BEFORE THE DEPARTMENT OF INSPECTIONS AND APPEALS

DEBRA S. HOFFMAN, Complainant,

and

IOWA CIVIL RIGHTS COMMISSION

v.

MAMA LACONA'S - WEST, JIM LACONA, and JOEL LOPEZ, Respondents.

CP # 11-93-25280
DIA # 96 ICRC - 1

SUMMARY[*]

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Debra S. Hoffman against the Respondents Mama Lacona's-West, Jim Lacona, and Joel Lopez. Ms. Hoffman alleges (a) sex discrimination in employment and (b) retaliation for lawfully opposing sex discrimination.

Complainant Debra Hoffman, a female, alleges that she was subjected to sexual harassment by Respondent Joel Lopez and other co-workers. She alleges that Respondents Mama Lacona's-West and Jim Lacona were aware of this harassment, but did not end it. She also alleges retaliation in her amended complaint. She believes she was discharged by Respondent Mama Lacona's-West due to her lawful opposition to sexual harassment.

A public hearing on this complaint was held on October 24-25, 1995 before the Honorable Donald W. Bohlken, Administrative Law Judge, at Room 19 of the Iowa State Capitol Building in Des Moines, Iowa. The Respondents Mama Lacona's-West and Jim Lacona were represented by Douglas A. Fulton, Attorney. The Respondent Joel Lopez did not appear and was not represented. The Iowa Civil Rights Commission was represented by Teresa Baustian, Assistant Attorney General. The Complainant, Debra Hoffman, was represented by James J. Beery and Thomas D. McMillen.

The Commission's Brief was received on December 11, 1995. The Respondent's Brief was received on December 12, 1995.

The Commission proved Complainant Hoffman's allegations of sexual harassment against Respondents Mama Lacona's-West, Jim Lacona and Joel Lopez by establishing:

> a. that she is a female and is therefore a member of a class protected against sex discrimination;

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

b. that she was subjected to harassment by Respondent Lopez and other employees of Respondent Mama Lacona's-West. This was adverse conduct which she regarded as uninvited and offensive and which any reasonable person would regard as offensive;

c. that this harassment was based upon her sex, i.e. because she is female;

d. that this harassment created a hostile or abusive work environment; and,

e. that Respondent Mama Lacona's-West, through its agents and managers, including but not limited to Respondent Jim Lacona, knew or should have known of the harassment and failed to take prompt, appropriate, and effective remedial action

The Commission proved Complainant Hoffman's allegations of retaliatory discharge under the circumstantial evidence method of proof. It established a prima facie case by proving: (a) that Complainant Hoffman took action to lawfully oppose sexual harassment while employed at Mama Lacona's-West; (b) that Complainant Hoffman was discharged from Mama Lacona's-West; and; (c). that there is a causal link between her discharge and her lawful opposition to the retaliation. That link was established by (1) the close proximity in time between her opposition and the discharge, (2) the atmosphere of condoned sexual harassment which increases the likelihood of retaliation for opposition to harassment; (3) the failure by Mama Lacona's to follow usual procedures with respect to complaints about rudeness by food servers when such a complaint was made against Hoffman, and (4) false testimony by managers to the effect they were not aware of Complainant's opposition to harassment.

The employer rebutted the prima facie case by introducing evidence articulating a legitimate, non-discriminatory reason for the discharge, i.e. that she was rude to a customer.

This reason, however, was shown by the evidence to be a pretext for retaliation. This included evidence indicating that the practices and procedures normally or purportedly followed by Respondent with respect to complaints of rudeness were not followed with the Complainant. The evidence also indicates that Complainant's conduct with respect to this reason, and a different reason provided her at time of discharge, was punished more severely than similar or worse conduct by other employees.

Other evidence of pretext included the employer providing inconsistent reasons for Complainant's discharge at the time of her discharge and at hearing. In addition, the numerous weaknesses, implausibilities, inconsistencies, incoherencies, and contradictions in management's testimony concerning the discharge and related events support a finding that the reason given for Complainant's discharge is unworthy of credence. The ultimate finding of discrimination is supported by the combination of the inference of discrimination remaining from the prima facie case and the finding that the purported reason for discharge is not credible.

Remedies awarded include $2773.77 in back pay, premiums for medical insurance, $20000.00 for emotional distress damages resulting from sexual harassment, and $7500.00 for emotional distress damages resulting from retaliatory discharge.

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FINDINGS OF FACT:

I. JURISDICTIONAL AND PROCEDURAL FACTS:

A. Subject Matter Jurisdiction:

1. Complainant Hoffman alleges that she was subjected to sexual harassment by Respondent Joel Lopez and other co-workers. She alleges that Respondents Mama Lacona's-West and Jim Lacona were aware of this harassment, but did not take appropriate action to remedy it. She also alleges retaliation in her amended complaint. She believes she was discharged by Mama Lacona's-West due to her lawful opposition to sexual harassment. These allegations bring her complaint within the subject matter jurisdiction of the Commission. See Conclusions of Law Nos. 1-2.

B. Procedural Matters:

2. Complainant Hoffman filed her complaint against the Respondents with the Iowa Civil Rights Commission on November 17, 1993. The last date given for the discriminatory acts alleged in her original complaint is October 16, 1993. Thus, the original complaint was filed less than one hundred eighty days after the last alleged act of discrimination. The complaint was amended to include retaliation on July 3, 1994.

3. The complaint was investigated. After probable cause was found, conciliation was attempted and failed. Notice of Hearing was issued on July 25, 1995.

II. BACKGROUND:

A. Complainant's Background:

4. Complainant Debra Hoffman, a female, was employed full-time at Respondent Mama Lacona's-West from November of 1992 to October of 1993 as a food server (waitress). (Notice of Hearing (complaint);Tr. at 52, 53). She was thirty-two years old at the time she began her employment. (Notice of Hearing (complaint)). She worked Tuesday through Friday evenings until close at 11:00 p.m. On Saturdays, she began work at 2:00 p.m. and left when the rush of business was over at approximately 9:00 p.m. (Tr. at 53). With the exception of setting up the salad bar, her main duties as food server involved taking orders for food and bringing the food to the customers. (Tr. at 54). On at least one occasion during her employment , she worked at a different Mama Lacona's location, the Southwest 9th store. (Tr. at 164-65). She was informed of her discharge from Respondent Mama Lacona's on October 16, 1993. (Tr. at 61-62). She was told she could stay for an additional one or two weeks, but elected to continue working only three or four more days. (Tr. at 63, 278-79).

B. Respondents' Background:

5. Respondent Mama Lacona's-West is a restaurant located in Clive, Iowa. (Notice of Hearing (complaint); Tr. at 34, 115, 146-47, 221, 250, 283). The restaurant is one of the restaurants operated by a corporation, Mama Lacona's Inc. (Tr. at 250, 253). In 1993, the corporation operated restaurants at both the Clive and Southwest 9th locations. (Tr. at 146, 252). A third location in Beaverdale had been closed prior to that time. (Tr. at 252).

6. In 1993, there were seventy employees, both full and part time, for the Clive location. (Tr. at 286-87). The staff for a Friday or Saturday shift would include approximately thirty employees, including ten waitresses, two bartenders, four buspersons, three dishwashers, five cooks, a salad maker, and a hostess, as well as managers Joe, Jim, and Charles Lacona. (Tr. at 287). This number would be reduced to twenty for shifts during the week. (Tr. at 287).

7. The president of the corporation, Charles Lacona, has operated Mama Lacona's since 1957. (Tr. at 250-51). This is a family business with three of Mr. Lacona's children in the business as of the date of hearing. (Tr. at 251-52). While, in earlier years, he was more active in working and managing the business, Charles Lacona now seasons the food and helps his son, Jim Lacona, manage the business. (Tr. at 251). It is evident from the record that he had the authority to discharge employees, as he discharged Complainant Hoffman. (Tr. at 62, 260, 267, 274, 300-01).

8. Respondent Jim Lacona was general manager for all of Mama Lacona's in 1993. (Tr. at 284). This position is subordinate to that of his father, Charles Lacona. (Tr. at 141, 221-22, 242, 283). In 1993, Jim Lacona spent the majority of his time at the Clive store, the busiest location, where he also acted as manager. (Tr. at 148, 284-85). His duties and responsibilities encompassed "everything" at Mama Lacona's. This included the authority to hire and discharge employees and to handle employee complaints. (Tr. at 285, 292-93). He usually worked up front at the Clive store as the cashier who answered phones and took orders. He also occasionally seated people. At times, he went back to the kitchen to get food for people who came in for orders to go. (Tr. at 288).

9. Joe Lacona, Jim's brother, had authority to hire and discharge employees and to handle employee complaints at the Clive store in 1993. (Tr. at 285, 292). Under the line of authority at the Clive store, such employee complaints should have reached him prior to Jim Lacona. (Tr. at 292). Venessa Devine, one of Jim's sisters, was assistant manager at the Southwest 9th store in 1993. (Tr. at 147, 148, 161). Their mother also managed at Southwest 9th. (Tr. at 253-54).

10. David Lihs was kitchen manager at the Clive restaurant for approximately six months ending in October 1993. (Tr. at 115). For approximately one year before that, he had worked there as a line cook. (Tr. at 115, 117). On brief, Respondents Mama Lacona's-West and Jim Lacona admit that David Lihs was kitchen manager and that he "had authority to hire, fire and discipline employees." (Respondents' Brief at 2). For reasons

set forth below, this admission is contrary to the interests of these Respondents and is binding on the Commission. See Conclusion of Law No. 5. See Finding of Fact No. 35. The preponderance of the evidence indicates that Mr. Lihs was a supervisory management employee with authority over the kitchen staff. (Tr. at 57, 115-16, 141, 293). This included the authority to resolve employee complaints concerning the kitchen staff. (Tr. at 292-93).

11. Respondent Joel Lopez, who was also known as "Minute," was a dishwasher on the kitchen staff. (Tr. at 18,40, 83, 86, 120, 265). Like the rest of the kitchen staff, with the exception of Mr. Lihs, Lopez was Hispanic. (Tr. at 10-11, 32, 289). Respondent Lopez and most of the other Hispanic staff spoke a little English. They communicated with each other primarily in Spanish. (Tr. at 23-24, 31-32, 86-87, 88, 171, 180, 256). Two of the Hispanic staff, Pablo and Jose, were fluent in both English and Spanish. (Tr. at 180, 291). Respondent Lopez was purportedly terminated by Respondent Jim Lacona approximately one month after the Complainant's discharge due to his being found in the cooler with his pants down. (Tr. at 38-39, 305-06, 327-29). See Finding of Fact No. 91B.

III. SEXUAL HARASSMENT:

A. Complainant Is A Member of A Protected Class:

12. Complainant Debra Hoffman is a female and is, therefore, a member of a class protected from sex discrimination by the Iowa Civil Rights Act. (Tr. at 12-13, 36, 120). See Conclusion of Law No. 16.

B. Complainant Hoffman Was Subjected to Unwelcome Sexual Harassment, i.e. Adverse Conduct Regarded By Her As Unwelcome and Reasonably Considered to Be Undesirable or Offensive:

13. Complainant Hoffman and other female food servers were the subject of repeated verbal and physical sexual harassment perpetrated by Respondent Jose Lopez and other male members of the kitchen staff.

1. Verbal Harassment:

14. The verbal comments heard by Complainant Hoffman at Mama Lacona's-West were more extreme than anything she had heard in her prior employment, which included being a food server at three other establishments. (Tr. at 53, 54-55, 56-57). Beginning by May of 1993, at the latest, four male members of the kitchen staff including Respondent ("MInute") Lopez, and others named or nicknamed "Balls" (Adon), "Jose" and "Jose-B" would repeatedly make comments, "kissy noises," "smooching noises," and wolf whistles toward Complainant Hoffman and other waitresses. (Tr. at 10-12, 27- 29, 36, 42, 56, 59, 60, 61, 83, 85, 92, 93, 106-07, 116-17, 120, 125, 170, 179).

15. Two of the most frequent comments directed toward Complainant Hoffman, and other waitresses, such as Amy Tobey and Kerry Koonce (nee Rigg), by the kitchen staff

were the Spanish slang phrases "chi-chi grandes" or "chi-chis" and "chupa mi verga, pichi cabron." (Tr. at 13, 18-19, 32-33, 56-57, 60, 116-17, 170-71, 179-80, 241). A shorter version of the latter phrase, i.e. "chupa mi verga" was also used (Tr. at 11, 13, 20, 60, 170). Complainant Hoffman heard Respondent Lopez, Pablo, and Jose repeatedly use the "chupa mi verga" phrase. (Tr. at 60). Kerry Koonce remembered this phrase because "[i]t was something that was said almost every night." (Tr. at 179).

16. The English translation of "chi-chis" or "chi-chi grandes" is "breasts" or "big breasts." (Tr. at 13, 19, 196-97, 292). The translation of "chupa mi verga, pichi cabron" is "suck my cock, you damn bitch." (CP. EX. # 1). The translation of "chupa mi verga" is "suck my cock." (CP. EX. # 1; Tr. at 20, 144, 197). Such comments were directed toward Complainant Hoffman and other females on a daily basis. (Tr. at 11, 13, 17-18, 56-57, 60, 106-08, 116-17, 179-80).

17. Some of the waitresses learned what these phrases meant from several sources. These sources included Bobby Carara, a waitress who spoke Spanish. (Tr. at 14). Some of the Hispanic staff members also informed David Lihs of the meaning of the "chupa mi verga" phrase. He, in turn, informed Complainant Hoffman and Amy Tobey. (Tr. at 14, 20, 32, 60). Complainant Hoffman, while not being initially aware of what these phrases meant, did learn their meaning while still employed at Mama Lacona's. (Tr. at 56-57, 60, 110). Although she had four years of high school Spanish, Kerry Koonce did not know the meaning of the vulgarism "chupa mi verga" because she does not know Spanish slang. Nevertheless, she could tell from the staff's groping hand gestures and body language, which occurred when the phrase was said, that it was a "very sexually degrading comment" which was intended to be offensive. (Tr. at 170-71, 179-80).

18. The accuracy of the waitresses and Mr. Lihs's understanding of the meaning of "chupa mi verga" is verified by the affidavit of Alfred A. Falconi, "an American of Latin American extraction," who "was raised in a bi-lingual household where both Spanish and English were used interchangeably." (CP. EX. # 1). Mr. Falconi is "fully bi-lingual (Spanish/English) as a result of [his] cultural background, visits and prolonged residence in Spanish-speaking countries and [his] education which includes high level course work in Spanish." (CP. EX. # 1). As an experienced interpreter and translator, Mr. Falconi is "conversant in both literary and textbook Spanish as well as the colloquial forms of the language." (CP EX. # 1).

2. Physical Harassment:

19. The kitchen staff also inflicted physical sexual harassment on Complainant Hoffman and other waitresses. The uniform dress initially worn by the waitresses included a wrap around skirt. (Tr. at 11-12). When the dress was untied, the strings would fall. While there was another part of the dress which prevented the underwear from showing, the strings would fall and the dress had to be retied. (Tr. at 12). Amy Tobey's uniform was frequently untied by members of the kitchen staff. (Tr. at 11). Debra Hoffman's dress was also untied by "Balls" on at least one occasion. (Tr. at 12, 91).

20. The kitchen staff also would grab Complainant Hoffman's hand and utter the objectionable phrases previously discussed when she reached for food under the warmer in the kitchen. (Tr. at 56-57, 60). These phrases were also said to Amy Tobey when she got her food from the line. (Tr. at 18).

21. Physical harassment also took the form of the Complainant and other waitresses being touched in other offensive ways by the kitchen staff. This included being grabbed by or patted on the rear, or being jabbed in the side. (Tr. at 12-13, 16, 27, 56, 57, 90).

22. One common occurrence for Complainant Hoffman, Amy Tobey, and Bev Erskine was for members of the kitchen staff to deliberately rub the front of their bodies against the back or side of these waitresses in the kitchen area. (Tr. at 13, 56-59, 117, 125). This often happened in an area in the back of the kitchen where the waitresses would stand to take a cigarette break or other momentary break from their duties. The dishwashers, such as Respondent Lopez, or other kitchen staff, such as Pablo, would do this while coming by to take clean plates back and stack them or to perform other functions. (Tr. at 57, 90).

23. David Lihs, the kitchen manager, observed this contact and noted that it appeared to be intentional and sexual in nature. (Tr. at 125, 134, 137). He noted that the staff members would utter some remark in Spanish when engaged in such body contact. (Tr. at 137). These contacts occurred when there was plenty of room for the staff member to pass the waitress without touching her body. (Tr. at 137-38).

24. One such rubbing incident occurred on October 15, 1993, while Complainant Hoffman was standing in the kitchen trying to get her tray arranged. Although there was sufficient room for Respondent Lopez to pass around her, he rubbed up against her and said something under his breath. (Tr. at 61, 79-80, 93). By the way it felt and the grunt and groan Mr. Lopez made while doing it, Complainant Hoffman concluded this rubbing was intentional. (Tr. at 79-80). She described it as a "full body rub contact." (Tr. at 80-81). This event was similar to other rubbing incidents involving Lopez, i.e. he would make a noise and rub up against the Complainant. (Tr. at 90). In addition to rubbing against her, Respondent Joel ("Minute") Lopez also wolf whistled at and patted Complainant Hoffman on the rear during her shift on October 15th. (Tr. at 13, 16, 27, 120). Lopez had been harassing her all day. (Tr. at 93).

25. Complainant Hoffman and these other waitresses did not invite or solicit the conduct of the kitchen staff. They tried to tell their harassers to stop this conduct and talked to some of their coworkers about it. (Tr. at 10, 14, 16, 36, 42, 57-58, 62, 90. 93, 107-08, 120, 171-73). They found it to be offensive, stressful, and to interfere with their work. (Tr. at 10, 54-55, 60-61, 62, 93, 108, 116-17, 120, 169-70). Any reasonable person, male or female, would also find such unwelcome verbal and physical sexual conduct to be hostile and abusive.

C. The Harassment of Complainant Hoffman and Other Female Food Servers Was Based Upon Their Sex:

26. The offensive verbal and physical conduct directed at Complainant Hoffman and other female food servers was clearly based upon their sex. The comments on breasts and use of the phrase ending in the Spanish equivalent of "you damn bitch" are obviously directed toward women. See Findings of Fact Nos. 15-16. The "wolf whistle" was directed at the Complainant and other women. See Finding of Fact No. 14. It is a matter of common knowledge that the "wolf whistle" is a type of whistle used by men to denote the presence of an attractive woman. Official notice is taken of this fact. Fairness to the parties does not require that they be given an opportunity contest this fact. See Conclusion of Law No. 4.

27. Other evidence shows that this conduct was directed toward the Complainant and other females because of their sex. The offensive physical and verbal conduct was sexual in nature and directed either primarily or exclusively towards females. See Findings of Fact Nos. 14-16, 19-25. There is no evidence in the record indicating that any such physical conduct was directed toward males. David Lihs testified that he was not aware of any male employees encountering Spanish profanity, wolf whistling, or the body contact directed toward female waitresses by the kitchen staff. (Tr. at 117). With the exception of the short phrase "chupa mi verga," there is no evidence such verbal conduct was ever directed toward males. Kerry Koonce noted that this phrase was sometimes used by the male kitchen staff towards each other as well as towards the waitresses. (Tr. at 180).

D. The Harassment Affected A Term, Condition Or Privilege of Complainant Hoffman's Employment:

28. The preponderance of the evidence demonstrates that the harassment adversely affected Complainant Hoffman's working environment, which is a condition of her employment. See Conclusion of Law No. 20. The totality of the circumstances shown in the evidence, including the frequency of the conduct, its severity, it's humiliating nature, and its impact on the Complainant's work performance demonstrate the hostile and abusive nature of her working environment. See Findings of Fact Nos. 29-33. The presence of multiple harassers and multiple victims of harassment also shows the environment was abusive. See Findings of Fact Nos. 14-15, 19-23, 25, 33. See Conclusion of Law No. 25.

1. Frequency of the Harassment:

29. The working environment could and was reasonably perceived to be a hostile or abusive environment due to the pervasive sexual harassment endured by Complainant Hoffman and her female coworkers. The verbal sexual comments, wolf whistles, kissing noises, and sexual gestures occurred virtually every day and often several times a day. These acts were not merely part of casual conversation. (Tr. at 11, 13, 18, 20, 28-29, 32-33, 55, 59, 60). Various acts of physical harassment involving unwanted touching also occurred on a daily basis. (Tr. at 11, 56). These acts of verbal and physical harassment were neither accidental nor sporadic. As Kerry Koonce noted, "[i]t was . . . a general every night thing that they went after Debbie [Hoffman]." (Tr. at 172). Thus the

frequency of these acts supports the conclusion that they resulted in an abusive or hostile environment.

2. Severity and Physically Humiliating Nature of the Conduct:

30. The severity of the acts also indicates the environment was abusive. The verbal demands for oral sex, stated in the crudest terms, could hardly be considered mere offensive utterances. See Findings of Fact Nos. 15-16. It is well recognized that physical harassment often has a more severe impact than verbal harassment. See Conclusion of Law No. 26. The untying of dresses, grabbing of hands, the patting or grabbing of the waitresses, and the rubbing of the harassers' bodies against the back and sides of the waitresses were physically humiliating and upsetting to these women. (Tr. at 10, 16, 42, 54-55, 58, 61-62, 90, 93-94, 120). These acts were severe enough to create a hostile working environment.

3. Interference With Work Performance Caused By the Harassment:

31. Finally, these acts made it more difficult for the complainant and other female food servers to do their job. Such acts would make it difficult for any reasonable person to perform their job. Complainant Hoffman knew when she went to work that she would have to deal with this harassment even though she did not want to face it. (Tr. at 54, 61). She noted that the more she said "stop" or "don't do that" to the harassers, the more they would persist in their behavior. (Tr. at 58, 172). When she told them that she knew what "chupa mi verga" meant, in an effort to get them to stop, they made it a point to use the phrase repeatedly. (Tr. at 106-07).

32. The grabbing, touching, and offensive remarks distracted Complainant Hoffman from her duties when she was busy trying to take care of customers. (Tr. at 54). On October 15, 1993, for example, Complainant Hoffman "blew up" under the stress of repeated harassment that day by Respondent Lopez. (Tr. at 93, 120). She yelled at him to stop. (Tr. at 16, 94, 120). He responded by standing there and laughing at her. (Tr. at 120). Previously, on that same day, she told him that she would find a way to make him stop and that she would sue him for sexual harassment. (Tr. at 62, 93).

33. Amy Tobey described the harassment as creating a stressful atmosphere. (Tr. at 10). She noted that, on October 15th, she also suffered interference from the kitchen staff in the form of the "chi-chi grandes" and "chupa mi verga" remarks whenever she went in to get food from the line. (Tr. at 17-18). Ms. Tobey responded to the verbal and physical harassment by telling the harassers to "stop" or "leave me alone.". (Tr. at 14). Like the Complainant and Ms. Tobey, another waitress, named Ellie, also tried to discourage the harassment, but without success. (Tr. at 172).

34. Given the frequency of the acts of sexual harassment, their severity, their physically humiliating nature, and their interference with work duties, these acts affected a condition of employment by creating a hostile and abusive working environment for Complainant Hoffman and some other female food servers at Respondent Mama Lacona's West.

E. Respondents Mama Lacona's-West and Jim Lacona Knew or Should Have Known of the Sexual Harassment Either Through Observation By Managers or Through Reports Made By Employees:

1. Manager David Lihs of Respondent Mama Lacona's-West Had Actual and Constructive Knowledge of the Sexual Harassment Inflicted on Complainant Hoffman and Other Female Food Servers:

> 35. David Lihs, in his position as kitchen manager, was a supervisory management employee with the power to hire, fire, and discipline employees on the kitchen staff. These facts were admitted on brief by Respondents Mama Lacona's-West and Jim Lacona. See Finding of Fact No. 10. These facts are binding as they are contrary to the interests of Respondent Mama Lacona's-West. See Conclusion of Law No. 5. These facts are contrary to the interests of Respondent Mama Lacona's-West because, if Lihs is a supervisor, he is, like any supervisor or manager for that employer, an agent of that employer. As such agent, any knowledge he may have of the harassment is imputed to Respondent Mama Lacona's-West. See Conclusion of Law No. 31.
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> 36. There is absolutely no question that, during the last three to four months of his employment as kitchen manager, David Lihs was well aware of the verbal and physical sexual harassment directed toward Complainant Hoffman and other food servers by the Hispanic members of his kitchen staff. (Tr. at 116-17, 125). Not only did he receive complaints from Complainant Hoffman, he observed the kitchen staff engage in "speaking a lot of profanity in Spanish, wolf whistling, rubbing up against the waitresses." (Tr. at 58, 117). He informed Hoffman and Tobey of the meaning of the "chupa mi verga" phrase. See Finding of Fact No. 17. He was also aware of the use of other Spanish profanity which he could not recall how to pronounce. (Tr. at 117). He perceived the rubbing incidents to be deliberate and sexual in nature. (Tr. at 125, 134, 137). He witnessed Respondent Lopez's wolf whistling directed at Complainant Hoffman on October 15th and saw her "blow up" in response to his continued harassment. (Tr. at 120). Lihs would be in the kitchen for most hours of its operation. (Tr. at 128). Given the pervasive nature of the harassment in the kitchen area, it would be difficult for him, or any reasonably observant person who spent a significant amount of time in the kitchen, to not notice it. (Tr. at 21-22, 82, 91, 125-26, 183-84).

2. Manager Joe Lacona of Respondent Mama Lacona's-West Had Knowledge of the Sexual Harassment Inflicted on Complainant Hoffman and Other Female Food Servers:

> 37. Reports about the sexual harassment of female food servers were made to Joe Lacona by two persons whose testimony is uncontradicted on this point.. Complainant Hoffman complained to him. (Tr. at 58, 88-89, 91). Robert Novak also brought these problems to the attention of Joe Lacona, after he had been informed of them by Complainant Hoffman and Amy Tobey. (Tr. at 36, 37, 42). Mr. Novak was employed at Mama Lacona's-West during the period of January to November of 1993. He started out as a waiter but eventually also became responsible for scheduling the wait staff and "mak[ing] sure

everything got done." (Tr. at 34, 41). At another time, Joe Lacona and Jim Lacona had asked him what was going on with respect to the harassment of waitresses. He told them what he knew. (Tr. at 40-41). He specifically told them that the Complainant and Amy Tobey thought the physical touching or bumping by the kitchen staff was done on purpose. (Tr. at 42-43).

3. Manager Jim Lacona of Respondent Mama Lacona's-West Had Knowledge of the Sexual Harassment Inflicted on Complainant Hoffman and Other Female Food Servers:

38. Complaints about or reports of sexual harassment of female food servers were made to Jim Lacona by at least three persons: Complainant Hoffman, Amy Tobey, and Robert Novak. (Tr. at 14, 15, 40-41, 42-43, 44, 58-59, 82, 88-89).

39. Complainant Hoffman and Amy Tobey each complained to Jim Lacona about sexual harassment on several occasions. (Tr. at 14, 15, 58-59, 82, 88-89). Robert Novak reported complaints of harassment by Hoffman and Tobey to Jim Lacona on the occasion previously described. See Finding of Fact No. 37.

40. It is more likely than not that, on the night of Friday, October 15, 1993, David Lihs also complained to Jim Lacona about Respondent Lopez's harassment of the waitresses. (Tr. at 121). The events of that night left a strong impression on Mr. Lihs. His memory with regard to those events appears to be clear.

41. After the Complainant "blew up" at Respondent Lopez that evening, David Lihs went to Pablo's son, Jose, and asked him to tell Lopez that he had to stop harassing Complainant Hoffman. Jose did so, and Lopez responded by laughing. (Tr. at 139). Mr. Lihs then told Lopez directly to stop bothering the waitresses. Lopez responded by taking a swing at Mr. Lihs. Mr. Lihs shoved Lopez away. (Tr. at 120-21, 129, 139-40). Mr. Lihs was upset and frustrated about the situation both with respect to the harassment and with being swung at by Lopez (Tr. at 131, 138, 140). He went out to the restaurant area and stated, among other things, to Jim Lacona that something had to be done about Lopez harassing all the waitresses. This statement was made in a loud voice. (Tr. at 121, 130).

42. Mr. Lihs also stated to Jim Lacona that if something was not done about the harassment, he was going to bring in the Department of Labor. (This had something to do with an allegation that employees were being paid in cash. Lihs apparently was threatening to take that matter to the Department if the harassment was not dealt with.) (Tr. at 132, 136). Jim Lacona responded to this by yelling at Mr. Lihs and taking him to the kitchen area. (Tr. at 132, 297). By this point, both Lihs and Lacona were shouting at each other. (Tr. at 130-32). Jim Lacona then told both Mr. Lihs and Mr. Lopez to leave the establishment until Tuesday, when he would deal with it. (Tr. at 131, 132-33, 298, 303). Both Mr. Lihs and Mr. Lopez left the restaurant. (Tr. at 131-32, 132-33, 298).

43. Jim Lacona's testimony emphasizes that he was more concerned that Mr. Lihs was loud in front of customers and was concentrating on getting him out of the dining area. (Tr. at 297). It is, however, more likely than not that Jim Lacona understood that David

Lihs was expressing a strong concern about harassment of the waitresses since Lihs stated this concern directly and made the threat to go to the Department of Labor if something was not done. The fact that this threat elicited a strong response from Jim Lacona demonstrates that Lacona understood what Lihs was saying. See Findings of Fact Nos. 41-42.

44. Although Mr. Lihs's testimony that he informed Jim Lacona about the harassment on October 15th is credible, his testimony that he brought prior harassment to the attention of higher levels of management on three or four occasions is effectively contradicted by his earlier testimony that he did "not particularly" speak to management about it "face to face." (Tr. at 118-19, 140).

4. President Charles Lacona of Respondent Mama Lacona's-West Had Knowledge of the Sexual Harassment Inflicted on Complainant Hoffman and Other Female Food Servers:

45. Both Complainant Hoffman and Bev Erskine also complained to Charles Lacona about the harassment. (Tr. at 58).

F. Respondents Mama Lacona's-West and Jim Lacona Failed to Take Prompt and Appropriate Action to Remedy the Sexual Harassment:

1. The Managers of Respondent Mama Lacona's-West Took No Disciplinary Action To End Sexual Harassment Beyond Inadequate and Ineffective Verbal Warnings:

46. As previously noted, David Lihs, Joe Lacona, Respondent Jim Lacona and Charles Lacona had the authority to discharge and discipline employees at Respondent Mama Lacona's-West. See Findings of Fact Nos. 7-10, 35. As Jim Lacona noted in his testimony, employee complaints should have been handled by David Lihs or Joe Lacona before they ever got to him. (Tr. at 292-93). Clearly, David Lihs, Joe Lacona and Jim Lacona were agents of Respondent Mama Lacona's-West who had the duty of resolving employee complaints as well as other duties normally delegated to supervisory personnel. See Findings of Fact Nos. 9, 10, 35. It may be reasonably inferred from Charles Lacona's position as president of the corporation and his involvement in the management of the business that he had the authority to handle employee complaints or to delegate these complaints to lower level managers. See Findings of Fact Nos. 7-8.

47. David Lihs was well aware of the nature and extent of the sexual harassment by the kitchen staff that occurred while he was kitchen manager. See Findings of Fact Nos. 35-36. The only action he took, however, over a three to four month period, to end the harassment was to tell the Spanish speaking workers, through translation by either Pablo, or his son, Jose, to stop their misconduct. (Tr. at 126-28).

48. On two or more occasions during this time, Jim Lacona also told certain members of the kitchen staff, through translation by Jose, to stop their misconduct. His directives to those individuals were, however, couched in general terms to the effect that the staff should stop bothering the waitresses and did not specifically identify acts of sexual harassment which must end. (Tr. at 127, 293-94).

49. These admonishments were very limited in their effectiveness. After one to four days, the acts of verbal and physical sexual harassment would begin again. (Tr. at 59, 127, 135).

50. It is possible, but not shown by a preponderance of the evidence in the record, that Joe Lacona or Charles Lacona had some role in these warnings. Complainant Hoffman testified that, after she complained to Joe, Jim, or Charles Lacona, the harassment would die down for one or two days. Although Joe Lacona indicated he would talk to the staff, there is no evidence that either he or Charles Lacona ever did so or asked others to do so. (Tr. at 58-59).

51. No employee was ever given a written reprimand, suspended, discharged or otherwise seriously disciplined for sexual harassment. (Tr. at 142). This was true even though kitchen manager David Lihs "felt that two or three of them should have been terminated on the spot because they had been told over and over again to quit what they were doing." (Tr. at 135). He realized the harassment had "[e]scalated to [where] just everybody started getting sick of it." (Tr. at 128). Despite this, when verbal warnings were given by management, Joel Lopez and the other offending employees were only told to stop their misconduct. They were not told that failure to do so would lead to more severe discipline such as suspension or discharge. (Tr. at 126-129, 134-36, 293-295, 304, 313).

2. The Managers of Respondent Mama Lacona's-West Failed to Take Appropriate and Effective Action to Remedy The Sexually Hostile Working Environment:

52. The managers' responses to complaints raised by Complainant Hoffman and other female food servers were often inappropriate and failed to remedy the harassment. When Complainant Hoffman complained to Jim Lacona, he mentioned his concern that, if he discharged one of his kitchen staff, he might lose them all as they were either relatives or friends. She felt Jim Lacona seemed to be balancing this interest against resolving her complaint. (Tr. at 82-83). At other times, Jim Lacona would respond to her complaints by turning around and walking away with little verbal response. (Tr. at 89). Similarly, when Amy Tobey complained to Jim Lacona about the harassment, she was told not to speak to him. (Tr. at 14, 15).

53. Even when verbal warnings were given to the offending employees, there was a complete failure by managers to inform the Complainant or other complaining females that anything had been done or that their complaints had been followed up in any way. This was true with respect to complaints made to David Lihs, Joe Lacona, Jim Lacona, and Charles Lacona. (Tr. at 15, 24, 58-59, 89). Given this lack of communication, it is not surprising that there is no evidence in the record that any efforts were made by Respondent Mama-Lacona's West or its agents to have the harassing employees meet with and apologize to the victims of their harassment.

54. With the exception of Jim and Joe Lacona asking Robert Novak what he knew about sexual harassment of the waitresses, there is no indication of any thorough investigation

to determine either the accuracy of the complaints made or the nature and extent of the sexual harassment. See Finding of Fact No. 37. The contacts by management with the complaining waitresses were brief encounters where management seemed to discourage the complaints. See Findings of Fact Nos. 52-53. Neither waitresses, such as Kerry Koonce, who did not complain to management, nor those who did complain, such as Amy Tobey, were ever questioned about sexual harassment by management. (Tr. at 19, 177). See Finding of Fact No. 52. It appears there were no communications with the accused harassers by management beyond telling them to stop bothering the waitresses. See Findings of Fact Nos. 47-48.

55. As set forth above, additional, reasonable steps for remedying harassment were available to the managers, but were not undertaken. These steps were warranted by the severe verbal and physical harassment inflicted on female employees and by the hostile and abusive nature of the work environment. These steps would include:

a. responding to internal complaints in a manner which would assure employees that their complaints would be taken seriously, thoroughly investigated, and, if found to be warranted, acted upon;

b. conducting a thorough investigation of complaints or reports of harassment ;

c. informing complaining employees of the status of any investigation or of steps taken to remedy their complaints;

d. warning offending employees that they would be subject to discharge if the harassment continued;

e. requiring offending employees to meet with and apologize to the employees they harassed;

f. requiring offending employees to commit to ceasing their sexual harassment of other employees;

g. suspending or discharging offending employees where warranted; and,

h. asking the complaining employees for suggestions on maintaining an harassment free environment.

56. The Commission has proved all the elements required to establish Complainant Hoffman's claims of sexual harassment against Respondents Joel Lopez, Mama Lacona's-West, and Jim Lacona. See Findings of Facts Nos. 4-55. See Conclusions of Law Nos. 15, 44-47. The Commission has established:

a. that Complainant Hoffman is a female and is therefore a member of a class protected against sex discrimination;

b. that she was subjected to sexual harassment by Respondent Lopez and other employees of Respondent Mama Lacona's-West. This was adverse conduct which she regarded as uninvited and offensive and which any reasonable person would regard as offensive;

c. that this harassment was based upon her sex, i.e. because she is female;

d. that this harassment created a hostile or abusive work environment; and,

e. that Respondent Mama Lacona's-West through its agents and managers, including but not limited to Respondent Jim Lacona, knew or should have known of the harassment and failed to take prompt, appropriate, and effective remedial action.

57. The proof of elements "a" through "d" establishes a case of individual sexual harassment against Respondent Lopez. The proof of elements "a" through "e" establishes a case of sexual harassment against the employer, Respondent Mama Lacona's and its agent, Respondent Jim Lacona. See Conclusion of Law No. 47.

IV. RETALIATORY DISCHARGE:

A. The Commission Established a Prima Facie Case of Retaliatory Discharge:

1. The Complainant Took Action To Lawfully Oppose Sexual Harassment:

58. Complainant Hoffman lawfully opposed sexual harassment at Respondent Mama Lacona's-West in two ways. First, as previously noted, Complainant Hoffman complained to managers David Lihs and Joe Lacona, general manager Jim Lacona, and president Charles Lacona. See Findings of Fact Nos. 36-38, 45.

59. Second, her response to the harassment by Respondent Lopez and the other kitchen staff members made it clear that she was strongly opposed to their harassment. Initially, Complainant Hoffman tried to "laugh off" or ignore the harassment in the hope that her harassers would tire of it. She then began to repeatedly tell them to stop the harassment. (Tr. at 58). Her repeated objections to Respondent Lopez's harassment on October 15th, which culminated in her yelling at him to stop, have already been noted. See Finding of Fact No. 32. As previously noted, Lopez's harassment of her on the 15th, and her "blow-up" in response to the harassment, led to an altercation between Lopez and kitchen manager Lihs. This incident resulted in a loud encounter between David Lihs and Jim Lacona, who sent both Lihs and Lopez home. See Findings of Fact Nos. 32, 40-43.

2. The Complainant Was Discharged From Her Food Server Position at Respondent Mama Lacona's-West:

60. It is undisputed in the evidence, and admitted by Respondent's Mama Lacona's-West and Jim Lacona on brief, that Complainant Hoffman was discharged from her position as

waitress or food server with Respondent Mama Lacona's-West by president Charles Lacona. (Respondent 's Brief at 13-14). See Findings of Fact Nos. 4, 7. See Conclusion of Law No. 5.

3. The Complainant Has Established a Causal Link Between Her Discharge and Her Lawful Opposition to Discrimination:

61. Complainant Hoffman has established causal links between her discharge and her lawful opposition to sexual harassment in four ways. The first and second are most directly related to the sexual harassment. First, her opposition and her discharge were close in time. Complainant Hoffman was informed of her discharge one day after the disruption of October 15, 1993. While the exact dates of her prior complaints to management and her protestations to the harassers are not known, it may be reasonably inferred that some of them were made in the previous three to four months when the harassment escalated. (Tr. at 128). Second, since Complainant Hoffman worked in an atmosphere where sexual harassment was overlooked and unpunished by her employer, the likelihood of retaliation for her opposition to such harassment is increased. See Conclusion of Law No. 51.

62. Third, the discharge of Complainant Hoffman, purportedly for an incident involving rudeness to customers, did not follow the procedures normally taken concerning complaints about rudeness by food servers. There appears to have been no other instance where a food server was directly discharged for such actions. (Tr. at 187, 310-11). No other food server was discharged for rudeness to customers in 1993. (Tr. at 281). See Finding of Fact No. 75. While Jim Lacona claimed such an incident would result in immediate termination of a waitress or any employee in the restaurant, he did not immediately terminate Complainant Hoffman. (Tr. at 301, 309). According to him, when he or Charles Lacona faced such a situation in the past, they would keep cutting the hours of the food server until he or she quit. (Tr. at 310-11). This procedure was not followed with respect to Complainant Hoffman. A similar difference in treatment of the Complainant and other employees with respect to the reason actually given her for her discharge is discussed below and reinforces the conclusion that there is a link between her discharge and her lawful opposition to discrimination. See Findings of Fact Nos. 82-84A.

63. Fourth, due to weaknesses in their testimony set forth more fully below, the testimony of Charles Lacona and Jim Lacona to the effect they were not aware of complaints about sexual harassment or of Complainant Hoffman's involvement in the events of October 15th prior to her discharge are not credited. See Findings of Facts Nos. 71-73, 77, 79-81, 89. Such false testimony tends to establish that the real reason for discharge is retaliation. See Conclusion of Law No. 51. By proving that the Complainant lawfully opposed discrimination; that she was discharged; and that there was a causal link between these two events, the Commission has established a prima facie case of retaliatory discharge. See Conclusion of Law No. 49.

B. Respondent Mama Lacona's-West Has Articulated a Legitimate Non- Discriminatory Reason for Complainant Hoffman's Discharge:

64. Respondent Mama Lacona's-West has produced evidence indicating that Complainant Hoffman was discharged for a legitimate, nondiscriminatory reason, i.e. that she was rude to a customer. Charles Lacona testified that he discharged the Complainant because there had been an incident when a customer complained that Hoffman was very rude. The customer had asked him for a new waitress. (Tr. at 260-61, 307-08). Although Charles Lacona testified that he had relied on other instances of rude conduct and customer complaints concerning the Hoffman, these instances were not set forth in any detail. (Tr. at 261-62, 274). On brief, Respondents Mama-Lacona's- West and Jim Lacona have taken the position that this one incident "was the basis for Charlie Lacona terminating the complainant's employment." (Respondents' Brief at 14). Therefore, Respondents cannot assert that any other legitimate reason served as a basis. See Conclusions of Law Nos. 6-7.

C. The Commission Has Established That Respondent Mama Lacona's Reason For Complainant Hoffman's Termination Is A Pretext For Retaliation:

1. Although The Incident Given As A Reason for Complainant Hoffman's Discharge Actually Happened, The Greater Weight of the Evidence Demonstrates That This Reason Is A Pretext For Retaliation:

65. The incident given as a reason for her discharge occurred two weeks prior to the time Complainant Hoffman was informed of her discharge. (Tr. at 66-67). The details as to exactly what the Complainant did are unclear. According to Complainant Hoffman, she may have aggravated the customer by saying "okay" in a rude or abrupt manner when she was interrupted while trying to talk to customers at another table. (Tr. at 67). According to Valerie Lacona, she may have refused to take food back to the kitchen which was cold or otherwise improperly served. (Tr. at 232).

66. While the complaining customers spoke to Charles Lacona, Jim Lacona was able to hear their complaint, as they were yelling at his father and were very mad. (Tr. at 308). The customers complained that "[t]his woman is being rude to us, and we're leaving if you don't get us another waitress." (Tr. at 301). Jim Lacona directed his sister, Valerie Lacona, who worked as a waitress, to take over the table. (Tr. at 67, 220-21, 232, 235, 301-02, 308).

67. The Commission, on brief, and Complainant Hoffman, in her testimony, admit that the incident given as the reason for her termination actually happened. (Commission's Brief at 6; Tr. at 66-68). These admissions are binding on the Commission and the Complainant. See Conclusions of Law No. 5. Despite this, the preponderance of the evidence supports the proposition that the reason given by the Respondent for Complainant Hoffman's termination is a pretext for retaliation.

2. The Lack of Credibility of Respondent Jim Lacona and of Charles Lacona is Fatal to the Respondent Mama Lacona's Explanation As to Why Complainant Hoffman Was Discharged:

a. The arguments of the Commission and Respondent Mama Lacona's West:

> 68. The Commission's and Complainant's argument is, in essence, that once Jim or Charles Lacona became aware that the altercation of October 15, 1993 came about after Complainant Hoffman "blew up" at Lopez because of his harassment, they were faced with the choice of either discharging Lopez to end the harassment or discharging Lihs and Hoffman. (Tr. at 78). See Commission's Brief at 6-7. See Findings of Fact Nos. 32, 41-42. Since the Respondent was concerned that the termination of Lopez might result in the rest of the kitchen staff leaving, it decided to terminate David Lihs and Complainant Hoffman. See Finding of Fact No. 52.
>
> 69. The Respondent's strongest argument against this scenario is that when Charles Lacona discharged Complainant Hoffman, he did not know about the disruption of October 15th and certainly did not know Complainant Hoffman was involved in these events. This is based on the propositions that (a) Charles Lacona was not in the restaurant at the time of the disruption, (b) Jim Lacona did not know of Complainant Hoffman's involvement, and (c) Jim Lacona did not communicate with Charles Lacona about the altercation until after Complainant Hoffman's discharge. (Respondent's Brief at 15).

b. Charles Lacona was not present at the restaurant during the disruption:

> 70. It is reasonable to conclude that Charles Lacona was not at Mama Lacona's-West at the time of the disruption on October 15th, 1993. He testified that he had left by 8:30 p.m., before the altercation. (Tr. at 259, 266, 300). Complainant Hoffman did not know if Charles Hoffman was there, but did note that sometimes he left early. (Tr. at 97).

c. Jim Lacona's testimony:

> 71. The remainder of the Respondent's argument relies almost exclusively on the testimony of Jim Lacona and Charles Lacona. If the testimony of Jim and Charles Lacona was credible, the Respondent's argument would be convincing. Their credibility, however, is so damaged by the weaknesses, implausibilities, inconsistencies, and internal and external contradictions in their testimony, with respect to the discharge and related material matters, that it is fatal to the argument. Jim Lacona's testimony may be summarized as follows:
>
> > a. on October 15th he did not know what had happened or what had precipitated the altercation between Lopez and Lihs. (Tr. at 296-98).
> >
> > b. he was too busy on the night of October 15th to fully investigate the altercation between Lihs and Lopez, because he acted as the cashier and had to get back to work so customers could pay their bills. His discussions with employees that

night indicated only that Lopez had swung at Lihs, who pushed him away. (Tr. at 298-99).

c. he does not recall Complainant Hoffman's name being mentioned to him that night. He was not informed of her involvement at that time. (Tr. at 298, 299).

d. he did not become aware that Complainant Hoffman had anything to do with the altercation until after Charles Lacona had informed her of her discharge. (Tr. at 299, 303-04, 311-12).

e. he did not communicate at all with Charles Lacona about the altercation between Lihs and Lopez from the time of its occurrence until the Complainant was informed of her termination. On Saturday, October 16, 1993, he was not even aware that Charles Lacona was going to or had terminated Complainant Hoffman. (Tr. at 300-01, 303, 314).

f. in the week following her discharge, some persons, whose identity he does not now recall, told him that the altercation began after Complainant Hoffman had thrown dishes on the table in the kitchen or splashed water on Lopez. Lopez had then yelled at her or threw something at her or did something else to her which caused Lihs to yell at him. (Tr. at 311-12, 314).

g. he never heard any complaint from Hoffman or any other waitress to the effect she or any other waitress had been sexually harassed by Lopez or other kitchen staff, either on October 15th or at any other time. (Tr. at 291, 298-99, 305). He first became aware that she had a concern with sexual harassment when he received the complaint filed with the Commission. (Tr. at 305). He did get complaints from a specific waitress, whose identity he does not recall. It is possible this person was Complainant Hoffman. This waitress, and possibly others, complained about being annoyed by the kitchen staff in ways other than sexual contact or sexual remarks, such as having water thrown on them or having their cigarettes taken. This resulted in general admonishments to the kitchen staff to stop bothering the waitresses on ten or fewer occasions. (Tr. at 293-94).

h. he was aware that, when this incident of rudeness had occurred, Complainant Hoffman had been sick. He had spoken to her after the incident and had been assured that it wouldn't happen again. There had been prior incidents of rudeness by the Complainant which had also been discussed with her. (Tr. at 309-10).

72. There are several problems with this testimony. Jim Lacona could not recall the identities either of the people who gave accounts of the events of October 15, 1993 or of the waitress who came to him with complaints about the kitchen staff. It seems likely, under these circumstances, that his recollection of the accounts of what happened on October 15th and of the waitresses' complaints is also incomplete.

73. Respondent Jim Lacona's assertions, that (a) he had received no complaints from waitresses about sexual harassment and (b) that he had no knowledge concerning sexual harassment of the Complainant or others until he received the complaint filed with the Commission, are incredible in light of the contrary and far more credible testimony of Robert Novak, David Lihs, Amy Tobey and Complainant Hoffman. While it is possible that some of these assertions may be the result of a lapse in memory, it is more likely than not that some of Jim Lacona's testimony on this issue is willfully false. It is very unlikely that Jim Lacona would forget his inquiry to Robert Novak about sexual harassment and all the complaints made by Complainant Hoffman, Amy Tobey, and David Lihs. See Findings of Fact Nos. 37-44, 54.

74. The Complainant's testimony about the incident of rudeness at Mama Lacona's-West agrees with Jim Lacona's to the extent that this incident had been discussed with her and that she had been ill when it occurred. It was her impression that this conversation with Jim Lacona had resolved the matter. She heard nothing further about it until her discharge. She also testified, however, that she had not been disciplined for any prior rudeness nor for any other cause. (Tr. at 66-67, 339-40). This testimony contradicts Jim Lacona's assertion that he had previously counseled her about rudeness. (Tr. at 309-10). Her testimony appears to be more credible given Jim Lacona's inability to recall when any of these prior incidents occurred. (Tr. at 302). There are no details of these alleged prior incidents in the record.

75. It should be noted that Robert Novak believed Complainant Hoffman was a good waitress, who gave good service to her customers. He noted that there were some customer complaints about the Complainant, as there were about all or most of the food servers, including himself. Such customer complaints about service were an expected daily occurrence in restaurants. Often such complaints do not warrant discipline of a waitress. He did not have her disciplined for any such complaints. (Tr. at 39, 44-45, 47, 49). When Venessa Devine was manager of the Southwest Ninth location, she heard one complaint about rudeness concerning Complainant Hoffman when Hoffman worked there. Ms. Devine did not hear of any complaints concerning Hoffman at the Mama Lacona's-West location. (Tr. at 164-65). There is no evidence that Complainant Hoffman was counseled about these specific complaints or that they were reported to Jim Lacona or Charles Lacona.

76. The contradictions between the procedures which Jim Lacona testified were followed with respect to rude behavior by employees toward customers and the actual practices followed with respect to the Complainant have been previously noted. See Finding of Fact No. 62.

77. Given the false assertions concerning his lack of knowledge of sexual harassment, and the other weaknesses, contradictions, and implausibilities in his testimony, it may be reasonably inferred that Jim Lacona's assertions concerning his knowledge of the events of October 15 and 16, 1993 and his communications with Charles Lacona are also false or unreliable.

d. Charles Lacona's testimony:

78. Charles Lacona's testimony on the events leading up to Complainant Hoffman's termination is also filled with contradictions, weaknesses, and implausibilities.

79. Charles Lacona's testimony on the question of whether he was informed by Jim Lacona about the incident of the 15th prior to informing Hoffman about her termination on the 16th is equivocal. It initially indicates that he believes he was so informed, but subsequently indicates that he doesn't know when he was informed of the disruption:

> Q. Were you made aware that Dave Lihs had been sent home by Jim Lacona on October 15th?
> A. The following day, or-- Yeah.
> Q. You knew that had happened, at some point, correct?
> A. Well, sure.
> . . .
> Q. Did your son, Jim, or somebody else, bring you up to speed on those events at some point?
> A. I imagine.
> Q. So you knew about them before the next day's--before the restaurant opened, then, the following day?
> A. I believe so. I don't know.
> Q. Did you know about those, then, before you met with Debra Hoffman that day?
> A. I don't even know that. I don't time things.

(Tr. at 264, 266).

80. At hearing, Charles Lacona replied in the negative to a question which asked if his decision to discharge Complainant Hoffman had "anything to do with the altercation that had occurred between David Lihs and the complainant?". (Tr. at 264). However, this testimony is meaningless as the facts indicate there was no altercation between David Lihs and the Complainant. The altercation was between David Lihs and Respondent Lopez. See Finding of Fact No. 41.

81. At the time of her discharge, Complainant Hoffman asked Charles Lacona if she was being discharged due to events that happened the previous night. He said "no." (Tr. at 62). His denial is questionable, however, because during this same conversation he gave her a reason for her termination which was not the "rudeness to customers" reason given at hearing. He admitted the reason he gave her was false. (Tr. at 262, 274).

82. Charles Lacona initially admitted that when he informed Complainant Hoffman of her discharge, he gave her a reason which was false, i.e. it was not "the real reason" for the discharge. (Tr. at 262). He subsequently contradicted this statement by testifying that the reason given her was actually a factor in the decision. (Tr. at 263). He later again admitted, however, that the reason given the Complainant was not the "real reason" for

her discharge, i.e. rudeness to customers. (Tr. at 274). The giving of inconsistent reasons for the discharge not only brings Charles Lacona's veracity into question, it also indicates that the reasons given are pretexts for retaliation. See Conclusion of Law No. 58.

83. The reason given Complainant Hoffman at the time she was informed of her discharge was that she was being discharged because she "harassed" Fred Ballard, who prepared rolls, by criticizing him about how slow he was in getting rolls to the waitresses and whether they were hot or not. (Tr. at 64-65, 78-79, 262-63).

84. At different points in his testimony, Charles Lacona indicates that this "harassment" of Ballard either was or was not a factor in Complainant's discharge. (Tr. at 262, 263, 274). If this actually was a factor in Complainant Hoffman's discharge, she was treated differently than other employees who complained about Fred Ballard. Although it was common for employees to make such complaints, there is no evidence in the record that any employee other than the Complainant was disciplined for making them. (Tr. at 78-79, 263, 268). Charles Lacona admitted that Ballard told him that both Complainant Hoffman and another waitress had complained about him. He also admitted that two waitresses had complained directly to him about Ballard being slow with the rolls. (Tr. at 267-68). Charles Lacona had responded to these complaints by talking to Ballard about this problem, but concluded Ballard was doing the best he could. (Tr. at 268-69).

84A. The inconsistent testimony, the difference in treatment of the Complainant and other employees who complained about Ballard, and the marked contrast in the severity of discipline administered to Complainant Hoffman as compared to those to those who harassed her and other waitresses indicates Charles Lacona's testimony that this reason was a factor in her discharge is not credible and that this reason is, at best, a pretext for retaliation.

85. Charles Lacona testified he did not tell Complainant Hoffman that she was being terminated due to rudeness to customers because this would hurt her feelings. His actions were supposedly based upon an illogical proposition. On the one hand, informing an employee that she is being discharged because a customer (whom she may have never met before) is upset with her conduct will hurt her feelings On the other hand, informing her that she is being discharged because a coworker (with whom she worked everyday) is upset with her conduct will either not hurt her feelings or hurt them to a lesser degree. (Tr. at 262, 280-81). This testimony is implausible.

86. Charles Lacona testified that the accumulation of complaints from customers played a role in his decision to discharge Complainant Hoffman. (Tr. at 274). However, there is no detail given on any of these complaints other than the one incident that occurred during the two week period prior to the Complainant's discharge. See Finding of Fact No. 64. He testified only that, while there had been other occasions of rudeness, it wasn't routine. (Tr. at 278).

87. Charles Lacona further testified that he liked to try to work out problems, such as customer complaints, with the waitresses. (Tr. at 261). This practice was not followed

with Complainant Hoffman, however, as Charles Lacona also testified that he had never talked to her about these problems until the day he informed her of her discharge, but had "just accepted it." (Tr. at 281).

88. It has already been noted that the discharge of the Complainant for rudeness did not conform to the usual or past practices at Mama Lacona's-West or practices implemented by Jim Lacona and Charles Lacona for dealing with such conduct. See Finding of Fact No. 62, 75.

89. Charles Lacona testified that he did not recall either Complainant Hoffman or Bev Erskine complaining to him about sexual harassment in 1993. (Tr. at 255-56). This testimony is effectively contradicted by Complainant Hoffman, who clearly recalled that she and Ms. Erskine made such complaints. (Tr. at 58). Charles Lacona's memory seemed to be foggy during his testimony. Jim Lacona noted that, because of his age, Charles Lacona will forget things. (Tr. at 286).

90. Given the unreliable and contradictory testimony of Jim Lacona and Charles Lacona concerning the Complainant's discharge and the events associated with it, as well as evidence demonstrating that Complainant Hoffman was not treated in accordance with established practices at Respondent Mama Lacona's-West and was treated differently from similarly situated employees who engaged in similar or worse conduct, it is concluded that the reasons given for her discharge are unworthy of credence. The combination of these factors and the inference of retaliation remaining from the establishment of the prima facie case demonstrates that the reason given by Respondent Mama Lacona's-West for Complainant Hoffman's discharge a pretext for retaliation. See Conclusion of Law No. 60.

3. Other Factors Which Indicate That Retaliation For Refusing to Accede to Sexual Harassment Is the True Reason For Complainant Hoffman's Discharge.

91. It was previously noted that, when Complainant Hoffman informed Respondent Jim Lacona about being sexually harassed by the kitchen staff, he expressed a concern that, if he discharged a member of the kitchen staff, the entire kitchen staff might leave as they were all either related or friends. See Finding of Fact No. 52. The Respondent's treatment of David Lihs lends credence to the theory that the Complainant was discharged in order to avoid discharging Joel Lopez and possibly losing the entire kitchen staff.

91A. The alleged prior and subsequent terminations of Joel Lopez do not negate this theory. Charles Lacona testified that, at some prior date, he had terminated Lopez for failure to show for work. He subsequently rehired him. (Tr. at 265, 269-72). It is not shown in the record, however, if this first termination occurred before or after the time when the kitchen staff became predominantly composed of a group of Hispanic employees, many or all of whom were related. The composition of the kitchen staff became more Hispanic over a period of time, as other employees quit and were replaced by new members of the family. (Tr. at 289). See Finding of Fact No. 11. Therefore, at the time of the first termination, the impact of Lopez's discharge on other members of the

kitchen staff may not have been a concern as the staff may not yet have been primarily composed of his family members.

91B. Jim Lacona also testified that, approximately one month after Complainant Hoffman's discharge, he discharged Joel Lopez. According to him, this occurred immediately after Joe Lacona and Robert Novak informed him that Lopez was found in the food cooler with his pants down. (Tr. at 305-06, 327-29). This testimony is not consistent with Robert Novak's. Novak, who quit shortly after this incident, indicated that Lopez was still employed at Mama Lacona's when Novak left. (Tr. at 38-39). Novak's report must have been made prior to the end of his employment because he left Mama Lacona's to begin serving a sentence for operating a motor vehicle while intoxicated. (Tr. at 48). Even if Jim Lacona did terminate Lopez, this may only indicate that management would risk upsetting the kitchen staff by discharging Lopez for this behavior, while it would not take such a risk to stop sexual harassment of waitresses or to punish swinging at a supervisor who tried to end the harassment.

92. After the altercation of October 15th, Lihs and Lopez were sent home until the following Tuesday by Jim Lacona. See Finding of Fact No. 42. On that following Tuesday, David Lihs called Charles Lacona. Charles Lacona told Lihs that he was discharged because Mama Lacona's could no longer afford to keep him because the payroll was too high. (Tr. at 122, 126, 131, 133). Although he was informed that the payroll was too high, the next day an ad appeared in the newspaper where Respondent Mama Lacona's-West was hiring a line cook. (Tr. at 122-23). Lihs's job at Mama Lacona's prior to becoming kitchen manager was line cook. See Finding of Fact No. 10. Jim Lacona acknowledged that Lihs had been a very good cook. (Tr. at 324).

93. Although Lihs was terminated, Joel Lopez was not discharged. Jim Lacona asserts that Lopez was not terminated because he did not know if he had been provoked to swing at Lihs. (Tr. at 122, 132-33, 304, 317, 326).

94. Lihs was informed by a bartender at Mama Lacona's-West that the management had informed him they would rather lose Lihs than terminate a Mexican member of the staff and lose the whole kitchen staff. (Tr. at 123-24). This is reminiscent of what Complainant Hoffman was told by Jim Lacona when she complained about sexual harassment. See Finding of Fact No. 52. Not surprisingly, Mr. Lihs does not believe the explanation given by Charles Lacona for his discharge. He believes he was discharged "[b]ecause I stood up for the waitresses." (Tr. at 122).

95. Charles Lacona and Jim Lacona disagree with Lihs's testimony on his termination. Charles Lacona denies that he discharged David Lihs. (Tr. at 264). He maintains that Lihs was discharged by Jim Lacona when he did not show up for work. (Tr. at 265). Jim Lacona testified that, on Tuesday, Charles Lacona suspended David Lihs until the following Friday as punishment for yelling at Jim Lacona in the dining room. According to him, when David Lihs did not show for work the following Friday, he was considered a voluntary quit. (Tr. at 315-16, 319-20).

96. David Lihs's version of events is considered more credible for two reasons. First, the less than credible testimony of Charles Lacona and Jim Lacona on other material facts has already been noted. Second, Complainant Hoffman credibly testified that in the week following October 16, 1993, she talked to David Lihs. He told her that he had been discharged on Tuesday because the payroll could not cover his wages anymore. (Tr. at 66). This contemporaneous account by a credible witness supports David Lihs assertion that he was terminated on Tuesday, October 19, 1993.

97. There is a common theme that ties together the discharges of Complainant Hoffman and David Lihs. Both were discharged shortly after the disruption of October 15, 1993. The disruption began when Complainant Hoffman was sexually harassed by Respondent Lopez. After she objected to the harassment, David Lihs attempted to stop it. Joel Lopez responded by swinging at David Lihs. Respondent Lopez, an employee who sexually harassed his coworker and who swung at his supervisor when he tried to stop the harassment, was retained. The coworker, who was harassed, and the supervisor, who tried to stop the harassment, were, however, both discharged. Under these facts, and the facts previously discussed, it is more likely than not that both Complainant Hoffman and David Lihs were discharged by Respondent Mama Lacona's-West in order to avoid discharging Lopez for sexual harassment and thereby possibly losing the kitchen staff.

V. CREDIBILITY:

98. Complainant Hoffman was a credible witness. Although she has a financial interest in winning the case, much of her testimony, particularly with respect to the existence of sexual harassment, was verified by neutral witnesses who had no financial interest in proving sexual harassment at Mama Lacona's. David Lihs's and Kerry Koonce's testimony included observations of sexual harassment which corresponded to those of the Complainant and Amy Tobey. Although Robert Novak did not witness the harassment, he was aware of internal complaints of such harassment made by Complainant Hoffman and Amy Tobey. Her demeanor was appropriate. The Complainant's testimony as a whole is consistent with the greater weight of the credible evidence. Her testimony on her tip income at Mama Lacona's is, however, not consistent with the documentation of such income. In that matter, the documentation is favored over her memory. See Finding of Fact No. 115.

99. Amy Tobey was also a credible witness. Although she is pursuing a separate lawsuit for sexual harassment against Mama Lacona's-West, much of her testimony was also verified by neutral witnesses such as David Lihs, Kerry Koonce, and Robert Novak. Her testimony on material issues in this case is consistent with the greater weight of the credible evidence. Her demeanor was appropriate.

100. On brief, Respondent suggests that a discrepancy between Ms. Tobey's testimony and Complainant Hoffman's shows that Ms. Tobey is not credible. (Respondent's Brief at 12). Ms. Tobey testified that the final incident which led to the altercation between Dave Lihs and Respondent Lopez involved Lopez patting Complainant Hoffman on the rear after she set dishes down at the dishwashing area. (Tr. at 16, 27). Complainant Hoffman

testified that the incident involved her being rubbed by Lopez while she was attempting to arrange a tray. (Tr. at 61, 79-81, 93).

101. Since Hoffman would probably have a tray of dishes in front of her if she was engaged in either setting them down or arranging an order, it would appear that both of these incidents would involve contact from behind her. Thus, it is possible that Tobey witnessed Lopez patting Hoffman on the rear immediately prior to rubbing up against her. It is more likely than not that Tobey witnessed one or more of the acts of harassment which Lopez inflicted on Complainant Hoffman that day. See Finding of Fact No. 24. Therefore, she may have confused the "patting" incident with the "rubbing" incident which led to the altercation. This minor discrepancy does not show that Ms. Tobey's testimony is generally not credible.

102. The testimony of David Lihs was, with one exception, credible. His testimony on the acts of sexual harassment practiced by the members of the kitchen staff and of the inadequate steps taken to counter it was clear and detailed. It should be noted that, although he was discharged from Respondent Mama Lacona's-West, he remained friends with Respondent Jim Lacona after the discharge. (Tr. at 318-19). His testimony does not seem to be fueled by personal animosity toward the Laconas. Nor is there any evidence that he has any financial interest in the case. Due to an internal contradiction in his testimony, his statement that he informed higher management of sexual harassment on three or four occasions prior to October 15, 1993 was not credible. See Finding of Fact No. 44.

103. Kerry Koonce was a highly credible neutral witness. Ms. Koonce's only association with either the Complainant or Respondent Mama Lacona's-West appears to be through her status as a former employee of Mama Lacona's. (Tr. at 168-69). She didn't even know about the hearing until four days prior to it when she was subpoenaed to testify. (Tr. at 168,180). Ms. Koonce was an observant employee during her time at Mama Lacona's. Her detailed, confident, and clear testimony verified many of the acts of physical and verbal sexual harassment testified to by other witnesses. There is no evidence that she had any stake, financial or otherwise, in the outcome of these proceedings.

104. Robert Novak was also a credible neutral witness. His association with either the Complainant or Mama Lacona's-West also appears to be limited to the time he was formerly employed there. (Tr. at 34-35). There is no evidence indicating that he has any personal or financial interest in these proceedings.

105. On brief, Respondent Mama Lacona's West and Jim Lacona suggest that stereotyping of Spanish speaking individuals played a role in the perceptions and discomfort felt by the waitresses when members of the kitchen staff spoke Spanish. (Respondent's brief at 10, 12-13). This argument is contrary to the greater weight of the evidence. It can hardly be said that if a waitress is offended by the obscene Spanish phrases used by the kitchen staff toward female employees then the waitress has an anti-Hispanic bias. These phrases would be equally objectionable in Spanish or English. See Findings of Fact Nos. 14-18.

106. It is not surprising if, after learning the meaning of the offensive phrases directed toward her, a female employee would then be suspicious of other incidents where Spanish-speaking employees laughed and joked in Spanish among themselves while pointing at her. Amy Tobey indicated she felt such discomfort, but this does not indicate an anti-Hispanic bias. (Tr. at 31). The offensive nature of speech may be communicated through body language. Kerry Koonce, for example, could tell that "chupa mi verga" was a sexually degrading phrase, even though she did not know its meaning, because of the hand gestures and body language which accompanied it. See Finding of Fact No. 17.

107. The Respondents also suggest on brief that it would not be possible for individuals with no or inadequate Spanish to recite the "chupa mi verga" phrase to someone else for translation. However, under this record, it appears that David Lihs and Bobby Carara may have volunteered this information to the waitresses. In any event, it would not be difficult for someone who did not speak Spanish to memorize and recite the pronunciation of such a short phrase after it has been directed towards her day after day. See Findings of Fact Nos. 14-17.

108. The credibility of Respondent Jim Lacona and Charles Lacona has already been extensively discussed. See Findings of Fact Nos. 71-90. Charles Lacona, as president and agent of Respondent Mama Lacona's-West, has an interest in seeing that Mama Lacona's-West does not pay damages in this case. See Finding of Fact No. 7. While it is not clear whether Mama Lacona's, Inc. is privately held, Charles Lacona was referred to by Mama Lacona's counsel as the "owner" of the business. (Tr. at 148). As a party, Respondent Jim Lacona has an interest in seeing that he does not pay damages in the case. These financial interests may, in part, account for the lack of credibility of these witnesses. Given the inconsistencies and contradictions in their testimony, they are not credible witnesses with respect to many material facts. Their testimony is relied upon primarily when it is background information or is supported by other credible evidence or indicia of reliability.

109. Both Venessa Devine and Valerie Lacona are daughters of Charles Lacona and, therefore, sisters of Respondent Jim Lacona. (Tr. at 146, 148, 166, 221-22). During the latter half of 1993, Venessa Devine would help out as a waitress during staff shortages at the Clive location approximately two days out of a month. (Tr. at 161, 163). During that time, Valerie Lacona also worked as a waitress at the Clive location. (Tr. at 221, 223). Ms. Lacona worked there on Wednesdays, Fridays, and Saturdays. (Tr. at 225).

110. On brief, Respondents suggest that because Venessa Devine and Valerie Lacona testified that they did not experience or observe sexual harassment, there was little or no sexual harassment by the kitchen staff of Mama Lacona's-West. (Respondent's Brief at 11). The Commission suggests that because they are Lacona family members, their testimony is not credible. (Commission's Brief at 5). For two reasons, it is clear that neither conclusion is consistent with the greater weight of the evidence.

111. First, it must be noted that Venessa Devine and Valerie Lacona may not have been aware of acts of harassment against other waitresses. As Valerie Lacona testified, it was entirely possible that other waitresses were being subjected to offensive conduct, but did not tell her about it. (Tr. at 241). With respect to the Spanish remarks, it must be noted that neither Venessa Devine nor Valerie Lacona knew Spanish. It is clear they had no idea what the Hispanic staff was saying. (Tr. at 155, 162, 228). Venessa Devine testified that she was never told about objectionable phrases and their translations. (Tr. at 155-56). She testified that "[w]hen they talk like that I don't even listen because nothing makes sense to me anyway. If you asked me if I heard them, I wouldn't know if I did or not." (Tr. at 163). Valerie Lacona testified that she did not know and was not concerned about what the kitchen staff was saying. (Tr. at 228). There is no evidence that Valerie Lacona was made aware of the use of the offensive Spanish phrases and of their translation. Thus, it is not surprising that they might not have taken notice of these phrases when they were used by the kitchen staff.

112. Second, it was well known by employees at Mama Lacona's West that Venessa Devine was related to the Laconas. (Tr. at 166). She was acquainted with the kitchen staff. (Tr. at 150). It was also well known by the staff that Valerie Lacona was the daughter of Charles Lacona and sister of Jim Lacona. (Tr. at 240). By her name alone, it would have been evident that she was part of the Lacona family. She was also acquainted with the kitchen staff. (Tr. at 225-26). It is hardly surprising that the daughters of the president of the company and the sisters of the general manager were not subjected to wolf whistles, rubbing, or other forms of sexual harassment by the kitchen staff. (Tr. at 152, 165-66, 227-28). The staff might well have viewed such actions as being detrimental to their own economic self-interest. It is possible that they might have toned down their actions when Ms. Devine and Ms. Lacona were present. It does not follow, however, that other waitresses, who were not members of the immediate Lacona family, were not sexually harassed.

113. Angela Hawksby is a waitress who has worked for Mama Lacona's for ten years, including four years at the Clive location. (Tr. at 189). She is also a long time friend of Venessa Devine and other members of the Lacona family. (Tr. at 210-11). Ms. Hawksby testified that she did not experience any kind of inappropriate or offensive verbal or physical conduct directed at her by the kitchen staff in 1993. She testified that she did not hear any wolf whistles although it appears she may not be certain what a wolf whistle is ("like 'woo'"). (Tr. at 195-96).

114. There are two problems with her testimony which make it less credible than the testimony of those who did observe, experience, or hear reports of sexual harassment. First, because she did not know Spanish, she would not know whether something derogatory was being said. "There is a lot of jibber-jabber there. I guess I don't pay much attention. I just do my job." (Tr. at 199). Second, Ms. Hawksby would focus on her job to such a degree that sexual harassment of others could have happened which she may not have noticed or remembered. This is demonstrated by these excerpts from the transcript:

Q. I guess what I'm observing is that it's pretty much your philosophy to keep your nose out of those things that aren't your job; is that correct?

A. Correct.

Q. If there was a problem going on, for instance, the event with Dave Lihs--

A. Uh-huh.

Q. --was it your standard conduct to move away from that problem and stay out of it?

A. Yes.

(Tr. at 208).

Q. Some of that [Spanish] language [spoken by the kitchen staff] was directed towards individuals who were not members of the Mexican portion of that kitchen staff; correct?

A. Could be.

Q. Okay. What you would really do is just shut that out and mind your own business and go about what you were supposed to do; isn't that true?

A. Right.

. . .

Q. So if there were insults shouted in Spanish, or sexually seductive or insulting phrases, those very well might go on and you would not observe them, that's fair to say, isn't it?

A. Could be.

. . .

Q. [I]f somebody were making a gesture with their hands at . . . another member of the waitress staff, you might just move right on by that and get on with what you were supposed to do; isn't that fair to say?

A. You would say that, yeah.

Q. Okay. Would you recall it this long after the occurrence had actually taken place?

A. I don't know.

Q. Is it possible that it occurred and you just don't recall it?

A. I don't know.

. . .

Q. [With respect to people bumping into other people] you don't know because you are minding your own business, you don't know whether that's intentional or unintentional?

A. Right. I don't know.

(Tr. at 212-14).

VI. DAMAGES:

A. Back Pay and Benefits:

1. Complainant's Earnings at Respondent Mama Lacona's West:

115. The best evidence of the Complainant's total 1993 earnings at Respondent Mama Lacona's-West is documentary evidence, i.e. her 1993 W-2 form which indicates that Mama Lacona's reported $8877.68 as her total wages and tips in that year. (R. EX. B; Tr. at 102). This amount is also consistent with her first and second quarter earnings data for 1993 reported by Mama Lacona's-West to the Department of Employment Services. (CP. EX. # 2). This amount yields an average of $211.38 per week for the 42 week period from January 1, 1993 to the end of her employment on or about October 20, 1993. (Tr. at 68). This amount is considerably less than the Complainant's guess of $350.00 to $450.00 per week for tip income alone. (Tr. at 68, 100). It is, however, probably more reliable as her W-2 includes $5298.02 in tip income which, under tax regulations, she would have regularly reported to Mama Lacona's in 1993. (R. EX. B). See Conclusion of Law No. 74. Documentation is often more reliable than human memory. For example, although Complainant Hoffman thought Mama Lacona's reported allocated tips to her on the basis of eight percent of sales, such allocation is not reflected on the 1993 W-2. (Tr. at 100; R. EX. B). Therefore, the amounts given in her W-2's and other documentation form a more appropriate basis for determining Complainant's back pay than the higher amounts based on her memory.

2. Beginning and Termination Dates of Back Pay:

116. The starting date for back pay would be the day after Complainant Hoffman's termination, i.e. October 21, 1993. Two possible end dates are suggested by the record.

117. The first possible end date is the week ending January 22, 1994. The unemployment insurance records of Complainant Hoffman, who received partial unemployment after her termination at Mama Lacona's, indicate she was no longer reporting earnings after that date. (CP. EX. # 2). This appears to be the date she stopped working at her new employment at the Red Lobster restaurant in Clive after being caught in a blizzard during her commute from Carroll, Iowa. . (Tr. at 75-76, 98-99, 109-10). If the blizzard had been the only factor in Complainant's quitting, then her back pay would end at that point, as employment at either Red Lobster or Mama Lacona's require a commute from Carroll to Clive. However, if she had been making as much money at Red Lobster as she was at Mama Lacona's, she would have continued to commute from Carroll to Clive. Her earnings at Red Lobster were less. (Tr. at 109-11). See Finding of Fact No. 122. Therefore, because her quit was due to the combination of weather related risks and low pay, and not just the weather, her back pay should not terminate as of that date. See Conclusion of Law No. 80.

118. The second possible end date is December 20, 1994. The Complainant had begun working as a bartender for the Top Hat lounge in Carroll, Iowa in March or April of 1994. (Tr. at 76). After her son came to live with her in November of 1994, she found that she could not get him on the school bus at 7:30 a.m. when she could not return home from work until 2:30 a.m. or 3:00 a.m. in the morning. Therefore, she quit her job at the Top Hat Lounge on December 20, 1994. (Tr. at 76-77). She also found out that hours at her next job, Cytel, ending at 10:00 p.m., did not work out for her and her son. (Tr. at 77-78). It is reasonable to conclude that, if she had continued at Respondent Mama Lacona's-West, she would have found that her hours there, ending at 9:00 p.m. or 11:00 p.m., would have required that she leave that position by December 20, 1994. See Finding of Fact No. 4. Therefore, December 20, 1994 is the end date for back pay.

3. Complainant Hoffman's Weekly Average Interim Earnings at Cheddars and Red Lobster Were Less Than Her Weekly Average Earnings at Respondent Mama Lacona's-West:

119. On brief, Respondents suggest that back pay should not be awarded because her replacement wages at her subsequent employment would have been nearly identical to what she obtained at Mama Lacona's-West. (Respondents' brief at 16). This position is not supported by the record.

120. Complainant Hoffman's first employment after Mama Lacona's-West was at Cheddars restaurant. (Tr. at 74). Although the Complainant could not recall the exact date she began there, it appears from the unemployment insurance records that her first reported income, after leaving Mama Lacona's, was for the week ending November 6, 1993. (CP. EX. # 2; Tr. at 73). Toward the end of December 1993, she also began working at Red Lobster. (Tr. at 74). Her earnings from Red Lobster and Cheddars from 1993 are reflected in her W-2 forms for that year. She earned $886.90 from Cheddars (Heartland Restaurant Corp.) and $61.69 from Red Lobster for a total of $948.59 in 1993. (R. EX. B; Tr. at 102). This amount yields an average of $118.51 per week for the eight week period from November 6, 1993 to December 31, 1993. This is $92.87 less than the

$211.38 per week average she earned at Respondent Mama Lacona's-West. See Finding of Fact No. 116.

121. Complainant Hoffman subsequently quit Cheddars, either in late December 1993 or in January 1994, because she believed she could make more money by working solely at Red Lobster. (Tr. at 74, 75, 112).

122. As previously noted, Complainant Hoffman left Red Lobster during the week ending January 22, 1994. See Finding of Fact No. 117. According to her unemployment insurance report, she reported a total amount of $280.00 for wages through that date in 1994. This amount yields an average of $93.33 for the three weeks ending January 22, 1994. This is $118.05 less than the $211.38 per week average she earned at Respondent Mama Lacona's-West. See Finding of Fact No. 116.

4. Gross Back Pay:

123. The amount of gross back pay, prior to deduction of interim earnings and unemployment insurance, for the fifty nine and five sevenths week period from October 21, 1993 to December 20, 1994 may be established by multiplying the Complainant's average weekly earnings at Mama Lacona's by 59 5/7 weeks = 59 5/7 X $211.38 = $12622.41.

5. Interim Earnings and Unemployment Insurance:

124. The total interim earnings for the period from October 21, 1993 to December 31, 1993 have already been established as $948.59. See Finding of Fact No. 120.

125. The earnings for all of 1994 are given as $6606.00 on Complainant Hoffman's 1994 tax return. (R. EX. C). Since Complainant did not have any further employment in 1994 after quitting her job at the Top Hat Lounge, it would appear that this amount reflects the total 1994 interim earnings through December 20, 1994. (Tr. at 77). See Finding of Fact No. 18.

126. The total amount of unemployment insurance paid out to Complainant Hoffman between October 21, 1993 and December 20, 1994 was $2294.05. (CP. EX. # 2).

127. The total of interim earnings and unemployment insurance for Complainant Hoffman for the period from October 21, 1993 to December 20, 1994 inclusive is: $948.59 + $6606.00 +$2294.05 = $9848.64.

6. Total Back Pay Due Complainant Hoffman After Interim Earnings and Unemployment Insurance Are Deducted:

128. The total back pay due Complainant Hoffman after interim earnings and unemployment insurance are deducted is: $12622.41 - $9848.64 = $2773.77

7. Medical Benefits:

129. Complainant Hoffman was informed by Jim Lacona, approximately 2 weeks before her termination, that once she had been employed a year, she would be provided one half of the premium of a medical insurance policy as a benefit. (Tr. at 81). This benefit description corresponds to that provided by Angela Hawksby and Charles Lacona. (Tr. at 204-05, 281-82).

130. Complainant began her employment with the Respondent Mama Lacona's-West in November of 1992. See Finding of Fact No. 4. The Respondent Mama Lacona's-West should provide, by affidavit, the amount for one half the total premium cost for health insurance which would have been provided by the Respondent for the Complainant if her employment had continued for the period from November 1, 1993 to December 20, 1994. On enforcement of the Commission's order, this affidavit may be provided to the district court for determining the amount of health insurance premiums to be awarded Complainant Hoffman. See Conclusion of Law No. 81.

B. Compensatory Damages For Emotional Distress:

1. Complainant Hoffman Suffered Emotional Distress Resulting From The Sexual Harassment to Which She Was Subjected:

131. Many circumstances have already been noted from which it may be inferred that the complainant, like any reasonable person confronting such events, suffered emotional distress due to sexual harassment. For a five month period, Complainant Hoffman was subjected to verbal and physical sexual harassment on a daily basis. The verbal harassment included wolf whistling, kissing noises, commentary on her breasts and the crude, derogatory demands for oral sex previously set forth. The physical abuse inflicted by male members of the kitchen staff included untying her dress, patting or grabbing her rear, jabbing her in the side, and rubbing the front of their bodies against her back or side. This harassment was witnessed as well as experienced by her coworkers. This verbal and physical conduct, by its very nature, inflicted humiliation on the Complainant. See Findings of Fact Nos. 13-15, 17, 19-24, 29, 34.

132. This harassment made it more difficult for Complainant Hoffman to do her job. This led to the Complainant's repeated requests to her harassers to stop and leave her alone. These requests led only to ridicule and intensified harassment. See Findings of Fact Nos. 31-32.

133. Complainant Hoffman's attempts to have the harassment remedied by management were also futile. Her complaints to David Lihs, Joe Lacona, Robert Novak, Jim Lacona, and Charles Lacona yielded only ineffective actions which were not, in any event, communicated to her. See Findings of Fact Nos. 36-38, 45, 46-55.

136. It may be reasonably inferred from all of the above circumstances that Complainant Hoffman suffered emotional distress due to sexual harassment and her employer's failure to remedy it.

137. There is also direct evidence of emotional distress resulting from sexual harassment. Complainant Hoffman's credible testimony shows that the sexual harassment was stressful. (Tr. at 54-55). If she wanted to continue working, she was forced to endure the harassment even though she did not want to face it. See Finding of Fact No. 31. The daily harassment by Joel Lopez angered and frustrated Complainant Hoffman. ["It just ticked me really bad. . . . I told him that if he did it again after all these times that I had told him not to do that, that I was going to find some way of making him stop."] (Tr. at 61-62). This ultimately led to her "blowing up" in anger at him on October 15, 1993. See Finding of Fact No. 32. Anger and frustration, like humiliation or upset, are forms of compensable emotional distress. See Conclusion of Law No. 85.

138. The combined circumstantial and direct evidence supports the conclusion that Complainant Hoffman suffered serious and substantial emotional distress due to the sexual harassment at Mama Lacona's-West. Given the duration and severity of Complainant Hoffman's emotional distress due to sex discrimination, an award of twenty thousand dollars ($20000.00) in damages for such distress is full, reasonable, and appropriate compensation.

2. Complainant Hoffman Suffered Emotional Distress Resulting From Her Retaliatory Discharge:

139. There is also direct and circumstantial evidence which demonstrates that the retaliatory discharge of Complainant Hoffman and its aftermath resulted in substantial emotional distress for her. Debra Hoffman had never been discharged before in her life. When she was informed of her discharge by Charles Lacona, she responded with shock and disbelief. (Tr. at 62-63, 79). She broke down in tears and said to another person (possibly Robert Novak) who was present, "Bob, can you believe this?" (Tr. at 79).

140. In her words: "I was absolutely floored. My jaw hit the floor. I could not believe that I was being fired for something like that. Especially after I had worked there almost a year and done everything that I could possibly do to help. I couldn't believe it." (Tr. at 62-63).

141. There are three circumstances from which it is reasonable to infer that the aftermath of the discharge caused distress to Complainant Hoffman. First, from the time of her discharge to the time of hearing, Complainant Hoffman remained convinced that her opposition to sexual harassment, especially that which occurred on October 15, 1993, was the true cause of her discharge. (Tr. at 62, 78).

142. Second, although Charles Lacona told Complainant Hoffman she could continue to work a week or two longer, it was impossible for her to do so as the kitchen staff blamed her for the discharge of David Lihs. Apparently she was blamed because Lihs might not

have gotten involved in an altercation with Lopez if Hoffman had not objected so strongly to Lopez's harassment. (Tr. at 63, 98). See Findings of Fact Nos. 4, 41-42. They responded by failing to put her food up. Complainant Hoffman felt she had to leave. (Tr. at 98).

143. Third, as a result of this retaliatory discharge, Complainant Hoffman was faced with substantial economic loss and the other burdens associated with unemployment. The economic loss of $2773.77, after the deduction of her unemployment insurance and earnings in lower paying interim employment, was equivalent to twenty-five percent of a years earnings for the Complainant at Mama Lacona's. [($2773.77) / ($211.38 wk. X 52 wks)] = [($2773.77) / ($10991.76)] = ..252 = 25.2%. See Findings of Fact Nos.115, 128. It may be reasonably inferred that this loss and the failure to obtain equivalent employment through December 20, 1994 took its emotional toll.

144. Given the duration and severity of Complainant Hoffman's emotional distress due to the retaliatory discharge and the consequences flowing therefrom, an award of seven thousand five hundred dollars ($7500.00) in damages for such distress is full, reasonable, and appropriate compensation.

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). Ms. Hoffman's complaint is within the subject matter jurisdiction of the Commission as the allegations that the Respondents subjected her to sexual harassment in employment and retaliatory discharge fall within the statutory prohibition against unfair employment practices which the Commission has the power to hear and determine. Iowa Code SS 216.6, .11, .15). See Finding of Fact No. 1.

2. "It shall be a . . . discriminatory practice for any person . . . to otherwise discriminate in employment against any . . . employee because of the . . . sex . . . of such . . . employee." Iowa Code S 216.6. "It shall be an unfair or discriminatory practice for: . . . 2. Any person to discriminate or retaliate against another person in any of the rights protected against discrimination by this chapter because such person has lawfully opposed any practice forbidden under this chapter." Iowa Code S 216.11. The "rights protected against discrimination by this chapter," id., include protection against the unlawful discharge of an employee. Id. at S 216.6(1)(a).

B. Timeliness and other Statutory Prerequisites:

3. Ms. Hoffman's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code S 216.15(11). See Finding of Fact No. 2. 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 S 216.15. See Finding of Fact No. 3.

II. Official Notice:

4. Official notice was taken of what a "wolf whistle" was. See Finding of Fact No. 26.

> 10. 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).

III. Admissions on Brief:

5. As noted in the findings of fact, several admissions on brief are made by the parties which are binding on the Commission because such admissions are adverse to the party making them. See Findings of Fact Nos. 10, 35, 60, 64, 67.

> 6. 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, XII Iowa Civil Rights Commission Case Reports 31, 48-49 (1993).

6. This doctrine effectively limits the legitimate nondiscriminatory reasons articulated by a Respondent to those set forth on brief:

> Thus the Commission must take as true . . . that . . . respondents assert, and are therefore limited to, only the . . . reasons cited on their brief as being their legitimate, non-discriminatory reasons for [their actions toward complainant].

> 7. This does not mean that any respondent to a charge of discrimination articulates a legitimate non-discriminatory reason merely by identifying it on brief. That must be done through the production of evidence which,

> assuming it were believed, would set forth a lawful, non-discriminatory reason for the action alleged to be due to discrimination. Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 517 (Iowa 1990). Rather, the Respondents' legitimate non- discriminatory reasons are limited to those set forth on brief, because by identifying only certain reasons on brief, the Respondents have admitted that those are the only reasons they may have articulated. The Respondents are bound by that admission. See Larson at 572. This admission is binding on the Commission in its adjudicative capacity and it may, therefore, consider only those reasons so identified on brief. See Id.; Grantham, 257 Iowa at 230-31.

Id. at 49 (emphasis added).

7. Under the above principles, the Commission must take as true that the reason set forth on brief is the one offered by Respondent as a legitimate, nondiscriminatory reason for Complainant Hoffman's discharge. This does not mean that this reason is the true reason or that merely setting forth such a reason on brief is sufficient to rebut the prima facie case. Rather, under these principles, the Commission is limited to determining whether the Respondent has produced sufficient evidence for the nondiscriminatory reason given on brief to rebut the prima facie case. The Commission may not speculate as to other possible legitimate, nondiscriminatory reasons not mentioned on brief.

IV. Informal Judicial Admissions:

8. The Complainant's admission in her testimony that the rudeness incident actually happened constitutes an informal judicial admission. See Finding of Fact No. 67.

The rule is well established that:

> [i]f a party testifies deliberately to a concrete fact, not as a matter of opinion, estimate, appearance, inference, or uncertain memory, but as a considered circumstance of the case his [or her] adversary is entitled to hold him [or her] to it as an informal judicial admission.

Swifter Grain Co. v. Koch, 246 Iowa 1118, 1127, 71 N.W.2d 29, 34 (1955)(quoted in Yockey v, State, 540 N.W.2d 418, 421 (Iowa 1995)).

V. Persuasive Value of Opinions From Other Jurisdictions:

9. Federal court decisions applying Federal anti-discrimination laws are not controlling or governing authority in cases arising under the Iowa Civil Rights Act. E.g. Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978). Nonetheless, they are often relied on as persuasive authority in these cases. E.g. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Although decisions of the United States Supreme Court are rejected as

persuasive authority when their reasoning is inconsistent with the broad remedial purposes of the Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d at 831; Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866-67 (Iowa 1978), its opinions are often entitled to great deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission at 866.

10. In determining the persuasive value of any Federal decision, or decision of another state, or other legal authority, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures of our country," Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971). Therefore, decisions from other jurisdictions are persuasive only when they are consistent with the controlling authority requiring liberal interpretation and construction of the Iowa Civil Rights Act. When determining the sense and meaning of the written text of a statute providing regulations conducive to public good or welfare, the statute is liberally interpreted. State ex. rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624, 629 (Iowa 1971). When determining the legal effect of its provisions, the Iowa Civil Rights Act "shall be broadly construed to effectuate its purposes," Iowa Code S 601A.18 (1991), and "liberally construed with a view to promote its objects and assist the parties in obtaining justice." Iowa Code S 4.2. "In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." Monroe Community School District v. Marion County Board of Education, 251 Iowa 992, 998, 103 N.W.2d 746 (1960); Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 832 (Iowa 1978). Therefore, constructions of the statute which "effectively defeat the remedial purpose of Chapter 601A [the Iowa Civil Rights Act]." should be rejected. See Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 167 (Iowa 1982).

V. Order and Allocation of Proof: The Burdens of Persuasion and Production:

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

12. 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).

VI. Sexual Harassment:

A. Sexual Harassment Theories: Quid Pro Quo and Hostile Environment:

13. It is well recognized that sexual harassment cases are often classified as arising under either the quid pro quo or hostile working environment theories. E.g. Fair Employment Practices (BNA) 405:6681 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990); Lindemann & Kadue, Sexual Harassment in Employment Law 7 (1992). It is, nonetheless, possible to have cases where both theories may be appropriate. E.g. Fair Employment Practices (BNA) at 405:6682; Lindemann & Kadue, Sexual Harassment in Employment Law at 8-9. In the quid pro quo case, a violation occurs when the employee is required to acquiesce to the sexual advances of his or her employer in order to obtain a job benefit, such as promotion, or avoid an employment detriment, such as discharge. See Fair Employment Practices (BNA) at 405:6681; Lindemann & Kadue, Sexual Harassment in Employment Law at 7, 8. The present case arises under the hostile environment theory. In the hostile environment case, a violation occurs when unwelcome conduct by the employer or coworkers, which is directed at the employee because of his or her sex, has the "purpose or effect of unreasonably interfering with an individuals's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Guidelines on Sexual Harassment, 29 C.F.R. S 1604.11(a), quoted in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986). See Lynch v. City of Des Moines, 454 N.W.2d 827, 834-35 (Iowa 1990).

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

14. "It is questionable whether the traditional burden-shifting analysis is appropriate or necessary in hostile work environment cases where the alleged discrimination does not involve deprivation of a tangible job benefit." Lynch v. City of Des Moines, 454 N.W.2d 827, 834 n.6 (Iowa 1990)(citing Henson v. City of Dundee, 682 F.2d at 905 n.11 and Katz v. Dole, 709 F.2d at 255-56)). This is so because the burden shifting analysis, utilized in disparate treatment cases relying primarily on circumstantial evidence as the means of proof, "serves to 'progressively sharpen the inquiry into the elusive factual question of intentional discrimination,' . . . in . . . case[s] where prohibited criteria and legitimate job related criteria often blend in the employment decision." Henson v. City of Dundee, 682 F.2d at 905 n.11. See Conclusion of Law No. 48. In cases of sexual harassment involving the repeated use of sexual remarks or epithets, verbal, or physical sexual advances, or other obviously sexual conduct, the factual question of intentional discrimination is not at all elusive. See Henson v. City of Dundee, 682 F.2d at 905 n.11 (sexual harassment creating offensive environment does not present elusive factual question of intentional discrimination). Therefore, the Commission, in its adjudicative capacity, has not used a burden shifting order and allocation of proof in harassment cases. Rather, the Commission, as the party with the burden of proof, Iowa Code S 216.15(7), is required to prove, by a preponderance of the evidence, all of the elements of a sexual harassment case. E.g. Dorothy A. Abbas, 12 Iowa Civil Rights Commission Case Reports 1, 22 (1994)(retaliatory harassment); Cristen Harms, 11 Iowa Civil Rights Commission Case Reports, 89, 124 (1992)(sexual harassment).

C. Elements of the Sexual Harassment Case:

15. The Commission may establish a valid claim of sexual harassment by proving the following elements:

1) The Complainant is a member of a protected class [i.e. she is a female];

2) She was subjected to unwelcome sexual harassment;

3) The harassment was based upon her protected class status [i.e. her sex];

4) The harassment affected a term, condition, or privilege of employment [e.g. her working environment], and;

5) The employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.

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

D. Protected Class Status of Complainant Hoffman:

16. It is established in the record that Ms. Debra Hoffman is a female and is protected against discrimination in employment on the basis of sex. Iowa Code S 216.6. See Finding of Fact No. 12.

E. Complainant Hoffman was Subjected to Unwelcome Sexual Harassment:

17. "The threshold for determining that [sexual] conduct is unwelcome is whether it was uninvited and offensive." Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962 (8th Cir. 1993). The sexual conduct "must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded it as undesirable or offensive." Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982), quoted in Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990). The unwelcome nature of the sexual conduct directed toward Complainant Hoffman is established in the record when viewed as a whole. She found the sexual conduct of Respondent Joel Lopez and other kitchen staff employees to be offensive, objected to it, and complained about it to Robert Novak, David Lihs, Joe Lacona, Jim Lacona, and Charles Lacona. See Findings of Fact No. 13-25, 31-32, 36-39. Although the record must be viewed as a whole, such complaints are often persuasive evidence that the conduct was unwelcome. Fair Employment Practices (BNA) 405:6681, 405:6685 "EEOC: Policy

Guidance on Sexual Harassment" (March 19, 1990). See Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990).

F. The Harassment Was Based on Complainant Hoffman's Protected Class Status, I.e. Her Sex:

18. It is established in the record that the harassment sustained by Ms. Hoffman was directed toward her because she a female. See Finding of Fact No. __. This element may be met by proof of either:

> [1] [H]arassing behavior lacking a sexually explicit content but directed at women and motivated by animus against women (citations omitted). . . [or];
>
> [2] [S]exual behavior directed at women . . . E.g. Huddleston v. Roger Dean Chevrolet, Inc. 845 F.2d 900, 904-05 (11th Cir. 1988); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987); see Andrews [v. City of Philadelphia], 895 F.2d at 1485; Lipsett [v. University of Puerto Rico], 864 F.2d at 905; Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988), cert. denied, 489 U.S. 1020 . . . (1989). [or];
>
> [3] [B]ehavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex. (Citations omitted). This third category describes behavior that creates a barrier to the progress of women in the workplace because it creates a message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment.(citations omitted).

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522-23, 55 Empl. Prac. Dec. S 40535 at 65759 (M.D. Fla. 1991). A similar scheme of three categories of sexually harassing behavior, albeit in a different order, is set forth in the leading legal treatise on sexual harassment in employment: "(A) unwelcome sexual advances, (B) gender-based animosity of either a sexual or a nonsexual nature, and (C) a sexually charged workplace." Lindemann & Kadue, Sexual Harassment in Employment Law 52 (1992).

19. In this case, it has been established that the harassment was based on Complainant Hoffman's sex because the harassment involves both repeated physical and verbal sexual behavior directed at women. The crude language used for the verbal sexual advances and comments by the harassers in this case may also reflect that the harassment is sex based for the same reason such language reflects a sexual basis in the gender animosity cases. These words, when directed at women,"deriv[e] their power to wound not only from their meaning but also from the 'disgust and violence they express phonetically.'" Id. at 75 & n.103 (quoting Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983)). The use of the word "bitch" toward a woman may be part of a pattern of obscene statements or name calling which constitute harassment based on sex. Burns v. McGregor Electronic Industries, Inc.,

989 F.2d 959, 964-66 (8th Cir. 1993). The presence of "insulting comments aimed at [the complainant] [which] were particularly reserved for women," also justifies the conclusion that the harassment was due to the Complainant's sex. Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990). See Findings of Fact Nos. 14-18.

G. The Harassment Affected A Term or Condition of Complainant Hoffman's Employment, I.e. Her Working Environment:

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

20. Although sexual harassment of Complainant Hoffman did not directly result in "the loss of a tangible job benefit," such a loss need not be proved in order to meet the requirement that a term, condition or privilege of employment was affected by the harassment. Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990). Her working environment is a condition of her employment. Thus, the creation of a hostile or abusive working environment is enough to show that a condition of employment has been affected. See id.

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

21. In determining whether a hostile or abusive working environment has been created, the Supreme Court of Iowa has focused on the pervasiveness and severity of the harassing conduct. "A hostile working environment is caused by discriminatory conduct or harassment which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632 (Iowa 1990). "Where sexual harassment in the workplace is so pervasive and severe that it creates a hostile or abusive work environment, so that the [complainant] must endure an unreasonably offensive environment or quit working, the sexual harassment affects a condition of employment." Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990).

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

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

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

> The existence of a hostile or abusive working environment must be established by the totality of the circumstances. . . . Whether . . . use of [sexual] slurs is continuous, severe and pervasive enough to rise to a violation of the Iowa Civil Rights Act is a question of fact. . . .
>
> It is well established that the "mere utterance of a [sexual], ethnic or racial epithet which engenders offensive feelings in an employee" does not affect the terms, conditions and privileges of employment to a significant degree. . . . Discriminatory comments that are "merely part of casual conversation, are accidental or are sporadic do not trigger . . . sanctions." . . .
>
> On the other hand, the determination of whether defendant's conduct is sufficiently severe and pervasive to constitute [sexual] harassment does not turn solely on the number of incidents alleged by plaintiff. . . . The totality of the circumstances requires the factfinder to examine the severity, as well as the number, of the incidents of harassment. . . . In some situations the severity of the offensive conduct may lessen the need for sustained exposure. The prima facie showing in a hostile environment case is likely to consist of evidence of many or very few acts or statements by the defendant which, taken together, constitute harassment.

Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 633-34 (Iowa 1990)(Iowa Civil Rights Act case)(citations omitted)(emphasis added).

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

Harris v. Forklift Systems, Inc., ___ U.S. ___, 114 S.Ct. 367, 371 (1993).

24. All of the above factors were considered in reaching the conclusion that Complainant Hoffman's working environment was hostile or abusive. See Findings of Fact Nos. 28-34. With respect to the factor of interference with work performance, it is sufficient to prove that a reasonable person subjected to such harassment would find, "as the plaintiff did, that the harassment so altered work conditions as to 'ma[k]e it more difficult to do the job.'" Harris v. Forklift Systems, Inc., 114 S.Ct. at 372 (Ginsburg, J., concurring)(quoting Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988)). It is not necessary to show that the Complainant's "'tangible productivity has declined as a result of the harassment.'" Id. (Ginsburg, J. concurring)(quoting Davis at 349)).

25. Other factors indicating the severity and pervasiveness of the sexual harassment reflected in the record include: (a) the harassment was inflicted by more than one coworker, and (b) the harassment was also suffered by other female food servers. Lindemann & Kadue, Sexual Harassment in Employment Law 178-79 (1992). See Findings of Fact Nos. 15, 19-23, 25, 29-31, 33-34.

4. Physical Harassment May Often Have A More Severe Impact Than Verbal Harassment:

26. Physical sexual harassment will often have a greater impact than verbal harassment. The Equal Employment Opportunity Commission has recognized that, while a hostile working environment claim usually requires a pattern of offensive conduct, "the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical." Fair Employment Practices (BNA) 405:6681, 405:6690-91 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990)(emphasis added). See also Carrero v. New York City Housing Authority, 890 F.2d 569, 578 (2nd Cir. 1989). "More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment." "EEOC Policy Guidance on Sexual Harassment" at 405:6691. Under these standards, the physical harassment experienced by Complainant Hoffman would, alone, be sufficient to establish a hostile and abusive work environment. See Findings of Facts Nos. 19-24, 30.

5. Pervasive Verbal Harassment Alone May Be Sufficient to Establish a Hostile or Abusive Working Environment:

27. Nonetheless, verbal harassment can also create a hostile and abusive working environment:

> [T]he pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment. See Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983); Hall [v. Gus Constr. Co.], 842 F.2d at 1012-15 [(8th Cir. 1988)]; Lipsett v. University of Puerto Rico, 864 F.2d 881, 903 (1st Cir. 1988); Ways v. City of Lincoln, 871 F.2d 750, 754-55 (8th Cir. 1989).

Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3rd Cir. 1990). The special potency of words exclusively reserved for or directed at women has already been noted. See Conclusion of Law No. 19. See also Lindemann & Kadue, Sexual Harassment in Employment Law 75 & nn. 102-03 (1992). Given the nature of the language repeatedly directed at Complainant Hoffman and other women at Respondent Mama Lacona's, Inc., the verbal harassment alone would be sufficient to establish a hostile and abusive work environment. See Findings of Fact Nos. 13-18, 26-27, 29-33.

6. The Effect of Combined Verbal and Physical Sexual Harassment Will Intensify the Hostility of the Environment and Increase the Likelihood That The Environment Will Be Found to Be Abusive:

28.

> When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of a hostile working environment. [citing e.g.] Hall v. Gus Construction Co., 842 F.2d 1010, [46 Fair Empl. Prac. Cases 573] (8th Cir. 1988).

Fair Employment Practices (BNA) 405:6681, 405:6691 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990) (emphasis added). The intense combined verbal and physical harassment sustained by Complainant Hoffman and other waitresses is more than sufficient to establish the existence of a hostile and abusive working environment. See Findings of Fact Nos.13-34

7. The Commission Has Met the Requirements that The Working Environment At Respondent Mama Lacona's-West Be Shown to Have Been Considered Hostile and Abusive When Viewed From Both the Perspectives of the Complainant and of a Similarly Situated Reasonable Person:

29. The Complainant's working environment was found to be considered by her to be hostile or abusive. It was also found that such an environment would be considered hostile and abusive by any reasonable person. See Finding of Fact Nos. 25, 28, 31, 34, 56. Thus, the evidence in this case met both the subjective requirement that the Complainant personally find the conduct to be hostile or abusive, and the objective requirement that a similarly situated reasonable person would find such conduct be hostile or abusive. See Harris v. Forklift Systems, Inc,, ___ U.S. ___, 114 S. Ct. 367, 370, 371 (1993). The Commission, and several courts, have found that the reasonable person standard should take into account the victim's sex as one of the circumstances to be considered, due to the differing perspectives of men and women. See Cristen Harms, 11 Iowa Civil Rights Commission Case Reports 89, 125 (1992)(citing e.g. Ellison v. Brady, 924 F.2d 872, 54 Fair Empl. Prac. Cas. 1346, 1353 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3rd Cir. 1990); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 55 Empl. Prac. Dec. at 6570 (M.D. Fla. 1991); Tindall v. Housing Authority, 55 Fair Empl. Prac. Cas. 22, 25-26 (W.D. Ark. 1991)). See also Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 965 (8th Cir. 1993); Lehmann v. Toys 'R' Us, 626 A.2d 445, 453-54 (N.J. 1993). This difference is not important in this case as both males and females would find the challenged conduct to be abusive.

H. Respondents Mama Lacona's-West and Jim Lacona Knew or Should Have Known of the Harassment But Failed to Take Prompt and Appropriate Remedial Action:

30. The Commission has proven that Respondents Mama Lacona's-West and Jim Lacona, as well as other managers and agents of Mama Lacona's-West, knew or should have known of the harassment by Respondent Lopez and other members of the kitchen staff. See Findings of Fact Nos. 35-45. The Commission has also proven that Respondents Mama Lacona's-West and Jim Lacona failed to take prompt and appropriate remedial action. See Findings of Fact Nos. 46-55. Proof of these facts establishes the last element necessary to establish their liability for hostile environment sexual harassment committed by either supervisors or coworkers. See Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632, 634 (Iowa 1990)(harassment by supervisor); Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 835 (Iowa 1990)(harassment by coworkers).

31. There is little question that Respondents Mama Lacona's-West and Jim Lacona had actual knowledge of the harassment. "Where supervisors have witnessed co-worker harassment firsthand, courts have held that the employer had actual knowledge." Lindemann & Kadue, Sexual Harassment in Employment Law 242 (1992). See Finding of Fact No.36. Actual knowledge is also shown when either lower level first line supervisors or higher level management receive complaints about sexual harassment. Id. See Findings of Facts Nos. 35-45. This is true even when the first level supervisor did not report the harassment to higher levels of management. Id. Constructive knowledge of harassment is imputed to the employer when the acts of harassment are "so numerous that the employer would have had to know of them." Id. at 243. See Finding of Fact No. 36. Actual or constructive knowledge of the harassment, and the failure to remedy the harassment, is imputed to the employer because supervisors are considered to be agents of the employer. See e.g..Hall v. Gus Construction Co., 842 F.2d 1010, 1016, 46 Fair Empl. Prac. Cases 573 (8th Cir. 1988).

32. "An employer cannot stand by and permit an employee to be harassed by his co-workers." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 634 (Iowa 1990)(citing DeGrace v. Rumsfeld, 614 F.2d 796, 803 (1st Cir. 1980)). The requirement for "prompt and appropriate remedial action," Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 835 (Iowa 1990), imposes "a reasonable duty on an employer who is aware of discrimination in the workplace to take reasonable steps to remedy it." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 634 (Iowa 1990).

33. Factors considered here in determining that this duty was not met were "the gravity of the harm, the nature of the work environment, and the resources available to the employer." Id. See Finding of Fact No. 55.

34. Remedial action has a two fold purpose. The first is to stop any harassment which is underway. The second is to deter future harassment. These purposes are the bench marks against which the appropriateness of remedial action is measured. Fuller v. City of Oakland, 47 F.3d 1522, 1528, 67 Fair Empl. Prac. Cas. 992 (9th Cir. 1995)(citing Ellison v. Brady, 924 F.2d 872, 882, 54 Fair Empl. Prac. Cas. 1346 (9th Cir. 1991)). "If 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach." Id.

35. To the extent any attempt to remedy the harassment was undertaken by Respondents Mama Lacona's-West and Jim Lacona, it was wholly ineffective. See Findings of Fact Nos. 46-55. Their response to employee complaints about harassment was often to dissuade or appear to ignore the complaints. See Finding of Fact No. 52. Obviously, this is not a prompt or appropriate response to such complaints. Cf. Waltman v. International Paper Co., 875 F.2d 468, 480 (5th Cir. 1989)(summary judgment denied employer where employee's evidence suggests employer may have dissuaded her from seeking an investigation of harassment).

36. With the exception of the questioning of Robert Novak by Jim Lacona and Joe Lacona, there is no suggestion that there was any adequate investigation of the complaints of harassment. See Finding of Fact No. 54. It is well recognized that an adequate investigation is a first step in an appropriate response to complaints of harassment. Compare Fuller v. City of Oakland, 47 F.3d 1522, 1528, 67 Fair Empl. Prac. Cas. 992 (9th Cir. 1995)(inadequate investigation was a factor in determining that employer was liable); Ways v. City of Lincoln, 871 F.2d 750, 755 (8th Cir. 1989)(same); College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 508 N.E.2d 587, 594 (Mass. 1987)(cited in Vaughn v. Ag Processing, Inc. 459 N.W.2d at 635)(same) with Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 634-35 (Iowa 1990)(prompt and thorough investigation was a factor in determining employer response was appropriate); Spicer v. Virginia, 66 F.3d 705, 708 (4th Cir. 1995)(same); Saxton v. A. T. & T. Co., 10 F.3d 526, 535, 63 Fair Empl. Prac. Cas. 625 (7th Cir. 1993)(same); Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 577-78, 54 Fair Empl. Prac. Cas. 268 (10th Cir. 1990)(same); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316, 49 Fair Empl. Prac. Cas. 522 (11th Cir. 1989)(same); Barrett v. Omaha Nat. Bank, 728 F.2d 424, 427 (8th Cir. 1984)(same).

37. "[A]n investigation is principally a way to determine whether any remedy is needed and cannot substitute for the remedy itself." Fuller v. City of Oakland, 47 F.3d 1522, 1529, 67 Fair Empl. Prac. Cas. 992 (9th Cir. 1995). Obviously, in a case such as this, where the actual and constructive notice of harassment may be sufficient to indicate a remedy is needed, a thorough investigation would, nevertheless, help determine the extent of the problem and of the required remedy.

38. Key elements of an investigation which were missing here included interviews of the complainant, the harassers, and coworkers who might be aware of such harassment. See Finding of Fact No. 54. Compare Fuller, 47 F.3d at 1529 (failure to promptly interview alleged harasser); Ways, 871 F.2d at 755 (complete failure to investigate alleged incident); College-Town, 508 N.E.2d at 589, 594 (failure to individually interview complaining employee and coworkers), with Vaughn, 459 N.W.2d at 634 (interviews of coworkers and supervisors); Spicer, 66 F.3d at 708 (interview of complainant and others); Hirschfeld, 916 F.2d at 577-78 (same); Steele, 867 F.2d at 1316(interview of employees); Barrett, 728 F.2d at 427 (interview of complainant, alleged harassers, and coworkers).

39. "'[A]ppropriate corrective action' . . . require[s] some form, however mild, of disciplinary measures. Action is 'corrective' only if it contributes to the elimination of the

problem at hand. Because disciplinary measures are more likely to decrease the likelihood of repeated harassment than a mere request to stop the behavior, disciplinary measures are [required]." Intlekofer v. Turnage, 973 F.2d 773, 778, 59 Fair Empl. Prac. Cas. 929 (9th Cir. 1992)(construing 29 C.F.R. S.1604.11(d) of the EEOC Guidelines on Sexual Harassment)).

40. Given the severity and pervasiveness of the sexual harassment in this case, more than "sporadic pep talks" or "mere verbal chastisements" would be required "forcefully to convey the message that [harassment] would not be tolerated." DeGrace v. Rumsfeld, 614 F.2d 796, 805 & n.5 (1st Cir. 1980). See Waltman v. International Paper Co., 875 F.2d 468, 479, 50 Fair Empl. Prac. Cas. 179 (5th Cir. 1989). This does not mean, however, that strong, clear oral warnings will not be appropriate measures in many cases:

> At the first sign of sexual harassment, an oral warning in the context of a counseling session may be an appropriate disciplinary measure if the employer expresses strong disapproval, demands that the unwelcome conduct cease, and threatens more severe disciplinary action in the event the conduct does not cease. [This is an appropriate] remedy in a case . . . where the harassing conduct is not extremely serious and the employer cannot elicit a detailed description concerning the occurrence from the victim. . . . [C]ounseling is sufficient only as a first resort. If the harassment continues, limiting discipline to further counseling is inappropriate. Instead, the employer must impose more severe measures in order to ensure that the behavior terminates. [T]he extent of the discipline depends on the seriousness of the conduct.

Intlekofer v. Turnage, 973 F.2d at 779-80 (emphasis added). See Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 635 (Iowa 1990)(harasser received written and verbal reprimands "and told that if there were any reoccurrences of 'inappropriate behavior,' he would be discharged."); Barrett v. Omaha Nat. Bank, 728 F.2d at 426 (cited in Vaughn at 635)(harasser reprimanded, placed on 90 day probation, informed discharge would follow further misconduct). The directives and warnings in this case did not meet the requirements for appropriate oral warnings set forth above. See Findings of Fact Nos. 47-51.

41. Another aspect of appropriate remedial action which could have been, but was not, undertaken in the instant case was to keep the Complainant, and others who complained about sexual harassment, informed of the efforts, minor as they were, to counter it. See Spicer v. Virginia, 66 F.3d 705, 708 (4th Cir. 1995)(no liability-employee informed of steps taken to address her complaint); Barrett v. Omaha Nat. Bank, 728 F.2d at 426 (no liability- employee informed of disciplinary steps taken against her harassers); College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 508 N.E.2d at 594 (liability found-failed to inform employee of staff meeting where her complaint was investigated).. See Finding of Fact No. 53. Nor were the victims of harassment asked to make suggestions for correcting their working environment. Cf. Ellison v. Brady, 924 F.2d at 883 (failure to request employee's input on return of

harasser to her workplace reflects insufficient regard for her interest in avoiding hostile environment).

42. No efforts were made to have offending employees apologize to their victims or otherwise commit to ending their harassment. See Vaughn v. Ag Processing, Inc., 459 N.W.2d at 634 (harasser apologized to employee for his swearing). An apology alone, however, is not sufficient remedial action as the law "requires more than a mere request to refrain from discriminatory conduct." Davis v. Tri-State Mack Distributors, 981 F.2d 340, 343 (8th Cir. 1992).

43. Once the offending employees renewed their harassment after being admonished by David Lihs and Jim Lacona, Respondents Mama Lacona's-West and Jim Lacona had an obligation to take stronger action such as suspending or discharging the offending employees. E.g. Intlekofer v. Turnage, 973 F.2d at 779-80 (Repeated warnings to the harasser, without harsher discipline, "did nothing except assure [the harasser] that continued harassment would be tolerated."); Hirschfeld v. New Mexico Corrections Dept., 916 F.2d at 577-78 (demotion of harasser); DeGrace v. Rumsfeld, 614 F.2d at 805 n.5 (citing with approval the three day suspension of an employee who used a racial epithet in Howard v. Nat'l Cash Register Co., 388 F.Supp. 603, 605 (S.D. Ohio 1975)).

44. Such disciplinary actions would be "both feasible and reasonable under the circumstances," Vaughn v. Ag Processing, 459 N.W.2d at 634 (quoting DeGrace v. Rumsfeld, 614 F.2d at 805), and consistent with the employer's duty to "let it be known . . . that . . . harassment will not be tolerated, and . . . [to] take all reasonable measures to enforce this policy." Id. (quoting DeGrace at 805). These actions were not, however, undertaken by the employer, Respondent Mama Lacona's-West, in this case, rendering it liable for sexual harassment. See Findings of Fact Nos. 51, 55-57. See Conclusion of Law No. 15.

I. Individuals May Be Liable For Violation of the Employment Provisions of the Iowa Civil Rights Act:

45. The Iowa Civil Rights Act states, in part:

> 1. It shall be an unfair or discriminatory practice for any:
>
> a.. Person to . . . otherwise discriminate in employment . . against any employee because of the . . . sex . . . of such . . . employee.

Iowa Code S 216.6(1)(a).

46. A "person" is defined, in part, as meaning "one or more individuals. . . [or] corporations." Iowa Code S 216.2(10). An employer is defined, in part, as "every . . . person employing employees within the state." Iowa Code S 216.2(6). The prohibition of sex discrimination in employment by a "person," as opposed to an "employer," indicates that this prohibition is not limited to employers. The structure of the "unfair employment

practices" section of the Act indicates that the broad prohibitions against employment discrimination are intended to apply to "person[s]", Iowa Code S 216.6(1)(a)(d); while other more specific prohibitions, apply to "labor organization[s]," id. at 216.6(1)(b)), or a combination of "employer[s], employment agenc[ies], labor organization[s]," id. at 216.6(1)(c)).

47. In determining the legal effect of the prohibitions against persons discriminating in employment on the basis of sex, the Act is to be "construed broadly to effectuate its purposes." Iowa Code S 216.18. As individuals, Respondents Jim Lacona and Joel Lopez are both "persons." See Iowa Code S 216.2(10). Thus, Respondent Joel Lopez is liable as a person who otherwise discriminated on the basis of sex, Iowa Code S 216.6(1)(a), through his acts of sexual harassment perpetrated against the Complainant and other employees at Mama Lacona's-West. Lopez's liability is established by proof of the first four elements of the sexual harassment claim because these elements define the duty violated by him, i.e. the duty to refrain from committing acts of sexual harassment. See Conclusion of Law No. 15. The fifth element applies to the, Respondent Mama Lacona's-West, and to Respondent Jim Lacona, because it defines the duty they violated, the duty to remedy sexual harassment committed by their employees. See Conclusion of Law No. 15.

VII. Retaliatory Discharge:

A. Summary of the Order and Allocation of Proof In Retaliation Cases Where the McDonnell-Douglas Analysis is Used:

48. The analysis used when proof of discrimination is made through circumstantial evidence also applies to proof of retaliation through circumstantial evidence. Lynch v. City of Des Moines, 454 N.W.2d 827, 834 n.6 (Iowa 1990). This order and allocation of proof, known as the "pretext," or "McDonnell-Douglas" method of proof, was described in the Dorene Polton case. Although the cases refer to the complainant's burdens of establishing a prima facie case and pretext, those burdens are borne here by the Commission as this proceeding is before this agency and not a court. Iowa Code S 216.15(6):

> 25. In the typical discrimination case, in which the Complainant uses circumstantial evidence to prove disparate treatment on a prohibited basis, the burden of production, but not of persuasion, shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 448 (Iowa Ct. App. 1981). These shifting burdens of production "are designed to assure that the [Complainant has] his day in court despite the unavailability of direct evidence." Trans World Airlines v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed. 2d 523, 533 (1985).
>
> 26. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). This showing is

not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

27. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, non-discriminatory reason for its action. Id.; Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). If the Respondent does nothing in the face of the presumption of discrimination which arises from the establishment of a prima facie case, judgment must be entered for Complainant as no issue of fact remains. Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). If Respondent does produce evidence of a legitimate non-discriminatory reason for its actions, the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

28. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981)).

29. This burden of production may be met through the introduction of evidence or by cross- examination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981). The Complainant's initial evidence and inferences drawn therefrom may be considered on the issue of pretext. Id. at n.10.

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

B. The Commission Established a Prima Facie Case of Retaliation:

49. A prima facie case of retaliation may be established by the Complainant by producing evidence which shows:

(1) [s]he was engaged in statutorily protected activity, (2) [s]he suffered adverse employment action, and (3) a causal connection between the two.

Hulme v. Barrett, 449 N.W.2d 629, 633 (Iowa 1989). The Commission established a prima facie case under this standard. See Finding of Fact No. 63.

50. Some ways in which a causal connection between the filing of the complaint and the adverse action can be shown are (a) proximity in time of the filing and the adverse action; (b) treating the complainant differently than employees who have not filed; (c) failing to follow established procedures and policies with regard to the action taken against the complainant; and (d) different treatment of complainant after the filing of the complaint than before the filing. Schlei & Grossman, Employment Discrimination Law 558-59 (2nd ed. 1983); Lindeman & Kadue, Sexual Harassment in Employment Law 284-85 (1992). See Walters v. United States Gypsum Co., 537 N.W.2d 708, 712 (Iowa 1995)(summary judgment for employer denied on retaliatiory discharge claim where employee produced evidence that she had never been previously disciplined for any of the reasons given for her discharge and no employee had ever been discharged for one of those reasons). See Finding of Fact No. 62.

51. A causal connection may be shown by "[e]mployer attempts to conceal that the person who decided on the adverse action knew at that time that the employee had engaged in protected . . . opposition" to discrimination. Lindeman & Kadue, Sexual Harassment in Employment Law 284-85 (1992). See Macey v. World Airways, 14 Fair Empl. Prac. Cases 1426 (N.D. Cal. 1977)(Determination that manager falsely testified on deposition that he was not aware of EEOC charge at the time Complainant was discharged was a factor which compelled the conclusion that discharge was at least partially due to retaliation). See Findings of Fact No. 63. A causal connection may also be shown when the person opposing discrimination is a victim of sexual harassment which the employer was aware of and failed to remedy prior to the adverse action taken against her. Cf. Hamer v. Iowa Civil Rights Commission, 472 N.W.2d 259, 263 (Iowa 1991)(Evidence of prior acts of discrimination may show employer motive with respect to subsequent acts); Hawkins v. Hennepin Technical Center, 900 F.2d 153, 156, 52 Fair Empl. Prac. 885 (8th Cir. 1985)("An atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation for complaints in individual cases."). See Finding of Fact No. 61. By analogy, the methods for showing a causal link apply not only to a link between the filing of a complaint and subsequent employment action, but also to a link between any other lawful opposition to discrimination and subsequent employment action.

52. It should be noted that establishing a causal connection through proximity in time is not contrary to the following rule:

> [T]he mere fact that an adverse employment decision occurs after a charge of discrimination is not, standing alone, sufficient to support a finding that the adverse employment decision was in retaliation to the discrimination claim.

Walters v. United States Gypsum Co., 537 N.W.2d 708, 712 (Iowa 1995)(quoting Hulme v. Barrett, 480 N.W.2d 40, 43 (Iowa 1992)).

53. Merely showing that an adverse employment action was taken at some point, perhaps years later, after a complaint is filed does not show proximity in time. In Hulme, for instance, the plaintiff's discharge did not occur until six months after her civil rights complaint was filed. Hulme at 43. The plaintiff's discharge did occur, however, immediately after she 'defiantly' objected to a new no smoking policy and told the store manager that he would have to fire her if he wanted to be rid of her. Id. at 42. Since the court held there was no evidence to connect the complaint and the employer's response to the plaintiff's objections to the policy, it is implicit that, under those facts, the filing and the action were not close enough in time to connect the two events. See id. In contrast to Hulme, in the instant case, the proximity in time between the Complainant's "blow-up" with Respondent Lopez, which was her last act of continuing resistance to sexual harassment, and her discharge is much closer than the events in Hulme. See Finding of Fact No. 61.

C. Respondents' Articulation, Through the Production of Evidence, of A Legitimate Non-Discriminatory Reason for Complainant's Discharge:

54. In order to rebut the Complainant's prima facie case, a Respondent must introduce admissible evidence which would allow the finder of fact to rationally conclude that the challenged decision was not motivated by retaliatory animus. Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981). The Respondent need not persuade the finder of fact that it was actually motivated by the proffered reasons. Id. Nonetheless, the Respondent must produce evidence that the action taken with respect to the Complainant was implemented "for a legitimate, nondiscriminatory reason." Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). This burden cannot be met "merely through an answer to the complaint or through argument of counsel." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed. 2d. 207, 216 n.9 (1981)). The Respondent in this case rebutted the prima facie case under these standards. See Finding of Fact No. 64.

D. Respondent's Reason Shown to Be A Pretext for Retaliation:

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

56.

30. [Pretext may be proven] by evidence showing:

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

Ruth Miller, 11 Iowa Civil Rights Commission Case Reports 26, 48 (1990). Pretext in the instant case was demonstrated by findings of fact indicating that the reasons articulated by Respondent did not actually motivate the discharge or were insufficient to motivate the termination under the circumstances. See Finding of Fact Nos. 82-88, 90, 91, 97.

57.

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

Ruth Miller at 48-49. In light of the circumstances, including the actual past practices of the Respondent Mama Lacona's West, its averred procedures for dealing with customer service complaints against employees, and the inconsistent and illogical reasons given for discharging complainant, it would appear the reason given for her termination is not reasonable. See Findings of Fact Nos. 75-76, 81-88.

58. In a pretext case, the"factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons even if no evidence undermining those remaining rationales in particular is available." Fuentes v. Perskie, 32 F.3d 759, 65 Fair Empl. Cas. 890, 894 n.7 (3rd Cir. 1994). In addition, "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action" may support the conclusion that such reasons are "unworthy of credence" and therefore pretexts for retaliation. Id. at 894. The testimony of the employer's top management in this case is filled with implausibilities, inconsistencies, incoherencies, or contradictions concerning the proffered legitimate reasons for its actions and related events. See Findings of Fact Nos. 72-90. The employer's inconsistent statements or actions (e.g. giving differing reasons for the discharge) may be probative on the issue of pretext. See Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 266 & nn.34-35 (2nd ed. 1989). See Findings of Fact Nos. 80-88.

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

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

Maxine Boomgarden, 12 Iowa Civil Rights Case Reports 31, 50 (1993) (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed. 2d 407, 418-19 (1993)).

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

61. In pretext cases, "the rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional [retaliation], and the Court of Appeals was correct, when it noted that, upon such rejection, 'no other proof of [retaliation] is required.' 970 F.2d at 493." St. Mary's Honor Center v. Hicks, 509 U.S. 702, 113 S.Ct. 2742, 125 L.Ed. 2d 407, 418-19 (1993) While this Commission is not legally compelled to find retaliation when the employer's reasons are disbelieved, it may do so, see id. at 419, and has done so in this case. See Finding of Fact No. 90.

62. Thus, under the McDonnell-Douglas analysis, the Commission has met its burden of persuasion with regard to establishing retaliation in violation of Iowa Code section 216.11.

VIII. Credibility and Testimony:

63. In addition to the factors mentioned in the findings of fact on credibility, the Administrative Law Judge has been guided by the following principles: First, it has been recognized that, when some witnesses have a relationship with one or the other of the parties which might color their testimony, the testimony of those witnesses who are disinterested will often be entitled to the greatest weight. See, Lareau & Sacks, Assessing Credibility in Labor Arbitration, 5 The Labor Lawyer 151, 178-79 (1989); See also Kaiser v. Strathas, 263 N.W.2d 522, 526 (Iowa 1978)(interest of witness, remote or otherwise may be taken into account). See Findings of Fact Nos. 102-104, 108, 113.

64. Second, "[w]hen the trier of fact . . . finds that any witness has willfully testified falsely to any material matter, it should take that fact into consideration in determining what credit, if any, is to be given to the rest of his testimony." Arthur Elevator Company v. Grove, 236 N.W.2d 383, 388 (Iowa 1975). "[T]he facts disputed in litigation are not random unknowns in isolated equations--they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in 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).

65. This case provides an example of the application of this principle. Because of Respondent Jim Lacona's willfully false denial of knowledge of sexual harassment, his testimony with respect to his knowledge of the events of October 15 and 16, 1993 and his communications with Charles Lacona were also found to be false. See Findings of Fact Nos. 73, 77. Charles Lacona's unreliable testimony, possibly due to a bad memory, on the reasons for complainant's discharge, also affected the weight given his testimony on other matters. See Findings of Facts Nos. 63, 79-81, 89. Cf. Fuentes v. Perskie, 32 F.3d 759, 764, 65 Fair Empl. Cas. 890, 894 at n.7 (3rd Cir. 1994)(pretext case--"factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons even if no evidence undermining those remaining rationales in particular is available.").

66. Third, "[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); accord Nadler v. City of Mason City, 387 N.W.2d 587, 591 (Iowa 1986); Loudon v. Hill, 286 N.W.2d 189, 193 (Iowa 1979)("Evidence need not be believed even when it is not contradicted."); Moser v. Brown, 249 N.W.2d 612, 616 (Iowa 1977)("It is well settled the finder of facts is not bound to accept testimony as true because it is not contradicted."). In determining whether such testimony is credible, the factfinder may consider other facts and circumstances in the evidence. Platter v. Minneapolis & State L. R. Co., 102 Iowa 142, 151, 157, 143 N.W. 992 (1913). See Findings of Fact Nos. 69, 71..

67.

> While . . . the trier of fact is not warranted in arbitrarily or capriciously rejecting the testimony of the witness, neither is it required to accept and give effect to testimony which it finds to be unreliable although uncontradicted. Testimony may be unimpeached by any direct evidence to the contrary and yet be so contrary to the natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in the evidence, or so contradictory within itself, as to be subject to rejection by the . . . trier of the facts.
>
> . . .
>
> The [factfinder] . . . might well scrutinize closely such testimony as to its credibility, taking into consideration all the circumstances throwing light thereon, such as the interest of the witnesses, remote or otherwise.

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

68. Fourth, 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).

69. Fifth,

> 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.

70. Sixth, witness demeanor can be used in evaluating witness testimony. 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). See Anderson v. City of Bessemer City, 470 U.S. 564, 575, 37 Fair Empl. Prac. Cas. 396 (1985); Libe v. Board of Education, 350 N.W.2d 748, 750 (Iowa Ct. App. 1984). Caution must be exercised, however, when using demeanor clues with respect to determining witness credibility as many traditional demeanor clues and notions are false. See, Lareau & Sacks, Assessing Credibility in Labor Arbitration, 5 The Labor Lawyer 151, 154-55. (1989). For example, "research shows pleasant facial characteristics are among the characteristics of those who lie." Id. at 155. Witness who either don't know what they are talking about or are liars may display a confident demeanor. Id. at 154. See Findings of Fact Nos.98-99, 103.

71. Seventh,

> The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.
>
> . . .
>
> The rule that it is for the [factfinder] to reconcile the conflicting testimony of a witness does not apply where the only evidence in support of a controlling fact is that of a witness who so contradicts himself as to render finding of facts thereon a mere guess. We may concede that, ordinarily, contradictory statements of a witness do not make an issue of fact; and that such situation may deprive the testimony of all probative force.

State v. Smith, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993)(quoting Graham v. Chicago & Northwestern Ry Co., 143 Iowa 604, 615, 119 N.W. 708, 711 (1909) and State ex rel Moehnick v. Andiroli, 216 Iowa 451, 249 N.W. 379 (1933)). The damaging effect of self-contradictory testimony is noted in the findings of fact. See Findings of Fact Nos. 62, 76, 79, 81-82, 84, 87-88, 102, 108.

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

73. Such deference is given because the administrative adjudicator who views the witnesses and observes their demeanor at the hearing is "in a far superior position to determine the question of credibility than is this court." Libe v. Board of Education, 350 N.W.2d 748, 750 (Iowa Ct. App. 1984). "Factual disputes depending heavily on the credibility of witnesses are best resolved by the trial court which has a better opportunity to evaluate credibility . . ." Capital Savings & Loan Assn. v. First Financial Savings & Loan Assn., 364 N.W.2d 267, 271 (Iowa Ct. App. 1984)(quoted in Board v. Justman, 476 N.W.2d 335, 338 (Iowa 1991)).

IX. Compensation:

74. The Commission has the authority to make awards of backpay. Iowa Code S 216.15(8)(a). In making such awards, interim earnings and unemployment compensation received during the backpay period are to be deducted. Id. The Complainant bears the burden of proof in establishing his or her damages. Diane Humburd, 10 Iowa Civil Rights Commission Case Rpts. 1, 9 (1989)(citing Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). See Children's Home v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Diane Humburd at 10 (citing e.g. EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.Y. 1976), aff'd mem., 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920

(1977)). This the Complainant has done. See Findings of Fact No. 123. With respect to her tip income, Complainant Hoffman was required to report all tips to her employer. IRS, Your Federal Income Tax For Individuals 65 (1995). The reported tips reflected on her W-2's (social security tips) were considered to more accurately represent her actual tips than the amounts reflected in her memory. See Finding of Fact No. 115.

75. The burden of proof for establishing the interim earnings, including unemployment insurance payments, of the Complainant rests with the Respondent. Diane Humburd at 10 (citing Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). The Respondent also bears the burden of proof for establishing any failure of the Complainant to mitigate damages. Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Commission may, as it has done here, choose to provide evidence of interim earnings the Complainant is willing to concede. Diane Humburd at 10. See Findings of Fact Nos 124-27.

76. The award of backpay in employment discrimination and retaliation 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 or retaliation]." 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 [retaliation or] 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.

77. "Iowa Code section 216.15(8) gives the Commission considerable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A [now 216]." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 531 (Iowa 1990). The Iowa Supreme Court has approved two basic principles to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Id. at 530-531. "It suffices for the [agency] to determine the amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. at 531 (Quoting with approval Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973)). These principles were followed here. See Findings of Fact Nos. 115-30.

78.

> [A] back pay period terminates when the [complainant] obtains comparable employment, and will not resume if [complainant] voluntarily quits . . . a new, better paying position. The back pay period may also be terminated when the [complainant] ceases to look for alternative employment.

Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 531 (2nd ed. 1989)(emphasis added). If a Respondent shows that a Complainant unjustifiably quits a job, the minimum earnings which would have been accrued in that position should be treated as interim earnings and deducted from the back pay award. EEOC v. Riss International, 35 Fair Empl. Prac. Cas. 423, 425-26 (W.D. Mo. 1982). "[T]he back pay provision is income replacing and . . . quitting a job for reasons unrelated to amount of income or further mitigating damages (absent discriminatory conditions or other justifying factors) should not entitle a party to additional back pay." Id. at 426 (emphasis added).

79. Complainant did quit subsequent employment with Cheddars because the pay was substantially less than she received in her former position with Respondent Mama Lacona's West. See Findings of Fact Nos. 21. Under the authorities cited above, Complainant's back pay should neither terminate as of this quit nor should the earnings which would have accrued in this position after the quit be treated as interim earnings. See also Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1235-36, 41 Fair Empl. Prac. Cas. 341, 347 (7th Cir. 1986)(leaving lower paying work does not affect back pay); Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 72 (1990)(same-waitress quit subsequent lower paying job).

80. Complainant later quit work with Red Lobster for a combination of pay reasons and her encounter with a blizzard. This would not have resulted in a quit from her employment with Respondent Mama Lacona's-West. See Finding of Fact No. 117. Complainant continued to search for work after this quit. See Findings of Fact Nos. 118. Under these circumstances complainant's back pay should neither terminate as of this quit nor should the earnings which would have accrued in this position after the quit be treated as interim earnings. See Baggett v. Program Resources, Inc., 806 F.2d 178, 42 Fair Empl. Prac. Cases 648, 651 (8th Cir. 1986)(back pay continued to plaintiff who quit job to go to Florida to get married and find other work); Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 72 (1990)(back pay continued to former waitress who quit subsequent job hairdressing dying patients as it was too distressing). Cf. EEOC v. Exxon Shipping Co. 745 F.2d 967, 36 Fair Empl. Prac. Cas. 330, 340 (5th Cir. (1984)(back pay continued despite refusal of job which required complainant to work every weekend when she had been discriminatorily denied a job which required only occasional weekend work). However, once Complainant Hoffman quit her employment at the Top Hat Lounge for a personal reason which would have also resulted in her leaving Respondent Mama Lacona's-West, her back pay terminated. See Finding of Fact No. 118.

81. Medical insurance premium costs were also awarded. Such premiums are one form of back pay compensation. Belton, Remedies in Employment Discrimination Law 338-39 (1992). The Commission has the option of either (a) retaining jurisdiction of the case in order to obtain the amount due for medical premiums and issue a supplemental order stating that amount, or (b) ordering Respondent Mama Lacona's-West to provide the information by affidavit, supplement the record by this means, and allow the district court

on enforcement of the Commission's order to determine the amount due in accordance with Finding of Fact Number 130. City of Des Moines Police Department v. Iowa Civil Rights Commission, 343 N.W.2d 836, 839-40 (Iowa 1984). The Commission chooses the latter as the more practical alternative.

X. Emotional Distress:

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

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

83. Like back pay, the award of emotional distress damages may serve an important secondary purpose. The reasonably certain prospect of an emotional distress damages award, when such damages are proven, serves to encourage employers to evaluate their own procedures to ensure they are nondiscriminatory and nonretaliatory. The failure to award such proven damages will remove this incentive and may encourage discriminatory or retaliatory practices. See 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 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)(secondary purpose of back pay).

83. The Iowa Supreme Court's observations on the emotional distress resulting from wrongful discharge are equally applicable to the distress resulting from sexual harassment and retaliatory discharge:

> [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).

84. The emotional distress sustained by the Complainant is substantial and serious. See Finding of Fact Nos. 138-39. Since even mild emotional distress resulting from discrimination is to be compensated, it is obvious that compensation must be awarded here. Darrell Harvey, 11 Iowa Civil Rights Commission Case Reports 65, 79 (1994); Alice Peyton, 11 Iowa Civil Rights Commission Case Reports 98, 124 (1994); Tammy Collins, 11 Iowa Civil Rights Commission Case Reports 128, 137 (1994); Stacey Davies, 11 Iowa Civil Rights Commission Case Reports 143, 157 (1994); Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 73 (1990); Robert E. Swanson, 10 Iowa

Civil Rights Commission Case Reports 36, 45 (1989); Ann Redies, 10 Iowa Civil Rights Commission Case Reports 17, 28 (1989). See Hy Vee , 453 N.W.2d at 525-26(citing Niblo, 445 N.W.2d at 356-57)(adopting reasoning that because public policy requires that employee who is victim of discrimination is to be given a remedy for his complete injury, employee need not show distress is severe in order to be compensated for it)).

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

85. Among the many forms of emotional distress which may be compensated are "anger," "upset," "hurt," Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-29 (1982)(citing Fraser and 121-129 Broadway Realty v. New York Division of Human Rights, 49 A.D.2d 422, 376 N.Y.S.2d 17 (1975)); see also Gaudry v. Bureau of Labor & Industries, 617 P.2d 668, 670-71 (Or. Ct. App. 1980); "frustration," Gaudry, 617 P.2d at 670-71; see also Boals v. Gray, 577 F.. Supp. 288, 296 (N.D. Ohio 1983); "discomfort," id., "humiliation, wounded pride, and the like." Niblo, 445 N.W.2d at 355. See also Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 571 (8th Cir. 1989)(upset and hurt feelings); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 550 (9th Cir. 1980)(upset).

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

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

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

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

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

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

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

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

90. In this case there was direct evidence of the emotional distress caused Complainant by the sexual harassment. This evidence took the form of her testimony describing her frustration and anger at being harassed. It was also provided by David Lihs's testimony describing Complainant Hoffman "blowing up" at Lopez for the harassment. See Finding of Fact No. 137. There was also direct evidence, in the form of Complainant Hoffman's testimony, which told of the tears and the shock which resulted from her discharge. See Findings of Fact Nos. 139-40. Although other evidence is also relied upon in this case to establish the distress caused by the harassment and discharge, "[t]he [complainants'] own testimony may be solely sufficient to establish humiliation or mental distress." Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1273, 27 Fair Empl. Prac. Cases 487, 491 (8th Cir. 1981). See also Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977); Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. Ill. 1981); Belton, Remedies in Employment Discrimination Law 415 (1992).

91. Emotional distress may also be established by circumstantial evidence. Tallarico v. Trans World Airlines, Inc., 881 F.2d at 571. See Howard v. Adkison, 887 F.2d 134, 139 (8th Cir. 1989)(damages may be proper because distress may be inferred from circumstantial evidence even where "the actual trial testimony contained no formal evidence of actual damage."); Sisneros v.. Nix, 884 F. Supp. 1313, 1344 (S.D. Iowa 1995)(same). See also Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d at 552 (race discrimination against Black male--distress inferred solely from the circumstances). Circumstances from which emotional distress may be inferred include the intense, repetitive, degrading and humiliating verbal and physical sexual harassment which complainant was subjected to every day, her harassers' ridicule when she asked them to stop, and the failure of management to remedy the harassment. See Findings of Nos. 131-136. Other circumstances indicative of emotional distress include the Complainant's being discharged due to her resistance to sexual harassment, a circumstance which was exacerbated by the kitchen staff's blaming her for the discharge of David Lihs for similar reasons, and the economic loss and other burdens associated with loss of employment. See Findings of Fact Nos. 141-43. See Conclusions of Law No. 98.

92. Of course, both forms of evidence in this case must be weighed together when determining the existence, nature and extent of the emotional distress suffered by the complainant: "[Emotional distress] can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d 634, 636-37 (7th Cir. 1974)(quoted with approval in Blessum, 295 N.W.2d at 845 (Iowa 1980)). "[I]n determining whether the evidence of emotional distress is sufficient to support an award of damages, we must look at both the direct evidence of emotional distress and the

circumstances of the act that allegedly caused that distress. . . . The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress." United States v. Balistrieri, 981 F.2d at 932, 933 (emphasis added)(holding that distress damage awards to housing discrimination testers were justified despite the "'somewhat general and conclusory nature" of their testimony because "racial discrimination . . . . is the type of action that one could reasonably expect to humiliate or cause emotional distress to a person."). Since sexual harassment and retaliatory discharge for opposing such harassment are precisely those kinds of inherently degrading or humiliating actions from which distress may be inferred, the combination of those circumstances and somewhat conclusory testimony (weaker than the evidence in this case) will support an award of emotional distress damages. See Schafran, Credibility in the Courts: Why is There a Gender Gap?, Judge's Journal, Winter 1995, at 5, 42 ("Sexual harassment, even when it is strictly verbal, causes significant harm to the victim."). This approach is consistent with Iowa law, which provides that, even where "the express testimony of distress is not strong," Dickerson v. Young, 332 N.W.2d 93, 99 (Iowa 1983), the presence of other facts which "would inevitably have a strong impact on the emotions of an individual" are substantial evidence of emotional distress. Id.

E. Determining the Amount of Damages for Emotional Distress:

93.

> [D]etermining the amount to be awarded for [emotional distress] is a difficult task. As one court has suggested, "compensation for damages on account of injuries of this nature is, of course, incapable of yardstick measurement. It is impossible to lay down any definite rule for measuring such damages.

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

94. Although awards in other cases have little value in determining the amount an award should be in another specific case, Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990), one source lists many examples of such awards, ranging from $500 to $150,000, for emotional distress in discrimination cases. See e.g. Belton, Remedies in Employment Discrimination Law 416 n.78 (1992)(listing awards in 19 cases; 17 of which were for $10,000 or over). While any award should be tailored to the particular case, one commentator has noted that "a $750 award for mental distress is 'chump change.' Awards must be made which are large enough to compensate the victim of discrimination adequately for the injury suffered." 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 60-61 (1982).

95. When making an award for emotional distress in sexual harassment cases, care must be taken to avoid the failure of our legal system to extend "consequential credibility" to women. Schafran, Credibility in the Courts: Why is There a Gender Gap?, Judge's Journal, Winter 1995, at 5, 40. "Consequential credibility" involves "being seen as someone of consequence, someone who matters, someone to be taken seriously. Part of being taken seriously is having your harms and injuries taken seriously--not devalued and trivialized." Id. at 40-41.

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

97. An award of damages for emotional distress may, however, be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). Nor need there be evidence of an effect on social activities. Marable v. Walker, 704 F.2d 1219, 1220 (11th Cir. 1983).

98. Nevertheless, the evidence of economic loss, involuntary unemployment, crying, the adverse effect of the discrimination on the Complainant's work, the number of persons exposed to the unlawful discrimination, the number of times the Complainant was exposed to behavior inducing embarrassment or humiliation, the discrimination's occurrence in the presence of others, the abusiveness of the actions and language directed toward the Complainant, and her feelings of anger or frustration are among those factors in this case which indicate the existence of serious and substantial emotional distress justifying an award of the magnitude made in this case.. See Blessum, 295 N.W.2d at 845 (Iowa 1980)(economic loss, effect on work); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988)(economic loss); Block v. R.H. Macy & Co., Inc., 712 F.2d at 1245 (unemployment and resulting loss); Rodgers v. General Motors Corp., 575 F. Supp. 12, 16 (W.D. Mich. 1982)(same); Aumiller v. University of Delaware, 434 F. Supp. 1273, 1310 (D. Delaware 1977)(same); Dickerson v. Young, 332 N.W.2d 93, 98 (Iowa 1983)(crying); Tallarico v. Trans World Airlines, Inc., 881 F.2d at 571 (crying); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d at 550, 552 (crying and economic loss); Dorothy Abbas, 12 Iowa Civil Rights Commission Case Reports 1, 15-16, 24 (1994)(crying, economic loss, fear of economic loss); Kentucky Comm'n On Human Rights v. Barbour, 587 S.W.2d 849, 852 (Ky. Ct. App. 1979)(number of persons exposed to discrimination; number of times complainant exposed to behavior inducing embarrassment or humiliation; whether the acts of humiliation occurred in presence of others or otherwise resulted in public exposure; presence or absence of aggravating factors such as abusive language); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases at 40-42 (feelings of anger or frustration, effect on work, exposure to outrageous or abusive conduct; number of times complainant exposed to discrimination; whether discriminatory acts occurred in

presence of others). Cf. Iowa Code S 96.2 (legislative recognition of the "crushing" burden of "involuntary unemployment"); Dobbs, Handbook on the Law of Remedies 530-31 & n.24 (1973)("The amount of the recovery is usually based on the severity of the actions and language used by the defendant.")(quoting Sutherland v. Kroger Co., 110 S.E.2d 716 (W.Va. 1959)).

99.

> 45. The two primary determinants of the amount awarded for damages for emotional distress are the severity of the distress and the duration of the distress. Bean v. Best, 93 N.W.2d 403, 408 (S.D. 1958)(citing Restatement of Torts § 905). "'In determining this, all relevant circumstances are considered, including sex, age, condition of life, and any other fact indicating the susceptibility of the injured person to this type of harm.' And continuing 'The extent and duration of emotional distress produced by the tortious conduct depend upon the sensitiveness of the injured person.'" Id. (quoting Restatement of Torts S 905). [See also Restatement (Second) of Torts S 905 (comment i).]

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 166 (1992). The severity and duration of distress, as well as other factors, were taken into account in making the damages award in this case. See Findings of Fact Nos. 131-44.

XI. Other Remedies:

100. Violation of Iowa Code sections 216.6 and 216.11 having been established, the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code S 216.15(8). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "An appropriate remedial order should close off 'untraveled roads' to the illicit end and not 'only the worn one.'" Id. at 771. In addition to the illustrative examples of remedial action enumerated under Iowa Code section 601A.15(8)(a), the Commission has the authority to require Respondents to develop and implement an educational program to prevent future instances of harassment. Lynch v. City of Des Moines, 454 N.W.2d 827, 835-36 (Iowa 1990).

XII. Attorneys Fees:

101. The Complainant having prevailed, she is entitled to an award of reasonable attorney's fees. Iowa Code § 216.15(8). If the parties cannot stipulate to the amount of these fees, they should be determined at a separate hearing. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987). The Commission must expressly retain jurisdiction of the case in order to determine the actual amount of attorney's fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees. City of Des Moines Police Department v. Iowa Civil Rights Commission, 343 N.W.2d 836, 839 (Iowa 1984).

XIII. Interest:

A. Pre-Judgment Interest:

102. The Iowa Civil Rights Act allows an award of actual damages to persons injured by discriminatory practices. Iowa Code S 216.15(8)(a)(8). Pre-judgment interest is a form of damages. Dobbs, Hornbook on Remedies 164 (1973). It "is allowed to repay the lost value of the use of the money awarded and to prevent persons obligated to pay money to another from profiting through delay in litigation." Landals v. Rolfes Company, 454 N.W.2d 891, 898 (Iowa 1990). Pre-judgment interest is properly awarded on an ascertainable claim. Dobbs, Hornbook on Remedies 166-67 (1973). Because the amount of back pay due Complainant at any given time has been an ascertainable claim since the time her employment ended, pre-judgment interest should be awarded on the back pay. Such interest should run from the date on which back pay would have been paid if there were no discrimination. Hunter v. Allis Chalmers Corp., 797 F.2d 1417, 1425-26 (7th Cir. 1986)(common law rule). The method of computing pre-judgment interest is left to the reasonable discretion of the Commission. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 543 (2nd ed. 1989). No pre-judgment interest is awarded on emotional distress damages because these are not ascertainable before a final judgment. See Dobbs, Hornbook on Remedies 165 (1973).

B. Post-Judgment Interest:

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

XIV. Hearing Costs:

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

a. The daily charge of the court reporter for attending and transcribing the hearing.

b. All mileage charges of the court reporter for traveling to and from the hearing.

c. All travel time charges of the court reporter for traveling to and from the hearing.

d. The cost of the original of the transcripts of the hearing.

e. Postage incurred by the administrative law judge in sending by mail (regular or certified) any papers which are made part of the record.

161 IAC 4.7(3).

105. Since the Commission and the complainant have prevailed in this case, an order awarding contested case costs is appropriate. The record should be held open so a bill of costs may be submitted after this decision becomes final. See Connie Zesch-Luense, 12 Iowa Civil Rights Commission Case Reports 160, 173 (1994).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Iowa Civil Rights Commission and the Complainant, Debra Hoffman, are entitled to judgment because they have established that the prohibition against sex discrimination in employment, set forth in Iowa Code section 216.6, was violated by the Respondents Mama Lacona's-West, Jim Lacona, and Joel Lopez, and that the prohibition against discrimination or retaliation directed toward persons who lawfully oppose discrimination, set forth in Iowa Code Section 216.11, was violated by Respondent Mama Lacona's-West.

B. Complainant Hoffman is entitled to a judgment of two thousand seven hundred seventy-three dollars and seventy-seven cents ($2773.77) in back pay for the loss resulting from her retaliatory discharge by Respondent Mama Lacona's-West.

C. Complainant Hoffman is entitled to a judgment of seven thousand five hundred dollars ($7500.00) in compensatory damages against Respondent Mama Lacona's-West for the emotional distress she sustained as a result her retaliatory discharge by that Respondent.

D. Complainant Hoffman is entitled to a judgment of twenty thousand dollars ($20000.00) in compensatory damages against Respondents Mama Lacona's-West, Jim Lacona, and Joel Lopez for the emotional distress she sustained as a result of the sexual harassment for which these Respondents were responsible.

E. Interest at the rate of ten percent per annum shall be paid by the Respondent Mama Lacona's-West to Complainant Hoffman on her award of back pay commencing on the date payment would have been made if Complainant Hoffman had remained in her employment with Mama Lacona's-West and continuing until date of payment.

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

G. The Respondent Mama Lacona's-West shall provide, by affidavit, the amount for one half the total premium cost for health insurance which would have been provided by the Respondent for the Complainant if her employment had continued for the period from November 1, 1993 to December 20, 1994. On enforcement of the Commission's order, this affidavit shall be provided to the district court for determining the amount of health insurance premiums to be awarded Complainant Hoffman. Such amount shall then be paid by Respondent Mama Lacona's-West.

H. Within 45 calendar days after the date of this order, provided that agreement can be reached between the parties on this issue, the parties shall submit a written stipulation stating the amount of attorney's fees to be awarded Complainant's attorneys. If the parties cannot agree on a full stipulation to the fees, they shall so notify the Administrative Law Judge in writing and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of the determining the proper amount of fees to be awarded. If no written notice is received by the expiration of 45 calendar days from the date of the final order in this case, the Administrative Law Judge shall schedule a conference in order to determine the status of the attorneys fees issue and to determine whether an evidentiary hearing should be scheduled or other appropriate action taken. Once the full stipulation is submitted or the hearing is completed, the Administrative Law Judge shall submit for the Commission's consideration a Supplemental Proposed Decision and Order setting forth a determination of attorney's fees.

I. The Commission retains jurisdiction of this case in order to determine the actual amount of attorneys fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees.

J. Respondents are assessed all hearing costs allowed by Commission Rule 4.7(3) and which were actually incurred in the processing of this public hearing. The precise calculation of costs shall be as shown on the bill of costs which is to be issued under the executive director's signature after this decision becomes final. The record shall be held open for this purpose.

K. Respondents Mama Lacona's West, Jim Lacona, and Joel Lopez are hereby ordered to cease and desist from any further practices of sex discrimination or retaliation.

L. Respondent Mama Lacona's -West shall post, within 60 days after the date of this order, in a conspicuous place at its location at Clive, Iowa, in areas readily accessible to and frequented by employees, the notice, entitled "Equal Employment Opportunity is the Law" which is available from the Commission.

M. All of Respondent Mama Lacona's-West management personnel, including Respondent Jim Lacona as well as all present incumbents of those positions held in 1993 by Charles Lacona, Joe Lacona, and David Lihs, shall be directed to read, and shall read, within 90 days after the date of this order, the leaflet Sexual Harassment in the Workplace which is available from the Commission. In addition, all food servers and kitchen staff shall be provided with and directed to read the publication Sexual

Harassment in the Workplace. Respondent Mama Lacona's West shall, at its own cost, make a Spanish translation of this publication available to members of the kitchen staff whose primary language is Spanish.

N. Respondent Mama Lacona's-West shall, within 180 days after the date this order, develop a proposed plan of education and training for all management personnel, including Respondent Jim Lacona as well as all present incumbents of those positions identified in paragraph M above, in the prevention, detection, and correction of sexual harassment; and pertinent grievance procedures in regard to such harassment. This plan shall be subject to the review and approval of the Commission's representative. The plan shall be implemented within 210 days of this order unless an extension is approved by the Commission's representative.

O. Respondent Mama Lacona's-West shall, within 180 days of this order, develop a proposed plan of education and training for all personnel, informing them about what behavior constitutes sexual harassment in employment and that this behavior is prohibited. During this education and training, all employees will be informed of appropriate grievance procedures to follow in the event they become aware of such harassment. They shall also be informed in writing that those employees who sexually harass other employees shall be subject to discipline up to and including immediate discharge from employment. Respondent Mama Lacona's West shall, at its own cost, make a Spanish translation of this policy available to members of the kitchen staff whose primary language is Spanish. This plan shall be subject to the review and approval of the Commission's representative. The plan shall be implemented within 210 days of this order unless an extension is approved by the Commission's representative.

P. Respondent Mama Lacona's-West shall develop, within 120 days of the date of this order, written policies on sexual harassment which shall include an effective grievance procedure. Copies of the grievance procedure shall be provided to each employee. Respondent Mama Lacona's West shall, at its own cost, make a Spanish translation of this grievance procedure available to members of the kitchen staff whose primary language is Spanish. These policies shall be subject to the approval of the Commission. In the event, in the sole judgment of the Commission's representative, agreement cannot be reached on the language of such policy, the version drafted by the Commission shall be adopted by the Respondent.

Q. Respondent Mama Lacona's-West shall file a report with the Commission within 210 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs B through G and L through P inclusive of this order.

Signed this the 28th day of March 1996.

_____

DONALD W. BOHLKEN
Administrative Law Judge
Department of Inspections and Appeals

2nd Floor, Lucas Bldg.
Des Moines, Iowa 50319-0083
515-281-8469
FAX: 515-281-4477

FINAL DECISION AND ORDER:

1. On May 9, 1996, the Iowa Civil Rights Commission, at its regular meeting, adopted, with the following amendments, the Administrative Law Judge's proposed decision and order which is hereby incorporated in its entirety as if fully set forth herein.

2. The amendments are as follows:

A. Paragraph 138 of the Findings of Fact is amended by striking the words "twenty thousand dollars ($20,000.00)" and replacing the stricken words with the words "seven thousand five hundred dollars ($7500.00)."

B. Paragraph 47 of the Conclusions of Law is amended to read in its entirety as follows:

47. In determining the legal effect of the prohibitions against persons discriminating in employment on the basis of sex, the Act is to be "construed broadly to effectuate its purposes." Iowa Code S 216.18. As an individual, Respondent Joel Lopez is a "person." See Iowa Code S 216.2(10). Thus, Respondent Joel Lopez is liable as a person who otherwise discriminated on the basis of sex, Iowa Code S 216.6(1)(a), through his acts of sexual harassment perpetrated against the Complainant and other employees at Mama Lacona's-West. Lopez's liability is established by proof of the first four elements of the sexual harassment claim because these elements define the duty violated by him, i.e. the duty to refrain from committing acts of sexual harassment. See Conclusion of Law No. 15.

C. Paragraph D of the Decision and Order is amended by striking the words "twenty thousand dollars ($20,000.00)" and replacing the stricken words with the words "seven thousand five hundred dollars ($7500.00)." Paragraph D of the Decision and Order is also amended by striking the words "Jim Lacona,".

IT IS SO ORDERED.

Signed this the ____th day of _____, 1996.

_____
Dale Repass
Chairperson
Iowa Civil Rights Commission

211 E. Maple
Des Moines, Iowa 50319