The County also paid, to the Complainant, his attorneys fees relating to those appeals and "[a] sum equal to Nicol's unpaid accrued vacation days and unpaid accrued sick-pay benefits which would have accrued if Nicol were regularly employed and working up to the effective date of the resignation of Nicol." In addition, the County agreed to provide the Complainant a neutral reference in response to inquiries from prospective employers. This agreement reserved Complainant Nicol's right to proceed with a complaint before this Commission. (R. Ex. C).

Background of Buchanan County Sheriff's Department:

8. In 1984 and 1985, there were a total of eight deputies, including Ronald Nicol, with the Buchanan County Sheriff's Department. (Tr. at 95, 186). There is no evidence in the record indicating the ages of the deputies other than Nicol. Duties of sheriff's deputies in late 1984 and 1985 included patrol work, criminal investigation work and civil work. (Tr. at 7, 94-95). At one time, deputies handled the jailing duties, but these had been essentially taken over by jailers by 1985. (Tr. at 95, 213).

9. General patrol duties involved crime prevention patrol of the county and several communities which contracted with the department for law enforcement services. (Tr. at 94-95). Criminal investigation involves responding to citizen complaints of crimes by ascertaining who committed the crimes and bringing those persons into custody. (Tr. at 95). Civil work is concerned with service of process on persons. This would include service of original notices, petitions for dissolution of marriage, injunctions, and attachments of property. (Tr. at 8).
10. Effective November 14, 1984, Leonard Davis became Sheriff, by election, of Buchannan County. He was still sheriff as of the date of the hearing. (Tr. at 138). Complainant Nicol's allegations of discrimination are entirely concerned with events which occurred or were alleged to have occurred during Nicol's employment under Sheriff Davis. (Complaint; Amended Complaint; Tr. at 53).

Statements From Complainant's Physicians:

11. When Leonard Davis became Sheriff, he was not aware that the Complainant had multiple sclerosis. (Tr. at 139- 40). He first became aware of the Complainant's illness when Ron Nicol informed him, shortly after his election, that he had the disease. (Tr. at 140). At some time prior

to February 4, 1985, Sheriff Davis did request that the Complainant obtain a physician's report stating what he could or could not expect from Complainant Nicol in light of his disease. (Cp. Ex. 7; R. Ex. A; Tr. at 23, 140-41, 189). Sheriff Davis made this request because Complainant Nicol had told him that there were various job functions that he could not do and the Sheriff wanted a doctor's statement verifying these limitations. (R. Ex. A; Tr. at 53-55, 184).

12. The complainant did obtain a report, dated February 5, 1985, from his physician, Dr. Hallberg. (Cp. Ex. 7; Tr. at 24, 162). The report set forth a listing of tasks which the Complainant could do and tasks which he could not do. (Cp. Ex. 7). Sheriff Davis told Mr. Nicol that the report was not worth the paper it was written on. (Tr. at 24, 162). Although Davis did not inform Nicol concerning why he considered the report worthless, he asserted that he felt this way because:

> the letter basically states this is what Ron feels he could do and what Ron feels he cannot do, and that was not what I was asking for. I was asking for a medical report from a doctor stating what I could expect from this man in a law enforcement field.

(Tr. at l62-63). Sheriff Davis testified he did not believe the letter stated what the *physician* felt Nicol could do. (Tr. at 189).

13. Although Dr. Hallberg's letter makes reference to what Complainant Nicol feels he can or cannot do, it specifically indicates that it was the common belief of *both* the physician and Nicol that he could or could not perform the various tasks set forth. Although Dr. Hallberg relied on information provided by his patient in making his evaluation, the letter is a statement of Dr. Hallberg's opinion on what Complainant can and cannot do in the law enforcement field. (Cp. Ex. 7).

14. After Dr. Hallberg's report was rejected, the Complainant suggested that he obtain a statement from University Hospitals in Iowa City, where his condition was originally diagnosed. (Tr. at 24). The Sheriff agreed with this suggestion. (Tr. at 24). Two documents from the University of Iowa Hospitals Department of Neurology, a letter addressed to Mr. Nicol, and a report addressed to Dr. Hallberg, both dated March 22, 1985, were eventually received by Sheriff Davis. (Cp. Ex. 5, 6; Tr. at 163). By the time these documents were received, the Complainant had begun his sick leave and was no longer at work. (Tr. at 163).

15. There is no evidence in the record indicating that either the request for doctor's statements verifying Complainant's assertions concerning his limitations or the response to the first statement were due to Complainant's age.

Removal of Complainant's Rank As Captain:

16. When Sheriff Davis took office, he was informed that Complainant's rank with the department was captain and that Complainant was chief deputy under the prior sheriff. (Cp. Ex. 2). As the new sheriff, Davis had the right to appoint his own chief deputy, who would then

receive the captain rank as a "political appointment." (Tr. at 153). Sheriff Davis chose to appoint Jack Straw to the chief deputy position. (Tr. at 155).

17. A rank obtained through "political appointment" is temporary, i.e. if a new sheriff selects a different chief deputy, the former chief deputy loses his captain rank. (Tr. at 155). Another way in which the rank of captain can be obtained is through Civil Service testing administered by the Iowa Law Enforcement Academy. (Cp. Ex. 2; Tr. at 18-19, 154). Unlike a "political appointment," a rank of captain obtained by a chief deputy through civil service testing does not end when a different chief deputy is selected. (Tr. at 154-56).

18. Once Jack Straw was made Chief Deputy, two of eight deputies were captains. Sheriff Davis believed this represented a situation where there were too many leaders and not enough followers. (Tr. at 153). He asked Complainant Nicol whether he had obtained his captain rank through a Civil Service examination. (Tr. at 154). Mr. Nicol replied that he had. (Tr. at 154). Sheriff Davis checked with the Civil Service Commission and the Iowa Law Enforcement Academy and was informed, erroneously, that there was no record of Complainant Nicol's promotional examinations. (Cp. Ex. 2; Tr. at 154). In fact, Nicol had taken and passed the supervisory promotional examination which gave him the rank of captain. (Tr. at 21, 96).

19. It appears that the Civil Service Commission would have had no record of the examinations because such exams are returned to the Academy. (Cp. Ex. 3). The Academy was able to provide copies of the examinations when the Complainant requested them by letter dated March 6, 1985. (Cp. Ex. 3; Tr. at 19-20). It appears that their informing Sheriff Davis that there was no record was human error on their part.

20. Based on the information available to him, Sheriff Davis concluded that Ron Nicol's appointment as captain was a "political appointment." (Tr. at 155). Therefore, on February 22, 1985, he issued a letter, to Complainant Nicol clarifying his civil service status and indicating his rank was now Grade 11 Deputy Sheriff. (Cp. Ex. 2; Tr. at 155). This reclassification was not a demotion, but, if it had stayed in effect, would have impacted his salary by lowering it from $18,900 per year to $17,800 per year. (Cp. Ex. 2).

21. Once Complainant Nicol received this letter, he obtained the test results from the Academy and filed a Civil Service Commission appeal of the letter. (Cp. Ex. 3; Tr. at 34). Within a week of the appeal being filed, Sheriff Davis reinstated the Complainant to the captain rank pending the outcome of the appeal. (Tr. at 156). The appeal was still pending at the time Complainant resigned. (R. Ex. C).

22. There is no evidence in the record indicating that Sheriff Davis treated the Complainant any differently in regard to his handling of the clarification of rank then he would have any non-disabled or younger deputy, if there had been one, who was not the chief deputy and who had the rank of captain. Only proximity in time to the request he not be required to perform certain duties links the Complainant's reclassification and his multiple sclerosis.

23. At some time prior to February 4, 1985, Sheriff Davis held a meeting for the deputies. (R. Ex. A; Tr. at 142). Ron Nicol and the other deputies were present at this meeting when Sheriff

Davis informed them that all deputies, with the exception of the investigator, should wear the standard uniform consisting of forest green trousers, taupe colored shirts, and required badges and emblems. (R. Ex. A; Tr. at 141-42).

24. Complainant Nicol and other deputies had been out of uniform prior to this meeting. (Tr. at 142). The Complainant had worn civilian suits to work prior to this meeting, while other deputies had worn uniform shirts and blue jeans. (Tr. at 58, 142-43). Prior to this meeting, Sheriff Davis had not mentioned uniforms to the Complainant. (Tr. at 142). There is no evidence in the record to indicate whether or not Sheriff Davis mentioned uniforms to other deputies prior to the meeting.

25. After the meeting, the Complainant continued to wear either civilian suits or what has been denominated a Class "A" uniform while on duty. (Tr. at 66, 144). A Class "A" uniform consists of a gold blazer, brown pants, brown shoes, brown tie and a hand-engraved badge. (Tr. at 58). An exposed gun is not worn with this uniform. (Tr. at 119-20). A Class "A" uniform is accepted as civilian attire at seminars and similar functions, but is not the uniform specified by Sheriff Davis at the meeting. (Tr. at 143-44). There is no evidence in the record that the other deputies, who were required to wear full uniform, were out of uniform after the meeting.

26. At some point after the meeting, but prior to February 4,1985, Complainant Nicol told Sheriff Davis that he had a physical problem with wearing a uniform. (R. **Ex.** A). The Complainant had told the prior sheriff, Joel Dryer, that he had difficulty wearing the standard uniform because, when walking with a cane, he kept hitting the exposed gun belt (holster) with the cane. (Tr. at 119). He had to use the cane to assist himself in walking due to the multiple sclerosis. (Tr. at 119). The record, however, does not reveal what specific physical problem the Complainant told Sheriff Davis that he had with wearing a uniform.

27. It was at about this time that the sheriff told the Complainant to get the doctor's report on what he could and could not do. (R. Ex. A; Tr. at 141). When the report from Dr. Hallberg did come in, however, the only mention of uniforms was that Mr. Nicol "has uniforms but prefers to wear plain clothes as he has served lots of papers, and feels he can do this [wear uniforms], but feels civilian clothes would not embarrass these persons." (Cp. Ex. 7). This language does not demonstrate any relationship between the Complainant's desire to wear plain clothes and his multiple sclerosis. Furthermore, the Complainant testified that wearing a uniform has "nothing to do with [MS] [t]hat's . . . the job I had at the time." (Tr. at 72). In considering this testimony, however, it should be remembered that Complainant was never asked nor testified about any problems that would result from wearing an exposed gunbelt.

28. On February 14, 1985, which was after Dr. Hallberg's letter was received, Complainant Nicol was verbally reminded to wear a uniform and not a civilian suit. (Tr. at 56, 145). On February 15, 1985, the Complainant appeared in a Class "A" uniform and was told to go home and get into uniform as specified. (Complaint; Cp. Ex. 1; Tr. at 145). He did so. (Tr. at 56, 145). The complainant subsequently received a written reprimand, dated February 28, 1985, which, in part, warned him to wear the uniform specified by Sheriff Davis. (Cp. Ex. 1).

29. There is no evidence in the record demonstrating different treatment of the Complainant on the basis of his age or multiple sclerosis in regard to the reprimand, or other warnings or reminders concerning uniforms. There is not sufficient evidence in the record to demonstrate that Sheriff Davis was aware of any specific problem concerning the uniform requirement and the Complainant's multiple sclerosis.

Reprimand of Complainant for Improper Service of Papers:

30. The February 28th reprimand was issued because Sheriff Davis had gotten the impression, based on the actions of the Complainant in regard to uniforms and in regard to his failure to serve papers at a designated time, which is discussed below, that the Complainant wanted to do things his own way and not abide by the sheriff's rulings. (Tr. at 152). In addition to the uniform issue, the February 28th letter also disciplined the Complainant in regard to two matters involving improper service of papers. (Cp. Ex. 1). The first involves the Complainant's failure to follow proper procedure in the service of legal notices. The second involves the Complainant's failure to follow the directions of Sheriff Davis to leave the office at 7:30 a.m., serve what papers he could, and return by 9:00 a.m. to hand the returns of the papers served to the secretary. (Cp. Ex. 1).

Improper Procedure:

31. Sheriff Davis became aware through reports by office personnel that Complainant Nicol had made errors, primarily making substituted service of legal notices, i.e. service upon a person other than the one to whom the notice was addressed, when service directly upon the person to whom the notice was addressed was required by law. (Cp. Ex. 1; Tr. at 17879). The cover sheet with the paper to be served would often indicate that service directly upon the person was to be made and the Complainant would sometimes fail to read the cover sheet and follow these directions. (Tr. at 63, 87, 89, 117, 145-46, 179).

32. There is no evidence in the record indicating that Sheriff Davis was aware of similar errors by other deputies. There is no evidence in the record linking the reprimand for following improper procedure to the Complainant's age or multiple sclerosis.

Failure to Attempt Service and Return by 9:00 A.M.:

33. After Sheriff Davis began his term in office, he decided to change some policies and procedures of the department. (Tr. at 147). Through personally serving some papers, he discovered that, if he went out at 7:00 a.m., he could serve people prior to their leaving for work and be back at the office by 9:00 a.m. (Tr. at 147-48). This procedure was not followed prior to his taking office. (Tr. at 180). Under the former procedure, service might not be attempted until after 9:00 a.m. and the deputy making service might not return until some time between 12:00 noon and 2:00 p.m. (Tr. at 147-48).

34. The advantages of this new procedure were twofold. First, it would reduce costs of service as it was not necessary to attempt service a second time. (Tr. at 148-49). Second, under the former system, the secretary might have nothing to do, except work left over from the day before, from

the time she came in at 8:00 a.m. until the deputy came in with the receipts from persons served. (Tr. at 147).

35. On December 19, 1984, Sheriff Davis came in and sorted the papers to be served into two piles, one for service within the City of Independence and one for the outlying areas of the county. (Tr. at 14950). The Complainant came in at 7:30 a.m., elected to serve papers within the City, and was directed to begin serving them immediately, serve as many as he could, and return by 9:00 a.m. (Tr. at 149-50). Deputy Hansel was given the papers for the outlying areas of the county and returned, after serving most of them, shortly after 9:00 a.m. (Tr. at 151). The Complainant had not left the office to begin serving papers until after 9:00 a.m. (Tr. at 151). The Complainant does not recall this incident but acknowledged it was possible. (Tr. at 63-64).

36. There is no evidence in the record of similar failure by other deputies to serve papers in the time and manner directed by the Sheriff. There is no evidence in the record linking the reprimand, for this failure to serve papers at the time and in the manner directed by the Sheriff on December 19, 1984, to the Complainant's age or multiple sclerosis.

Sheriff Davis Statement to the Complainant Concerning Retirement:

37. At some time prior to Complainant's going on sick leave, during a verbal reprimand of the Complainant for a reason not reflected in the record, the Complainant's multiple sclerosis and the problems it caused him came up for discussion. (Tr. at 165-66, 184, 189). During the course of that discussion, the sheriff asked the Complainant if he had ever checked with Social Security or the Iowa Public Employees Retirement System about a disability retirement. (Tr. at 165). The Complainant replied that he had checked and was not eligible. (Tr. at 165). Sheriff Davis stated he would help the Complainant out, i.e. to get a disability retirement if he wanted one. (Tr. at 30, 165). The sheriff's action was taken in order to help the Complainant obtain an early retirement if he wanted one and not to pressure the Complainant to resign. (Tr. at 165).

Removal of Complainant's Responsibility for Reviewing Records of the Emergency Operations Commission:

38. The Emergency Operations Commission is an entity which maintains the combined records of the Independence Police Department and the Buchanan County Sheriff's Department. (Tr. at 159). These records were reports of investigations of criminal offenses. (Tr. at 45). The Complainant read these reports, initialed them and signed the requests for vacation and other time off made by Mrs. Higgins, the secretary who handled these records. Only one employee would have this duty at any given time. (Tr. at 15, 44, 160). This duty was not a major part of the Complainant's job. (Tr. at 44). Prior to going on sick leave, Mr. Nicol was removed from this duty and replaced by Chief Deputy Jack Straw. (Tr. at 161).

39. During the course of the hearing, the issue arose of whether the removal of this responsibility was due to Complainant's age or multiple sclerosis. Complainant Nicol's removal from this duty was made by the Board of Supervisors as part of a routine change of personnel. (Tr. at 161-62). There is no evidence in the record to indicate that Sheriff Davis had any role in this removal

other than to inform Complainant Nicol of it. (Tr. at 18, 60, 161). There is no evidence in the record linking the removal of this duty to the Complainant's age or multiple sclerosis.

Removal of Complainant's Jail Responsibilities:

40. Under the prior sheriff, the Complainant had certain responsibilities pertaining to the jail. (Tr. at 51). At times, he would relay messages between the sheriff and Alice Peyton, the jail administrator. (Tr. at 49-50). He did not, however, exercise any supervisory authority over her. (Tr. at 49). On one occasion, he set up a disciplinary hearing for an inmate. (Tr. at 47, 50). He also reviewed jail records by reading through daily paperwork and initialing it, a function which took five minutes a day. (Tr. at 17, 214-15). The jail responsibilities were taken over by Sheriff Davis shortly after he took office. (Tr. at 18, 158).

41. During the course of the hearing, the issue arose of whether the removal of these responsibilities was due to Complainant's age or multiple sclerosis. Sheriff took over this responsibility because he wanted to see how jail operations worked and because he felt he should handle the responsibility. (Tr. at 154). There is no evidence in the record to indicate that, if a nondisabled deputy or one not of complainant's age had this responsibility at the outset of Sheriff Davis' administration, Sheriff Davis would have refrained from taking over this responsibility. There is no evidence in the record linking the removal of this responsibility to the Complainant's age or multiple sclerosis.

42. After it was discovered, in 1980, that Complainant had multiple sclerosis, the prior administrations of Sheriffs Herrick and Dryer accommodated the Complainant's progressive condition by gradually limiting his duties to predominantly civil work. (Tr. at 41-43, 47, 51-53, 92, 97). The Complainant stopped routine patrol work in approximately 1980. (Tr. at 41). He did continue to do patrol work after his multiple sclerosis was diagnosed in order to fill in for deputies who wanted to be with their families on Christmas holidays and similar occasions. (Tr. at 41). By the fall of 1984, he was doing no patrol work because (a) he was kept busy doing civil work during the day and, (b) it was necessary in order to accommodate his condition. (Tr. at 13, 41-43, 97).

43. During Sheriff Dryer's term, from January 1, 1984 to November 13, 1984, Complainant Nichol was not required to do patrol work, accident investigation, answer emergency calls, or to perform strenuous duties such as breaking up fights. (Tr. at 92, 97, 138). Thes., limitations on Complainant Nicol's duties did not adversely affect the efficiency of the department or impose additional costs because the civil work done by Nicol would have to be done by a deputy in any event. (Tr. at 98). It should be noted that the number of deputies available did not change from Sheriff Dryer's administration to Sheriff Davis'. (Tr. at 95,186).

Accommodation Not Provided For Complainant's Multiple Sclerosis Under the Davis Administration:

44. Once Sheriff Davis took office, Complainant Nicol was expected to answer accident calls although he had informed Sheriff Davis that such stress adversely affected his multiple sclerosis and that, in a serious accident, a victim's life might be endangered because he could not handle

the situation. (R. Ex. A; Tr. at 54, 68-69, 77, 169, 187). Sheriff Davis only response to the Complainant's informing him that he should not answer accident calls due to his multiple sclerosis was to ask for a doctor's statement on what he could and could not do. (Tr. at **54-55). As** previously noted, Davis' reaction to Dr. Hallberg's statement was to dismiss it as not being worth the paper it was printed on.

45. Sheriff Davis believed he had the right to expect all of his deputies to perform all functions. (Tr. at 188). He had informed Complainant Nicol that he expected him to perform all deputy functions, although he did not assign Nicol to routine patrol. (Tr. at 29, 59, 77, 192-93). He never indicated, despite Complainant's requests to not be assigned strenuous, stressful duties, that any accommodation would be provided him. (Tr. at 28). There is no evidence in the record that any accommodation of Complainant Nicol was ever considered by Sheriff Davis.

46. The culmination of this policy of requiring the Complainant to answer accident calls is reflected by Complainant Nicol's account of the day in March when he had to respond to two personal injury accident calls. (Tr. at 12, 68-70). The stress resulting from this call led to an exacerbation of Complainant's multiple sclerosis and to his taking sick leave:

> I had two accidents . . . they didn't turn out to be big accidents, you know ... but there were enough there . . . I should explain . . . When you get an accident and you're out on the road somewhere, then you've got to turn red lights on if. . . it's a personal injury . . . you've got to race you know. Then all the time that you're traveling there you're not only in the stressful situation of driving because you're driving faster than normal but then you say, Oh my gosh, what happens if I get there and I can't do those things! When one of these situations come up and I can't do it now and somebody dies over that thing . .. how are you going to live with yourself? And I had two of them in the same day and that . . . really started bringing up this old boil, that boiled this whole thing up.... by the day I said I can't do it, I just couldn't do that one anymore. . . . And there was a road covered by ice, and there was a hill and people coming over it. And I kept going, "Oh my gosh," and I was having a hard time handling it, yes.

(Tr. at 68-70). See Finding of Fact No. 6.

Constructive Discharge:

47. Complainant Nicol resigned based on (a) his perception that Sheriff Davis was harassing him, and (b) his reasonable and accurate belief that, if he returned to work from sick leave, he would be required to answer accident calls and to perform other duties which would subject himself to stress, exacerbate his worsened condition, and endanger the public. (Tr. at 33-35, 54, 72, 76, 78, 87). The predominant reason for Complainant's resignation, which would have resulted in his resignation even in the absence of the perceived harassment actions, was the requirement to perform accident call and similar stressful duties. (Tr. at 35, 76).

48. In July, Sheriff Davis contacted the Complainant and asked him when and if he were going to return from sick leave. (R. Ex. B; Tr. at 174). Although Sheriff Davis had received the doctor's

statements from University Hospitals indicating that stress worsened Complainant's condition, he gave no indication that the Complainant could return under different conditions. (Cp. Ex. 5, 6; R. Ex. B; Tr. at 33-34, 163). Sheriff Davis would have accepted the Complainant's return to work under the conditions which existed prior to Complainant's taking sick leave. (Tr. at 174).

49. Complainant could not safely work under conditions where there was no accommodation for his multiple sclerosis. (Tr. at 35, 78). Under these circumstances, it was reasonable for Mr. Nicol to state that he did not know when he would be back or if he would ever be back. (R. Ex. B). Between that time and his resignation, there was still no indication of any accommodation for Complainant's multiple sclerosis. (Tr. at 35). A reasonable person in his position would feel he had no real choice but to accept the proffered settlement and resign.

Credibility Findings:

50. Complainant Nichol was a credible witness. His testimony is internally consistent and reflects few or no contradictions on material matters. There were instances where his memory of events was not as clear as other witnesses, but, where there was contradiction between his and other's testimony regarding whether events happened or not, complainant acknowledged such events may have happened. (Tr. at 63-64).

51. Sheriff Leonard Davis' testimony was credible with the exception of his testimony that he did not believe that Dr. Hallberg's report reflected Dr. Hallberg's opinion on what the Complainant could do in the law enforcement area. The report itself is sufficient evidence to show that testimony is not credible. A far more believable explanation, in light of the whole record, for Sheriff Davis' rejection of the report is that Sheriff Davis simply did not want to accommodate the Complainant's condition.

52. Joel Dryer, Sheryl Adams, Kathy Flaucher, and Alice Peyton were credible witnesses.

Back Pay

53. The Complainant's resignation was effective September 10, 1985. (R. Ex. C). He was paid at full salary by sick and vacation leave taken through that date. (R. Ex. C; Tr. at 75). His salary as of February 2, 1985 was approximately eighteen thousand nine hundred dollars per annum. (Cp. Ex. 2). The record does not reflect any information on salary increases for deputy sheriff until July 1, 1989 when the sheriff's salary was increased to twenty-five thousand two hundred dollars per annum. (Tr. at 38-39). Given that a captain's salary is fixed at eighty-five percent of the sheriff's salary, the deputy sheriff salary at the rank of captain as of that date would be twenty-one thousand four hundred twenty dollars. (Cp. Ex. 2). Since it is unknown whether there were any salary increases between February 2, 1985 and July 1, 1989 or, if there were increases, what amount they were, back pay shall be calculated at the rate of $18,900 per year through July 1, 1989.

54. If he had not been constructively discharged, Complainant Nicol would have retired at age 55. (Tr. at 34, 34, 104). Therefore, the back pay period covers the period from September 10, 1985 to Complainant's 55th birthday. Complainant's birthdate is not in the record. Since

Complainant was 55 as of the date of the hearing, his 55th birthday would have occurred within the year preceding the hearing, i.e. at some point between August 11, 1988 and August 10, 1989. See Finding of Fact No. 3.

55. It may reasonably be inferred that, but for the stress resulting from the continued requirement to answer accident calls, Complainant's March 1985 exacerbation would not have occurred, at least not at that time. See Findings of Fact Nos. 6, 46. As a result of this exacerbation, by September, 1985, Complainant's ability to climb stairs was impaired to the extent he could not be expected to climb stairs in the course of civil work. (Tr. at 16, 35). As of the prior March, however, Deputy Hansel, the other deputy performing civil work during the day, had indicated his willingness to handle those situations. (Tr. at 9, 151). For this reason, and for other reasons stated in the Conclusions of Law, the Commission is not persuaded that the back pay period should terminate due to the effects of this exacerbation.

56. By the date of hearing, some further exacerbations had occurred. (Tr. at 35, 37). Other than Complainant Nicol's testimony that he was more "confused now than I ever was in 1985," there is no evidence in the record detailing the number of these exacerbations, when they occurred and what effects they had on Complainant's abilities. (Tr. at 35). Given this paucity of evidence on these subsequent exacerbations, the Commission is not persuaded that the back pay period should be terminated at a date prior to the Complainant's 55th birthday because of such exacerbations.

57. A gross annual salary of $18,900 yields a weekly amount of $363.46. There are sixteen weeks during the period from September 11, 1985 to December 31, 1985. 167 weeks X $363.46 + $5815.36 gross back pay through December 31, 1985.

58. Gross back pay for the years 1986 and 1987 is $37,800.00. (2 years X $18,900 per year + $37,800).

59. Gross back pay for the period from January 1, 1988 through August 10, 1988 is $11,448.99. (311/2 weeks X $363.46 per week + $11,448.99).

60. The total gross back pay for the period from September 11, 1985 to August 10, 1988 is $5815.36 + $37,000.00 + $11448.99 **+** *$54,264.35.*

61. Gross back pay for the period from August 1 1, 1988 until Complainant's 55th birthday or June 30, 1989, whichever comes first, shall be computed at the rate of $18,900 per year. Gross back pay, if any, for the period from July 1, 1989 to Complainant's 55th Birthday shall be computed at the rate of $21,420 per year.

62. There is no evidence in the record of interim earnings nor any evidence indicating that Complainant failed to mitigate damages.

Emotional Distress:

63. Because of his multiple sclerosis, Complainant Nicol was more vulnerable to stressful events. (Cp. Ex. 5, 6, 7; Tr. at 11, 33, 129, 133-34). Mr. Nicol has sustained substantial economic loss

due to his constructive discharge. See Findings of Fact Nos. 5354, 57-62. He was undoubtedly aware of the potential for such loss at the time of his constructive discharge. (Tr. at 34-35). The continued failure to accommodate the Complainant, the resultant requirement to respond to the accident calls, the subsequent exacerbation of Complainant Nicol's illness, and the need to take sick leave, resulted in substantial emotional distress for Complainant. See Findings of Facts Nos. 5, 44-46, 49, 55. It may reasonably be inferred that these circumstances surrounding and leading up to the constructive discharge resulted in the constructive discharge being a very stressful event. In addition, being involuntarily unemployed has led to a serious loss of self-esteem for the Complainant which was evident even at the date of the hearing, almost four years after the discharge. (Tr. at 36, 17).

64. In making an award of damages for emotional distress, care has been taken to ensure that no award is made for emotional distress caused by the disease per se. (Tr. at 31). In addition, no award is made for any emotional distress caused by actions of the Respondent, such as the reprimand of February 28, 1985, which are found to be nondiscriminatory.

65. In light of the severity and duration of the distress suffered by Complainant Nicol, an award of seven thousand five hundred dollars ($7,500.00) is full, reasonable, and appropriate compensation.

CONCLUSIONS OF LAW

Jurisdiction:

1. Mr. Nicol's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code § 601A.15(11) (1985). See Finding of Fact No. 1. All the statutory prequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code § 601A.15 ('1989). See Finding of Fact No. 2.

2. Mr. Nicol's complaint is also within the subject matter jurisdiction of the Commission as the allegations that the Respondent constructively discharged the Complainant due to his age and disability fall within the statutory prohibition against unfair employment practices. Iowa Code § 601A.6 (1985). "it shall be a. .. discriminatory practice for any person to refuse to hire... or to otherwise discriminate in employment against any applicant..... or employee because of the age . . . or disability of such applicant or employee." Id.
Complainant Nicol's Disability:

3. "Disability" means the physical ... condition of a person which constitutes a substantial handicap." Iowa Code §601A.2(11) (1985). "Substantially handicapped person" includes "any person who has a physical ... impairment which substantially limits one or more major life activities. 240 Iowa Admin. Code §6.1(1) (now at 161 Iowa Admin. Code §8.26(l)). "Impairment" includes "any physiological disorder or condition ... affecting [the neurological] ... body system. Id at 6.1(2) (now at 161 Iowa Admin. Code § 8.26(2)). "Walking" is a "major life activity." Id at §6.1(3) (now at 161 Iowa Admin. Code §8.26(3)).

4. Complainant Nicol has a "disability" as that term is used in Iowa Code sections 601A.6 and 601A.2(l 1) because he has a physical condition which constitutes a substantial handicap. Iowa Code §601 A.2(11) (1985). The condition constitutes a substantial handicap under 240 Iowa Administrative Code section 6.1(1) because:

> a. it is a physical impairment as defined by commission rule 6.1(2) [See Finding of Fact No. 4];
>
> b. which substantially limited him in the major life activity of walking under commission rules 6.1(1) and 6.1(3). See Finding of Fact No. 4.

Complainant Nicol's Age:

5. Throughout his employment with Respondents, Complainant Nicol was protected by the Iowa Civil Rights Acts' broad prohibition against age discrimination in employment. Iowa Code §601A.6(2) (1985). See Finding of Fact No. 3.

Constructive Discharge:

6. "Constructive discharge exists when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." First Judicial District Department of Correctional Services v. Iowa Civil Rights Commission.315 N.W.2d 83, 87 (Iowa 1982). The Iowa Supreme Court has adopted an objective standard for determining when a constructive discharge has occurred: "To find constructive discharge, the fact finder must conclude that, "working conditions would have been so difficult or so unpleasant" that a reasonable person in the employee's position would be compelled to resign." Id. (citing Bourque v. Powell Electrical Manufacturing Company, 617 F.2d 61, 65 (5th Cir. 1980)).

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

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

Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 269 (2nd ed. 1989).

8. In this case, two different employment practices were cited by the Complainant and the Commission's representative as constituting the conduct required to establish element number two above. First, they asserted that the Complainant had been harassed due to his age and disability by a series of actions taken by Sheriff Davis. (Complaint; Amended Complaint; Commission's Brief at 5-6). Second, they asserted that Sheriff Davis had failed to accommodate the Complainant's disability. (Complaint; Commission's Brief at 5-6).

Harassment:

9. To establish a valid claim of harassment on the basis of age or disability, the Complainant would have to prove:

> 1) He is a member of a protected class.
>
> 2) He was subjected to harassment, i.e. adverse conduct regarded by. him as unwelcome and reasonably considered to be undesirable or offensive.
>
> 3) The harassment was based upon his protected class status.
>
> 4) The harassment affected a term, condition, or privilege of employment;
>
> 5) The employer knew or should have known of the harassment and failed to take prompt remedial action.

Ct Lynch v. City of Des Moines, No. 89-222, slip op.at l6 (lowa April 18,1990) (requirements for sexual harassment case); Chauffeurs, teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 378 (Iowa 1986) (requirements for racial harassment case); Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

10. Element number one above has been established in regard to both age and disability. Element number three focuses on the essence of a claim under the disparate treatment theory, i.e. whether the complainant has been "intentionally singled out for adverse treatment on the basis of a prohibited criterion." Henson v. City of Dundee, 682 F.2d at 903. Disparate treatment is shown when:

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

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

11.

> [I]t is essential to realize that it does not matter whether the employee is a good or bad employee, or whether the employer is fair or unfair. For example, a violation ... would be proved under the disparate treatment theory by evidence that a female

> plaintiff was discharged for four unexcused absences in accordance with a company rule that all persons with four unexcused absences are discharged, but similarly situated male employees were not discharged after four unexcused absences. However, if similarly situated male employees were also discharged in such circumstances, there would be no violation... In both situations, it is irrelevant whether the plaintiff was a bad employee or a good employee. General conceptions of whether or not it is fair to discharge someone for four unexcused absences are similarly not determinative.

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

12. There has been no showing of age discrimination as there is no evidence in the record demonstrating an age discriminatory motive in regard to any of the actions alleged by Complainant Nicol to constitute harassment on the basis of age. See Findings of Fact Nos. 8, 15, 22, 29, 32, 36, 37, 39, 41. In the absence of any showing that intolerable working conditions were the result of such harassment, it must be concluded that Complainant Nicol was not constructively discharged on the basis of age.

13. The evidence is also not sufficient to show harassment on the basis of disability.The greater weight of the evidence does not show different treatment on the basis of disability in the removal of Complainant Nicol's rank as captain; the reprimand for failure to wear his uniform; the reprimand for improper service of papers; the removal of his responsibility for reviewing records of the Emergency Operations Commission; or for removal of his jail responsibilities. See Findings of Fact Nos. 22, 29, 32, 26, 39, 41.

14. The Sheriff's request for a statement from Complainant's physician, his dismissal of this statement as not being worth the paper it was printed on, and his mentioning disability retirement to Complainant Nicol are all obviously related, to Complainant's disability. It cannot be said, under the facts of this case, that requesting a physician's statement or suggesting disability retirement constituted harassment. Neither of these actions, under these facts, constitute unreasonable or adverse treatment of complainant. Sheriff Davis' remark about the doctor's statement was insensitive and indicative of his refusal to accommodate Complainant's disability, but one such statement will usually not be sufficient to create an intolerable working environment. Cf. Henson v. City of Dundee, 682 F.2d at 904 (in order to constitute a violation must be sufficiently pervasive as to alter conditions of employment). See Findings of Fact Nos. 11-13, 37, 51.

Failure to Provide a Reasonable Accommodation for Complainant's Disability:

15. 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 336, 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 in religion and disability cases).

16. The distinction between the two theories is based on the recognition that it is "necessary to provide a requirement of reasonable accommodation in order to eliminate discrimination against the disabled." Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d 192, 196-97 (Iowa 1987). Reasonable accommodation theory requires different, beneficial treatment of the disabled while disparate treatment theory is based on the prohibition against adverse, different treatment:

> The physically disabled employee is clearly different from the nonhandicapped by virtue of the disability.But the difference is a disadvantage only when the work environment fails to take into account the unique characteristics of the handicapped person. (citations omitted.) Identical treatment may be a source of discrimination in the case of the handicapped, whereas *different* treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.

Holland v. Boeing Company, 90 Wash.2d 384,583 P.2d 621, 623 (1978) (quoted in Iowa Beer and Liquor Control Department v. Iowa Civil Rights Commission, 337 N.W.2d 986, 899 (Iowa Ct. App. 1983); also cited with approval in Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d at l96-97)).

17. The burden of proof or "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding is on the complainant to persuade the finder of fact that Respondents failed to provide a reasonable accommodation for his disability. Cerro Gordo County Care Facility v. Iowa Civil Right Commission, 401 N.W.2d 192,196 (Iowa 1987); King v. Iowa Civil Rights Commission, 334 N.W.2d 598,602 (Iowa 1983)(citing Linn Cooperative Oil Company v. Mary Quigley, 305 N.W.2d 728,733 (Iowa 1981)).

18. 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).

19. In the reasonable accommodation case, this burden of producing evidence shifts. King, v. Iowa Civil Rights Commission, 334 N.W.2d at 601-02. See Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d at 196.

20. The Complainant has the initial burden of proving a prima facie case of discrimination under the failure to accommodate theory by a preponderance of the evidence. King v. Iowa Civil Rights Commission, 334 N.W.2d at 601. See Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d at 196. He must offer evidence sufficient to create an inference that the employer failed to accommodate his disability in violation of the Act. Cf. Teamsters v. United States. 431 U.S. 324, 358 (1 977)(plaintiff must offer evidence adequate to create an inference that employment decision based on illegal criterion). Once a prima facie case is

established, a presumption of discrimination attaches. Trobaugh v. Hy-Vee Food Stores. Inc., 392 N.W.2d 154,156 (Iowa 1986).

21. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows either that he made a reasonable accommodation to Complainant's disability, Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d at 196, or that he could not accommodate the employee without incurring undue hardship. King v. Iowa Civil Rights Commission, 334 N.W.2d at 602. Once the Respondent has produced such evidence, the presumption of discrimination drops from the case. Trobaugh v. HyVee Food Stores. Inc., 392 N.W.2d at 156.

22. This burden of production is different from the burden required in a disparate treatment case where the employer is only required to produce evidence of a legitimate non-discriminatory reason for its action. This is so because, in a reasonable accommodation case, the employee requires positive different treatment, while, in the disparate treatment case, the employer is attempting to explain adverse different treatment. Compare Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d at 196 (alleged failure to accommodate employer has a duty to produce evidence of reasonable accommodation of disability) with Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154,156 (Iowa 1986) (alleged different treatment on basis of disability-employer has duty to produce evidence that shows legitimate, nondiscriminatory reason for the challenged action). See Conclusion of Law No.16.

23. 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. King v. Iowa Civil Rights Commission, 334 N.W.2d at 602. 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)). Within the context of the failure to accommodate theory of discrimination, a showing of unwillingness or refusal to provide a reasonable accommodation would demonstrate that a discriminatory reason motivated the employer.

24. 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 6. C;t. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981). The Complainant's initial evidence and inferences drawn therefrom may be considered on the issue of pretext. Id. at n.10. This burden of production merges with the Complainant's ultimate burden of persuasion, i.e. the burden of persuading the finder of fact that discrimination occurred. Id. 450 U.S. at 256, 101 S. Ct. at , 67 L. Ed. 2d at fl-7. When the Complainant demonstrates that the Respondent's reasons are pretextual, the Complainant must prevail. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 717-18 (1983)(Blackmun, J. concurring).

25. In the instant case, Complainant Nicol established a prima facie case of discrimination under the failure to accommodate theory by showing:

(1) A new employment requirement, specifically the requirement to answer accident calls, was imposed by his employer which the Complainant could not safely meet due to his disability. See Findings of Fact Nos. 4-6, 42-46.

(2) The Complainant informed his employer that he could not safely meet the new requirements which conflict with the limitations of his disability. See Findings of Fact Nos. 44-45.

(3) The Complainant was penalized for his disability by being required to perform the new requirement despite the danger to himself and others. See Findings of Fact Nos. 44-46.

Cf. King v. Iowa Civil Rights Commission, 334 N.W.2d at 603-04 (setting forth requirements for prima facie case of failure to accommodate religious beliefs). It should be noted that the reference to "penal[ty]" in this formulation of the prima facie case does not necessarily refer to discipline. Id. at 603-04. In king. for example, the Complainant was allowed to be absent for religious holidays provided he arranged and paid for his own substitute. Id. at 604. King asserted that he was penalized by not being reimbursed for his lost income. Id. Here, the penalty asserted, and shown by the evidence, is that Complainant was required to assume a duty he had not been required to perform for at least well over a year, answering accident calls, at substantial risk to his health and others' safety. See Findings of Fact Nos. 42-46.

26. Respondents have failed to produce evidence to demonstrate that reasonable accommodation was made for Complainant in regard to accident calls or that such accommodation would constitute an undue hardship. See Findings of Fact Nos. 43, 45. Although Respondents correctly point out, on brief, that there was testimony and rebuttal testimony on possible accommodations for Complainant, "should his disease become worse" to the point he could no longer act as process server, this testimony does not address the question of reasonable accommodation based on Complainant's condition as it was from the time he was informed that he would be expected to do all duties, including answering accident calls, to the time of his resignation. Respondents' Brief at 5-6 (citing Tr. at 99-100, 197-200). Complainant Nicol has established an unrebutted prima facie case of discrimination under the failure to accommodate theory.

27. Even if the evidence cited in Respondent's brief were considered to have rebutted the Complainant's prima facie case, the Complainant would still prevail as (a) the statements made by Sheriff Davis to Complainant in regard to Dr. Hallberg's statement and in regard to expecting him to perform all duties demonstrates a discriminatory motive, i.e. a refusal or unwillingness to provide a reasonable accommodation, and (b) the evidence demonstrates that Respondents could have continued to exclude Complainant from accident call and other strenuous duties at a de minimis cost. Such a low standard of accommodation may not be "sufficient in every circumstance," but it is under these facts. Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d at 197. See Findings of Fact Nos. 43, 4445.

28. All of the elements required to show constructive discharge have been established:

(1) the requirement that Complainant Nicol continue to answer accident calls, despite the threat to his and others' safety, rendered his working conditions such that a reasonable person would find them intolerable; [See Finding of Fact No. 44-46, 49]

(2) a failure to accommodate Complainant Nicol's disability, in violation of the Iowa Civil Rights Act, created the intolerable working conditions; [See Conclusions of Law No. 26, 27]

(3) Complainant Nicol's involuntary resignation resulted from the intolerable working conditions.[See Findings of Fact No. 47-491.

Respondents' Defense Based on Iowa Code Section 341 A. 1 1 (3):

29. Respondents assert that, by the authority of low Code Section 341A.1 1 (3), they would have the right to discharge Complainant Nicol without making an accommodation for his disability. They argue that Sheriff Davis would have been justified in discharging Complainant Nicol by July 1985 because of Complain ant's extended sick leave and statement that he did not know if he would ever return to work. Respondents' Brief at 4; Findings of Fact No. 6, 49. There are several reasons why this is not so.

30. First, Iowa Code section 341A.11(3) allows the discharge of deputy sheriffs for "mental or physical unfitness for the position held." It prevails over low Code sections 601A.6's prohibition against the "discharge [of) any employee . . . because of the . . . disability . . . of such . . . employee " only if the two statutes cannot possibly be construed "so that effect is given to both." Iowa Code § 4.7 (1989). Given the rule of broad construction specifically applicable to section 601A.6, Iowa Code 601A.18, and the rule that all provisions of the Iowa Code "shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice," Iowa Code § 4.2, it is clear that the two can be reconciled by construing Iowa Code 341A.1 1 (3) to allow the discharge of deputy sheriffs for "mental or physical unfitness for the position held" *only when reasonable accommodation for any physical or mental disability is not possible.*

31. Second, because of the very nature of constructive discharge, the only questions o employer motivation which arise are those involved in determining whether the conduct creating the intolerable working conditions constitutes illegal discrimination. That conduct is only an element of a constructive discharge, it is not a discharge per se. See Conclusions of Law No. 6, 7.

32. Third, it has already been found, based on Sheriff Davis' testimony, that Sheriff Davis would have taken Complainant Nicol back in July of 1985 if he did no have to accommodate his disability. See Finding of Fact No. 48.

33. Fourth, even with a non-constructive discharge, it is not enough merely to show that the decision to discharge would have been justified for a legitimate reason. Price-Waterhouse v. Hopkins. U.S. , 57 L.W. 4469, 4476 (1989). The employer must show that it was motivated by the legitimate reason at the time the discharge decision was made and that the same decision

would have been made in the absence of the discriminatory criterion. Id. With a constructive discharge such a showing is obviously impossible.

Remedies:

34. Violation of Iowa Code section 601A.6 having been established, the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code S 601A.15(8 (1989). 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.

Compensation:

35. The Commission has the authority to make awards of backpay. Iowa Code § 601A.15(8)(a)(1) (1989). In making such awards, interim earnings and unemployment compensation received during the backpay period are to be deducted. Id. The Complainant bears the burden of proof in establishing his damages. Diane Humburd, CP # 03-85-12695, slip op. at 32-33, (Iowa Civil Rights Comm'n Sept. 28, 1989)(citing Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Id. at 34-35, 37 (citing e.g. EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.&. 1976), *affd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied,* 434 U.S. 920 (1977)). This the Complainant has done. See Findings of Fact No. 53- 54, 57-62. The burden of proof for establishing either the interim earnings of the Complainant or any failure to mitigate damages rests with the Respondent. Diane Humburd, CP # 03-85-12695, slip op. at 35-37, (Iowa Civil Rights Comm'n Sept. 28,1989)(citing e.g. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). No evidence on either of these issues was introduced. See Finding of Fact No. 62.

36. The award of backpay in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a backpay award . . . provide[s] the spur or catalyst which causes employers and unions to self-examine and to self evaluate their employment practices and to endeavor to eliminate [employment discrimination)." Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975). Second, backpay serves to "make persons whole for injuries suffered on account of unlawful employment discrimination." Id. 422 U.S. at 419, 95 S.Ct. at 2372. Both of these purposes would be served by an award of backpay in the present case.

37. "Iowa Code section 601A.15(8) gives the commission considerable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, No. 88-934, slip op. at 47 (Iowa January 24, 1990). The Iowa Supreme Court has approved two basic principles to be followed in computing awards in discrimination cases: "First, an unrealistic Exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved

against the employer." Id. at 45. "it suffices for the [agency] to determine the-e amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery."- Id. (Quoting with approval Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973)).

Termination of the Back Pay Period at Complainant's 55th Birthday:

38. The determination that the back pay period, should end at Complainant's 55th birthday, when he would have retired, is based on the principle that the period ends "if the plaintiff ceases to suffer the adverse economic effects of discrimination." Schlei & Grossman, Employment Discrimination Law: Five year Cumulative Supplement 529 (2nd ed. 1989). The Respondent has the burden of proof in establishing that the back pay period should terminate prior to the Commission's final decision. Id. The greater weight of the evidence does not support an earlier termination of the back pay period than Complainant's 55th birthday. See Findings of Fact No. 55, 56.

39. Furthermore, it has been found that, but for the failure to accommodate complainant, his March 1985 exacerbation would not have occurred, at least not at that time. See Finding of Fact No. 55. Under these circumstances, where the exacerbation and its effects on Complainant's ability to continue employment are causally linked to the Respondents' discriminatory failure to accommodate, the exacerbation and its effects cannot be permitted to terminate Complainant's back pay. Cf. Wells v. North Carolina Board of Alcoholic Control, 714 F.2d 340, 46 Tair Empl. Prac. Cas. 1766,1767-68 (4th Cir. 1983)(where complainant left employment due to back injuries sustained as a result of discriminatory failure to promote to a nonlabor- position, termination of employment had no effect on back pay).

40. The Commission has the option of either (a) retaining jurisdiction of the case in order to obtain the date of Complainant's 55th birthday, calculate the amount of back pay for the period from August 11, 1988 to Complainant's birthday, and issue a supplemental order stating that amount, or (b) ordering Complainant to provide the date by affidavit, supplement the record by this means, and allow the district court on enforcement of the Commission's order to calculate this amount using the formula set forth in Finding of Fact Number 61. City of Des Moines Police Department. Iowa Civil Rights Commission. 343 N.W.2d 836, 839-40 (Iowa 1984). The Commission chooses the latter as the more practical alternative.

Damages for Emotional Distress:

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

42. "[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, No. 88-934, slip op. at 32 (Iowa January 24, 1990).

43. 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)(housing discrimination case). Nonetheless, such evidence may be considered. See Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988). "Humiliation can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d at 636 (quoted with approval in Blessum v. Howard County Board. 245 N.W.2d 836, 845 (Iowa 1980)). Even slight testimony of emotional distress, when combined with evidence of circumstances which would be expected to result in emotional distress, can be sufficient to show the existence of distress. See Dickerson v. Young 332 N.W.2d 93,98-99 (Iowa 1983).

44. When the evidence demonstrates that the complainant has suffered emotional distress proximately caused by discrimination, an award of damages to compensate for this distress is appropriate. Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984)(citing Nichols, Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview, 32 Drake L. Rev. 273, 301 (1982-83)). The Complainant did suffer substantial emotional distress resulting from discrimination. See Finding of Fact No. 63.

45.

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

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

46. The amount of damages for emotional distress will depend on the facts and circumstances of each individual case. Marian Hale. 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984). Past Commission decisions have referred to the consideration of various factors in awarding damages for emotional distress. Id. Upon examination of the Commission's cases, and the authorities cited therein, it is concluded that the two primary determinants of the amount

awarded for damages of emotional distress are the severity of the distress and the duration of the distress. See Cheri Dacy, 7 Iowa Civil Rights Commission Case Reports 17, 24-25 (1985); Marian Hale. 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984).

47. A wrongdoer takes the person he injures as he finds him. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975). A previously disabled person injured by the acts of a wrongdoer "is entitled to such increased damages as are the natural and proximate result of the wrongful act." Id. at 46; Cf.Lynch v. City of Des Moines, No. 89-222. slip op. at 24 (Iowa April 18, 1990) (upholding award of emotional distress damages in sexual harassment case against appeal of damages as inadequate-noting some distress due to other turmoil in complainant's life unrelated to discriminatory actions of employer). This principle applies to psychological and emotional injuries. McBroom v. State, 226 N.W.2d at 46.

Interest:

48. The Iowa Civil Rights Act allows an award of actual damages to persons injured by discriminatory practices. Iowa Code § 601A.15(8)(a)(8) (1989). Prejudgment interest is a form of damages. Dobbs, Hornbook on Remedies 164 (1973). It "is allowed to repay the lost value of the use of the money awarded and to prevent persons obligated to pay money to another from profiting through delay in litigation." Landals v. Rolfes Company, No. 88-1638, slip op. at 19 (Iowa April 18, 1990). Pre-judgment interest is properly awarded on an ascertainable claim. Dobbs, Hornbook on Remedies 166-67 (1973). The amount of back pay due Complainant at any given time has been an ascertainable claim since the time of his resignation. See Findings of Fact No. 53-62. Emotional distress damages are not ascertainable before a final judgment. See Dobbs, Hornbook on Remedies 165 (1973).

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

Credibility and Testimony:

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

Motion to Dismiss:

During the course of the hearing, Respondents made a motion for "directed ruling of dismissal of the complaints." (Tr. at 135-37). The basis for the motion was the Complainant's failure to prove either age or disability discrimination. Although the Complainant has failed to prove age

discrimination or disability discrimination under the theory of disparate treatment through harassment, he has proven disability discrimination through failure to provide a reasonable accommodation for his disability. The motion to dismiss should be denied.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Ronald Nicol, is entitled to judgment because he has established that Respondents Buchanan County Sheriff's Department and Buchanan County Board of Supervisors failed to accommodate his disability and constructively discharged him due to his disability in violation of Iowa Code Section 601A.6 (1985).

B. Respondents' motion to dismiss is denied

C. Complainant Nicol is entitled to a judgment of fifty-four thousand two hundred sixty four dollars and thirty-six cents ($54,264.36) in back pay for the period from September 11, 1985 to August 10, 1988 for loss resulting from his constructive discharge by Respondents.

D. Complainant Nicol is entitled to a further judgment of back pay in accordance with the formula set forth in Finding of Fact Number 61.

E. Complainant Nicol shall, within thirty days of the date of this order, provide to the Commission, with a copy to Respondents' attorney, an affidavit stating the date of his 55th birthday.

F. Complainant Nicol is entitled to a judgment of seven thousand five hundred dollars ($7,500.00) in compensatory damages for the emotional distress he sustained as a result of the discrimination practiced against him by Respondents.

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

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

I. Respondents are hereby ordered to cease and desist from any further practices of failing to provide reasonable accommodation to or constructively discharging disabled employees.

J. Respondents shall post, within 60 days of the date of this order, in conspicuous places at their locations in Independence, 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.

K. Respondents shall require Sheriff Davis to review Iowa Code section 601A.6 of the Iowa Civil Rights Act and sections 8.26 through 8.32 of the Commission's administrative rules (161 Iowa Administrative Code § 8.26-8.32).

M. Respondents shall file a report with the Commission within 90 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs J through K inclusive of this order.

Signed this the 16th day of May, 1990.

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 July 19, 1990, the Iowa Civil Rights Commission, at its regular meeting, reversed the Administrative Law Judge's proposed decision and order in the above captioned case to the extent that the proposed decision and order found that Respondents had violated Iowa Code section 601A.6 by failing to accommodate Complainant Nicol's disability of multiple sclerosis and by constructively discharging Complainant Nicol.

2. In accordance with the Commission's decision, Findings of Fact Nos. 44-49, the last sentence of Finding of Fact No. 51, and Findings of Fact Nos. 53-65 are deleted from the proposed decision.

3. In accordance with the Commission's decision, Conclusions of Law Nos. 25-49 and the unnumbered Conclusion of Law under "Motion to Dismiss" are deleted. Paragraphs A-M of the Decision and Order are also deleted.

4. The finding that the Respondents had failed to accommodate Ronald E. Nicol is reversed because, in light of the record as a whole, as of the date of his resignation, Complainant Nicol no longer possessed the job qualifications as a result of his disability. The complaint in the above captioned case is hereby dismissed.

IT IS SO ORDERED.
Signed this the 23rd day of July, 1990.

Abigail Pumroy
Chairperson
Iowa Civil Rights Commission

Copies to:

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Ronald E. Nicol
P.O. Box 203
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Note: As indicated by this final decision, the proposed decision was reversed and the case dismissed. The complainant appealed the final decision. The Commission was affirmed by both the District Court for Polk County and the Iowa Supreme Court.