BEFORE THE IOWA CIVIL RIGHTS COMMISSION

JOHN MACK BURTON, Complainant,

VS.

CONTRACT CLEANERS, INC., WALLACE SYKES, and the HENKEL CORPORATION, Respondents.

CP # 12-82-9357

This matter came before the Iowa Civil Rights Commission on the amended Complaint filed by John Mack Burton against the Respondents Contract Cleaners, Inc., Wallace Sykes, and the Henkel Corporation alleging discrimination on the bases of race and age in employment.

Complainant Burton alleges that the Respondents Contract Cleaners, Inc., Wallace Sykes, and Henkel Corporation are liable for his discharge from the position of maintenance person due to his age and his race.

A public hearing on this complaint was held on September 5, 1989 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Conference Room of the Iowa Civil Rights Commission's offices in Des Moines, Iowa. The Complainant, John Burton, was represented by Roger J. Kuhle, Attorney at Law. The Respondent Henkel Corporation was represented by Larry L. Shepler, Attorney at Law. Respondent Wallace Sykes was neither present nor represented. The status of Respondent Contract Cleaners, Inc. will be discussed in the Findings of Fact. The Iowa Civil Rights Commission was represented by Rick Autry, Assistant Attorney General.

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

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

In Considering witness credibility, the Administrative Law Judge has carefully scrutinized all testimony, the circumstances under which it was given, and the evidence bolstering or detracting from the believability of each witness. Due consideration has been given to the state of mind and demeanor of each witness while testifying, his or her opportunity to observe and accurately relate the matters discussed, the basis for any opinions given by the witness, whether the testimony has in any meaningful or significant way,been supported or contradicted by other testimony or

documentary evidence, any bias or prejudice of each witness toward the case, and the manner in which each witness will be affected by a particular decision in the case.

FINDING OF FACT

Jurisdictional Facts:

1. The Complainant, John Burton, filed a verified complaint CP # 12-82-9357 with the Iowa Civil Rights Commission, on December 7, 1982, alleging violation of Iowa Code Chapter 601A by discrimination on the bases of race and age in the termination of his employment by Contract Cleaners, Inc. (Complaint). The complaint was subsequently amended on April 22, 1983 to name Contract Services Limited and Wallace Sykes as additional Respondents. (Amended Complaint). (It should be noted that Complainant filed a voluntary dismissal of his complaint against Contract Services Ltd. on July 11, 1989.) It was further amended on January 3, 1985 to add Henkel Corporation as a Respondent. (Amended Complaint). The Complaint's termination date is stated in the Complaint as occurring on or about November 18, 1982. (Complaint). Official Notice is taken of the fact that there are nineteen days between November 18, 1982 and December 7, 1982. Fairness to the parties does not require an opportunity to contest this fact. The complaint was investigated. (Notice of Hearing). Official notice was taken at hearing that probable cause was found. (Tr. at 119). Conciliation was attempted and failed. (Notice of Hearing).

2. The Notice of Hearing, which through inadvertence did not include a copy of the complaint, was issued on February 21, 1989. Another copy of the Notice of Hearing, with a copy of the complaint, was mailed on March 6, 1989. The final hearing date was set, after a continuance, by a scheduling memorandum order dated July 24, 1989.

3. Official notice was taken at the hearing of the Notice of Hearing. (Tr. at 111). Official notice was also taken of the document indicating Notice of Hearing was sent to Wallace Sykes by certified mail letter number 5lOO8l and of the return receipt received from that letter. (Tr. at 111). This return receipt is dated March 3, 1989 and signed by Shirley Sykes.

4. Official notice was also taken of certified letter number 32400 addressed to Wallace Sykes informing him that he was being provided, with the letter, a second copy of the Notice of hearing and a copy of the complaint. (Tr. at 112). Official Notice is now taken of the return receipt from that letter, dated March 8, 1989, and signed by Shirley Sykes. Fairness to the parties does not require that they be given an opportunity to contest that fact. Finally, official notice was taken at the hearing of the scheduling memorandum order dated July 24, 1989 which indicates it was mailed to Wallace Sykes.

5. Wallace Sykes was neither present nor represented at the hearing. No answer or other written response to the Notice of Hearing has been filed by Mr. Sykes.

Background of Contract Cleaners. Inc. and John Burton:

6. Contract Cleaners, Inc. was engaged in contract cleaning of meat packing plants. It provided janitorial services for those facilities. (Cp. Ex. A). In June of 1982, it provided such services to the Swift Independent Packing Company plant in Des Moines, Iowa.

7. Complainant John Burton is a Black male born on August 5, 1938. He began his employment with Contract Cleaners, Inc. on June 7, 1982. (Exhibit K-Request for Admissions by Respondents Henkel Corporation and Wallace Sykes, hereinafter referred to as "Admissions.")* On November 18,1982, the date of his discharge from Contract Cleaners, Inc., he was 44 years old. (Admissions).

8. John Burton was hired and spent his entire employment as part of the "kill floor crew" a labor cleanup crew, i.e. his job was to clean up spills and residues remaining from the butchering and processing of cattle. (Tr. at 17, 65, 67). This is an unskilled job. Complainant Burton would first hose down an area to be cleaned with a pressure hose spraying a chemical and soap solution. A water hose would then be used to rinse off the area cleaned. A broom is used to push meat and fat residues into a pile. These residues are then carried away with a shovel. (Tr. at 86-87).
9. Complainant Burton was initially assigned to the rendering area and worked there, unaccompanied by other employees, until approximately August of 1982. (Tr. at 67-69). He was then assigned to clean the "saw area" where he remained until his discharge. (Cp. Ex. 1; Tr. at 67).

Qualifications of Complainant Burton:

10. Complainant Burton has an eighth grade education. (Tr. at 17). His last position immediately prior to obtaining employment with Contract Cleaners was work for approximately one year as a dishwasher in a restaurant in Des Moines. (Tr. at 18). After he arrived in Des Moines from Missouri, Complainant Burton also did some moving jobs for his brother. (Tr. at 64). Before that, he had worked as a driver's helper for a moving company and as a forklift driver at a chemical plant's warehouse, both in Missouri. (Tr. at 18, 59-60).

Mr. Burton had also worked as an ironworker in California ending in approximately 1974. (Tr. at 51). He had worked two to three years as an apprentice ironworker and three to four years as a journeyman. (Tr. at 56). He had allowed his union card to lapse when he moved to Mexico, Missouri where there were no ironworker jobs available to him. (Tr. 57-58).

11. Inspectors at the Swift meat packing plant would write daily reports on areas which were not sufficiently cleaned and make them available to Contract Cleaners supervisors. (Tr. at 92). Until the day of his discharge, Complainant Burton had never been the subject of such a write-up. (Tr. at 32, 80). Until that day, he had also received no prior warnings on his job performance. (Tr. at 80, 115). He got along well with his supervisor in the rendering area, and with Darrell Morris, his second to last supervisor in the saw area (Tr. at 24, 69). He did not refuse overtime work or to help out wherever needed. (Tr. at 42).

12. On July 17,1983, Complainant Burton received a raise to $4.75 per hour. On August 14, 1982, Complainant Burton was given "leadman" status, which resulted in a $.50 per hour raise. (Cp. Ex. G; Tr. at 22-23, 38). This status resulted in new duties for Complainant Burton in

addition to his cleaning duties. (Tr. at 70). As leadman, he would conduct a joint walk-around with Randy, the supervisor above the Complainant's own supervisor, as the next shift came on looking for areas where cleaning had not been properly done. (Tr. at 70-71). If inadequately cleaned areas were found, they would touch them up. (Tr. at 70). In addition to this, Complainant would orient new people to the requirements of the job. (Tr. at 71). He would also fill in for laborers who did not show up for work. (Tr. at 74). At some time shortly before his termination, the Complainant was asked to, and did, give up his leadman status until his new supervisor, Wallace Sykes, was oriented to the position. (Tr. at 75). His hourly wage did not, however, decline between the time he rescinded the leadman status and his discharge. (Admissions; Tr. at 75-76, 80).

Racial and Age Composition of the Kill Floor Crew:

13. Throughout John Burton's employment the nine person kill floor crew was usually composed of approximately six black and three white employees. (Cp. Ex. 1; Tr. at 30, 67- 69). The ages and hire dates of the kill floor crew members as of the Complainant's termination on November 18,1990 are:

Name	AGE	DATE OF HIRE
F. Burney	59	05/25/76
J. Burton	44	06/07/82
J. Lyles	33	08/02/82
C. Burton	26	07/28/82
D. Morris	25	02/16/82
R. Millsap	21	06/05/82
G. Jones	20	10/11/82
D. Morris	20	03/09/82
W. Toner	18	11/13/82

(Cp. Ex. H; 1; Tr. at 69).

14. Payroll records indicate that three persons were hired by Contract Cleaners, Inc. within two weeks after Complainant Burton was discharged. The records do not show, however, their race or their work (ESP)assignment:

Name	Age at Hire	Date of Hire
J. Burton	27	12/01/82
K. Cooper	25	11/19/82
S. Collier	19	12/01/82

(Cp. Ex. H).

Events Occurring During the Period of November 11-18. 1982:

15. Wallace Sykes, a white male born on August 6, 1950 was hired as a supervisor by Contract Cleaners, Inc. on November 11, 1982. (Admissions; Cp. Ex. G). Complainant Burton was introduced to Mr. Sykes for the first time on November 16, 1982. For some unknown reason, Mr. Sykes was either introduced or the Complainant believed he was introduced as Douglas Humble. (Complaint; Tr. at 25). At that time, which was the first day Mr. Sykes acted as Complainant's supervisor, he stated that he had heard that Mr. Burton was a good worker and that he wanted Mr. Burton to teach a man he identified as his son, William Toner, everything he knew. (Tr. at 26, 28, 29, 80, 82). Mr. Toner is either the son, stepson or son-in-law of Mr. Sykes. (Admissions). He also informed Mr. Burton that the operation would be not be changed until he saw fit to change it. (Tr. at 116).

16. Mr. Sykes then introduced William Toner to the Complainant. (Tr. at 28). This was Mr. Toner's first day on the job also. (Tr. at 28, 29). William Toner was a white male born on May 25,1964. (Admissions; Cp. Ex. G). He was hired by Contract Cleaners on November 13,1982. (Admissions).

17.There was no further contact between Complainant Burton and Respondent Sykes until November 18, 1982. (Tr. at 30, 82, 84, 91-92). On November 17,1982, William Toner came to Complainant Burton and stated that his father, Wallace Sykes, had told him to come over and tell Burton to show him how to do everything in the area. (Tr. at 29, 85-86). In an effort to teach Mr. Toner how to do the job, Complainant Burton handed him the water hose he was using to clean the area and said "We'll start here." (Tr. at 29, 8586). This was Complainant Burton's usual method for teaching new employees their jobs. (Tr. at 29-30, 72).

18. He directed Mr. Toner to use the hose to wash residue off a table. (Tr. at 87). Toner's response was to reply "No, my Dad says 'show me,'" apparently meaning that he wanted to stand and watch while Complainant Burton did the work. (Tr. at 29, 88-89). He then handed the hose back to the Complainant and walked away from him. (Tr. at 30, 90). Complainant Burton had no further communication with Mr. Toner. (Tr. at 31, 91-92).

19. While on break on November 17, 1982, Complainant overheard "Randy," who was Respondent Sykes' supervisor, state that the kill floor crew was overstaffed and would have to be reduced. (Tr. at 35, 107).

20. At the beginning of the Complainant's shift on November 18, 1982, Wallace Sykes informed him that there had been criticism of his work by the inspectors in regard to two items.

(R. Ex. 2; Tr. at 35, 93). First, the "tail wash" area was not sufficiently clean. (Tr. at 93). Second, the wall behind a scale was dirty. (Tr. at 36, 95). This conversation occurred in the break room prior to Complainant Burton going to his work area. (R. Ex. 2).

21. The tail wash was not the area assigned to Complainant Burton to clean. (Cp. Ex. 1; Tr. at, 67, 94, 117). When Mr. Burton informed Respondent Sykes of this, Sykes replied that "any area I tell you to clean is your area."

Mr. Sykes had never told Mr. Burton to clean that area. (Tr. at 95).

22. The scale referred to was a "hot" scale located in the saw area where Complainant worked. (Admissions). This scale was a computerized scale which weighed meat and printed a slip of paper with the weight on it as the meat passes on a hook on a railing over the scale. (Tr. at 33). By November 17, 1982, Swift Independent Packing Company had a standing policy that the scale was not to be moved or cleaned by Contract Cleaners personnel. (Admissions; Tr. at 33). Although the Complainant was allowed to clean the floor under the scale and the walls around it, he was not to clean the scale or the area of the wall behind the scale where he would have to move the scale in order to clean it. (Tr. at 33-34).

23. On one prior occasion, Mr. Burton had moved the scale in order to clean. He and other Contract Cleaners employees and supervisors were then informed at a meeting that, by moving the scale, it was placed out of adjustment. The scale was shut down for approximately one day while Swift personnel readjusted it. (Tr. at 34). Complainant Burton and the others were informed that, if an individual moved the scale, Swift would revoke his pass into the plant, an action which would, in effect, end his employment. (Tr. at 36, 97). Only Swift personnel were to clean or move that scale. (Tr. at 34). As of November 18, 1982, Burton had never been told to move the scale in order to clean the wall behind. (Tr. at 1 1 6).

24. John Burton told Respondent Sykes that he had cleaned as far behind the scale as he could without moving the scale. Sykes replied that Burton could have moved the scale as it pulls away from the wall. (Tr. at 36). Burton indicated to Sykes that he had been told not to bother or move the scale. (Tr. at 96). Sykes reply was, in essence, that if he told the Complainant to move the scale he was to move it as Sykes was the supervisor. (Tr. at 97). At this point Burton told Sykes about his prior experiences with the scale and how Swift would pull his pass if he did move it. (Tr. at 36,97).Wallace Sykes said he would take the blame. (Tr. at 98). Burton said he would move the scale and clean the wall, if he had to.

(R. Ex. 2). He then asked Sykes to ask the night supervisor or maintenance personnel about it because he did not want to lose his pass. (R. Ex. 2; Tr. at 37, 100).

25. At this point, Respondent Sykes discharged Complainant Burton. (Admissions). He did so by telling him, "You're a smart aleck anyway. We don't have any use for you. So, I'm letting you go." (R. Ex. 2; Tr. at 37, 1 00-01).

26. When Complainant Burton arrived in the break room that day, William Toner was also in the break room. During the course of his conversation with Wallace Sykes, but prior to the actual discharge, Mr. Toner had left the break room and had begun to clean the saw area, which was the Complainant's assigned area. (Tr. at 37-38).

Evidence Produced By Respondent Fails to Articulate a Legitimate Non-Discriminatory Reason For Complainant's Discharge:

27. Respondent Henkel Corporation offered no witnesses of its own. Henkel Corporation's attorney did cross-examine Complainant Burton, who was the only witness to testify at the

hearing. Respondent Henkel also offered two exhibits. Only one of these exhibits, which consists of excerpts from the deposition of Complainant Burton, dealt with the reasons for Complainant's termination. (R. Ex. 2). The reliance on Complainant Burton's hearing and deposition testimony constitutes reliance on a witness who had no personal knowledge of the actual reasons for his discharge. He could only testify that certain reasons were stated to him.

28. None of the evidence produced by Respondent Henkel Corporation sets forth with any clarity or specificity the reasons for discharge of Complainant Burton. At most, the evidence provided, which is Complainant's testimony on cross- examination and on deposition, indicates that Wallace Sykes informed Complainant Burton that the reason for terminating him was that he "was a smart aleck anyway."

29. The term "smart aleck" is susceptible of different meanings. For example, it may refer to "an obnoxiously conceited person," The Random House Dictionary 841 (1978), or to a "would be clever person, a know-all," The Compact Edition of the Oxford English Dictionary 4066 (1971). With the evidence produced by Respondent Henkel it is impossible to ascertain what meaning Wallace Sykes applied to John Burton.

30. The language used by Wallace Sykes is conclusory language. It is not possible to ascertain from the evidence why Sykes believed Complainant Burton,,wan a "smart aleck." He stated the Complainant was a "smart aleck *anyway."* This language indicates Sykes' perception of Complainant might either relate to some aspect of Burton's response to Sykes comments immediately prior to his discharge or to some other actions of Complainant at another time, i.e. "regardless of what is being said now, you're a smart aleck." See The Compact Edition of the Oxford English Dictionary 95 (1971)(definitions of "anyway" and "anyhow"). Under these circumstances, the smart aleck" reason for discharge has no more specificity or clarity than if Sykes had simply stated that Mr. Burton was a "bad employee."

31. The statement "we don't have any use for you" appears to be simply another way of stating the Complainant is being discharged. If it was a reason for the discharge, it, like the "smart aleck" reason, is so vague and generalized it cannot be addressed because it does not set forth why there was no use for Complainant Burton. It is impossible, under the present record, to ascertain whether or not this was a reference to the possible reduction of the kill floor crew. See Finding of Fact No. 19. If it was, it does not state why Complainant Burton was the one selected for layoff.

Other Evidence of Reasons for Complainant's Termination:

32. The Complainant introduced four letters from Respondent Henkel Corporation to the Iowa Civil Rights Commission which make reference to whether or not Henkel had records relating reasons for Complainant Burton's termination and what those reasons were. (Cp. Ex. A, B, C, H). Letters to the Commission dated September 24, 1984 and January 21, 1985 state that Henkel's records indicate that Contract Cleaners Incorporated discharged Burton because he refused a supervisor's order to clean a wall. (Cp. Ex. A, B). Letters to the Commission dated January 30, 1986 and March 30, 1986, however, indicate that Henkel has no records concerning disciplinary actions taken by Contract Cleaners, Inc. (Cp. Ex. C, H). No actual records stating the reasons for

Complainant Burton's discharge were offered at hearing. Leaving aside the legal question of whether, given the failure of Respondent Henkel Corporation to articulate a legitimate non-discriminatory reason for Complainant's discharge, it is necessary to consider this evidence, the greater weight of the evidence demonstrates that Complainant Burton did not refuse his supervisor's order to clean a wall. Se Finding of Fact No. 24.

The "Smart Aleck" Reason:

33. Assuming that the evidence produced on the "smart aleck" reason was sufficient to articulate a legitimate, non-discriminatory reason for the discharge of Complainant Burton, the greater weight of the evidence demonstrates that Burton acted reasonably, and not as a "smart aleck," in his interactions with Wallace Sykes and William Toner. See Findings of Fact Nos. 15-26.

Relationship Between Henkel Corporation and Contract Cleaners. Inc.:

34. In November and December of 1982, Respondent Contract Cleaners, Inc. was a wholly owned subsidiary of Bonewitz Chemical Services, Inc (Admissions). At that time, Bonewitz Chemical Services, Inc. was a wholly owned subsidiary o Respondent Henkel Corporation. (Admissions). Also at that time, Respondent Contract Cleaners, Inc. was a wholly owned subsidiary of Respondent Henkel Corporation. (Admissions).

35. Contract Cleaners, Inc. merged into Bonewitz Chemical Services, Inc. effective December 30, 1983 (Cp. Ex. E). Through the merger, Bonewitz became responsible for all the liabilities of Contract Cleaners Inc. (Cp. Ex. E). Contract Cleaners, Inc. did not survive the merger. (Cp. Ex. E).

36. Bonewitz Chemical Services, Inc. merged into Henkel Corporation effective December 3l, 1984. (Cp. Ex. F). Through the merger, Henkel became responsible for all the liabilities of Bonewitz Chemical Services, Inc. (Cp. Ex. F). This included the liabilities of Contract Cleaners, Inc. See Finding of Fact No. 35.

Credibility Findings:

37. Complainant John Burton was a credible witness. His testimony concerning material facts was consistent on both direct and cross examination and with his deposition. Furthermore, his calm, straightforward manner of testifying bolstered his credibility.

Compensation:

Average Gross Earnings at Contract Cleaners:

38. At the time John Burton was discharged, he was earning $5.25 per hour at his regular rate of pay. (Admissions). He was initially hired, on June 7, 1982, at $4.50 per hour. (Cp. Ex. G; Tr. at 17). See Finding of Fact No. 7. On July 17,1982, he received an increase of five and one-half percent to $4.75 per hour. (Cp. Ex. G; Tr. at 22). There is no evidence in the record of what this increase represents, i.e. whether it was an annual or other periodic pay increase, a cost of living

adjustment, or some other type of increase. On August 14,1982, he received the $.50 per hour increase for leadman status. (Cp. Ex. G; Tr. at 22-23, 38). There is no evidence in the record of periodic pay increases received by employees after Complainant's discharge or of how Contract Cleaners, Inc. or any successor employer determined what the amount of such pay increases would be or when they would be placed into effect.

39. A review of Complainant Burton's check stubs reveals that, after his increase to $5.25 per hour due to acquiring leadman status, he worked an average of 12 hours of overtime per week at $7.87 per hour. This represents an amount one and one-half times the base rate. He was paid overtime for hours in excess of forty hours per week. (Cp. Ex. G). His regular hours were eight hours per day. (Tr. at 18).

40. Complainant Burton's average weekly gross earnings would be: [Regular weekly earnings + overtime weekly earnings] = [$5.25 X 40] + [$7.87 X 121 = [$210.00] + [94.44] = $304.44 gross earnings per week. His average daily earnings would be one fifth of that amount or $60.88. His average yearly earnings would be: $304.44 X 52 weeks = $15830.88.

Mitigation of Damages:

41. After his discharge from Contract Cleaners, Inc., Complainant Burton searched and applied for work comparable to his former employment. (Tr. at 39-40, 45, 109). He did odd jobs for his landlord to help defray his rental costs of $225.00 per month. (Tr. at 43). He also did moving jobs for his landlord's brother. (Tr. at 43). '

42. During 1984, he was not available for work for approximately six months due to illness. (Tr. at 47-48). He eventually became discouraged with the meager results of his work search and ceased looking for work. (Tr. at 109-110). The last job he applied for was a construction job sometime in 1989. (Tr. at 48, 109-110). Since, at the time of the public hearing he could not recall the date he made application, it is apparent that the time of application must have been substantially earlier in 1989. (Tr. at 48, 109- 1 10).

43. Official notice is taken of the facts (1) that the. availability of construction work is highly seasonal. and (2) that the number of construction jobs available increases dramatically with the coming of spring and good weather necessary to many construction jobs. Fairness to the parties does not require that they be given an opportunity to contest these facts. Therefore, a reasonable estimate may be made that Complainant's last application for work was made in March or April of 1989. Complainant's back pay period should cease as of April 30, 1989 to reflect the termination of his work search.

44. There is no evidence in the record to suggest that, prior to April 30, 1989, there were either suitable positions which Complainant Burton could have discovered and for which he was qualified or that he failed to exercise reasonable care and diligence in seeking a position.

Gross Back Pay Through April 30, 1989:

45. Complainant Burton's gross back pay through April 30,1989 would be computed as follows:

A. November 18-19, 1982: $60.88 X 2 days = $121.76.

B. November 20 - December 31, 1982 $304.44 X 6 weeks = $1826.64.

C. The year 1983 = $15830.88.

D. Six months of the year 1984 = $15830.88 X 1/2 year = $7915.44.

E. The years 1985 through 1988 inclusive $15830.88 X 4 years = $63323.52.

F. The four month period for January 1 - April 30,1989 = $15830.33 X 1/3 year =$52.76.77.

TOTAL GROSS BACK PAY = A + B + C + D + E * F = $121.76 + $1826.64 + $15830.88 + $7915.44 * $63323.52 + $5276.77 = $94295.01 Gross Back Pay for the Period of November 18, 1982 through April 30,1989.

Interim Earnings and Unemployment Insurance Payments:

46. Complainant Burton has conceded the following amounts for interim earnings and unemployment insurance:

A. November 18 - December 31, 1982:$1008.00. (Cp. **Ex.** L).

B. The years 1983 through 1986 inclusive: $12,000.00. (Brief at 20).

C. The years 1987 through 1988 inclusive: $2,000.00 (Brief at 20).

D. For the year 1989 (if back pay for the entire year has been granted), the amount of $1000.00. (Brief at 20) Since back pay is only granted for 1/3 of the year, the interim earnings conceded are $333.33.

TOTAL INTERIM EARNINGS AND UNEMPLOYMENT COMPENSATION = A +B + C + D = $1008.00 + $12,000.00 + $2,000-00 + $333.33 = $15341.33.

Net Back Pay:

47. The amount which Complainant Burton is due in net back pay is calculated by the formula: [Gross Back Pay - (interim earnings + unemployment compensation)] = $94295.01 - $15341.33 =$78,953.68 TOTAL NET BACK PAY.

Emotional Distress:

48. Complainant Burton has suffered substantial economic loss due to his discharge. See Findings of Fact Nos. 38-47. The awareness that his job was his only source of income, and that he had lost it due to his race and age, was and is distressing to John Burton. (Tr. at 38).

49. The loss of his job, and the need for his family to rely on unemployment insurance, Aid to Dependent Children payments, and food stamps for a lower standard of living was degrading to him and clearly damaged his self-esteem. (Tr. at 38, 41, 49). Complainant Burton "felt like a beggar" doing odd jobs for rent. (Tr. at 45). It became necessary for Burton's family to leave their rented home of four years as, even with income from odd jobs for the landlord, they could not pay all rent and utilities. (Tr. at 43). They moved to a government subsidized home. (Tr. at 14). The reliance on government payments to support and house his family was particularly stressful to John Burton because of the stereotype "that Black people are used to [living on welfare]." (Tr. at 49). His goal had always been to work and "provide through employment for my family." (Tr. at 49).

50. The circumstances leading up to his discharge have already been described. See Findings of Fact Nos. 15-26, 33. John Burton felt his reward for loyalty to his job was to be discharged. (Tr. at 41-42).

51. It is clear from the record that the discrimination suffered by John Burton, and the aftermath of that discrimination, caused John Burton substantial emotional distress which was still evident as of the date of the hearing. In light of the severity and duration of the emotional distress sustained by John Burton, an award of five thousand dollars ($5,000.00) would be appropriate, full, and reasonable compensation.

CONCLUSIONS OF LAW

Jurisdiction:

1. Mr. Burton's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code 6601 A.15(12) (1981). See Finding of Fact No. 1. All the statutory prequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code § 601A.15 (1989). See Findings of Fact Nos. 1-2.

2. Mr. Burton's complaint is also within the subject matter jurisdiction of the commission as the allegation that the Respondent Contract Cleaners, Inc. terminated him due to his race and his age falls within the statutory prohibition against unfair employment practices. Iowa Code§601A.6 (1981). "it shall be a . . . discriminatory practice for any person . . . to discharge any employee ... because of the age, race ... of such ... employee." Id

Default Judgment:

3. A motion that default judgment be entered against Respondent Wallace Sykes was made by the attorney for Complainant Burton. (Tr. at 5). "A 'default' is a failure to take a step required in the progress of an action and a judgment by default is a judgment against the party who has

failed to take such step." Kirby v. Holman, 238 Iowa 355, 374, 25 N.W.2d 664 (1947). The question of whether or not to enter a default judgment is largely within the discretion of the adjudicating body. See Johnson v. Gib's Western Kitchen, Inc., 338 N.W.2d 872, 874(Iowa 1983). In district court, for example, the court is not required to enter a default judgment even though the conditions set forth in the specific Rules of Civil Procedure governing the entry of default judgment have been met. Id. The policy of the law is to favor trial on the merits. Id.

4. In order to enter default judgment against a respondent, it must first be shown, where the respondent has not voluntarily appeared, that the adjudicating body acquired personal jurisdiction over the respondent. 49 C.J.S. *Judgments* §24 (1947); 47 AM. JUR. 2D *Judgments §* 1174 (1969). Such acquisition of personal jurisdiction is shown by proof of service of process, i.e. service of the notice of hearing. 49 C.J.S. *Judgments §* 24 (1947); 47 AM. J UR. *2D Judgments §* 1174 (1969). This rule is consistent with those rules of civil procedure which operate together to require that a defendant in a civil action, who has neither appeared nor filed an answer or motion, has been served with process prior to entry of default. See Iowa R. Civ. Pro. 53, 230.

5. This proceeding is a "contested case" because it is "a proceeding... in which the legal rights, duties or privileges of a party are required by..... statute to be determined by an agency after an opportunity for an evidentiary hearing ." Iowa Code §§ 17A.12 (2); 601A.15 (1989). As such, service of the notice of hearing may be made on a respondent by "personal service as in civil actions or by certified mail return receipt requested." Iowa Code § 17A.12(l) (1989).

6. Personal jurisdiction was acquired over Respondent Wallace Sykes by the Commission because evidence in the record and documents officially noticed prove that the statutory requirements for service of the notice of hearing on him have been met. See Findings of Fact Nos. 2-5.

7. Official notice may be taken of all facts of which judicial notice may be taken. Iowa Code § 17A.14(4) (1989). Official notice of these documents is proper because judicial notice may be taken of "all the . . . jurisdictional papers in a case on trial and the same need not be noticed in evidence." Searls v. Knapp, 5 S.D. 325, 327, 56 N.W. 807, 808 (1894) (taking judicial notice of summons and pleading), *quoted in* In Re Williams Estate, 90 S.D. 173, 240 N.W.2d 74, 76 (S.D. 1976); see Slater v. Roche, 148 Iowa 413, 126 N.W. 121 (1910)(taking judicial notice of writ of attachment and return of service as papers properly filed or returned).

8. In light of the Commission's acquiring personal jurisdiction over Respondent Wallace Sykes, of his failure to respond to the Notice of Hearing, and his failure to be present or represented at the hearing, the motion for entry of default judgment against him should be granted. See Findings of Fact Nos. 2-5. Under these circumstances, denial of default judgment would not serve the policy of the law favoring trial on the merits.

Order and Allocation of Proof Where Complainant Relies on Circumstantial Evidence of Discrimination:

9. The burden of proof or "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding is on the complainant to persuade the finder of fact that he was discharged due to his race or age or both. Linn Co-operativee Oil Company v. Mary Quigley, 305 N.W.2d 728,733 (Iowa 1981).

10. Although Federal court decisions applying Federal anti-discrimination laws are not controlling in cases under the Iowa Civil Rights Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978), they are often relied on as persuasive authority in these cases. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Opinions of the Supreme Court of the United States are entitled to particular deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866 (Iowa 1978).

1 1. 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).

12. In the typical discrimination case, which alleges disparate treatment on a prohibited basis, this burden of producing evidence shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency. 304 N.W.2d 443, 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) (emphasis added).

13. The Complainant has the initial burden 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). Once a prima facie case is established, a presumption of discrimination attaches. Id.

14. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, nondiscriminatory reason for its action. Id.; Linn Cooperative 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).

15. 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, lnc.,392 N.W.2d 154, 157 (Iowa 1986); Wing B. 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)).

16. 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. This burden of production merges with the Complainant's ultimate burden of persuasion, i.e. the burden of persuading the finder of fact that intentional discrimination occurred. Id. 450 U.S. at 256, 101 S. Ct. at 1 67 L. Ed. 2d at 217. When the Complainant demonstrates that the Respondent's reasons are pretextual, the Complainant must prevail. United State Postal Service Board of Governors v. Aikens, 460 U.S. 711, 717-18 (1983)(Blackmun, J. concurring).

Establishment of Prima Facie Cases of Race and Age Discrimination:

17. In this case, Complainant Burton established prima facie cases of race and age discrimination in his discharge by showing:

> (1) that he belongs to a group protected by the statute, (2) that he was qualified for the job from which he was discharged, (3) that, despite his qualifications, he was terminated, and (4)... that after his termination, the employer hired a person not in [complainant's] protected class or retained persons with comparable or lesser qualifications who are not in a protected group.

Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 177 (Iowa Ct. App. 1988)(emphasis added). See Findings of Fact Nos. 7-14.

18. In regard to element number 4 above and age discrimination, it should be noted that the Iowa Civil Rights Act protects persons of all ages against age discrimination in employment with two exceptions: persons under eighteen years of age if they are not considered by law to be adults, and employees over forty-five years of age in apprenticeship programs. Hulme v. Barrett, 449 N.W.2d 63132 (Iowa 1989)(citing Iowa Code § 601A.6(2). Although the persons hired or retained by Respondent Contract Cleaners, Inc. after the Complainant's discharge, who were comparably or less qualified than the Complainant, are therefore within the protected group, the age difference of more than 10 years between these persons and Complainant Burton is sufficient to find, in conjunction with the other elements, that a prima facie case of age discrimination has been established. Buckley v. Hospital Corporation of America, 758 F.2d 1525, 1530, 37 Fair Empl. Prac. Cases 1082, 1085 & n.2 (llth Cir. 1985). See Findings of Fact Nos. 1314.

19. Complainant Burton also established prima facie cases of age and race discrimination in his discharge by showing:

> (1) he was a member of a protected class, (2) he was capable of performing the job, and (3) he was discharged from the job.

Smith v. Monsanto Chemical Co., 770 F.2d 719, 38 Fair Empl. Prac. Cases 1141, 1142 n.2 (8th Cir. 1985); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253, 25 Fair Empl. Prac. Cases 1326 (8th Cir. 1981).

Respondent's Failure to Articulate, Through the Production of Evidence, A Legitimate Non-Discriminatory Reason for Complainant Burton's Discharge:

20. In order to rebut the Complainant's prima facie case, the Respondent must introduce admissible evidence which would allow the finder of fact to rationally conclude that the challenged decision was not motivated by discriminatory animus. Linn Cooperative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981). The Respondent need not persuade the finder of fact that it was actually motivated by the proffered reasons. Id. Nonetheless, the Respondent must produce evidence that "[Complainant] was discharged for a legitimate, nondiscriminatory reason." Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). This burden cannot be met "merely through an answer to the complaint or through argument of counsel." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed. 2d. 207, 216 n.9 (1981)). If a Respondent fails to state a sufficient reason to meet this burden, the Complainant "need only prove the elements of the prima facie case to win." Loeb v.. Textron, 600 F.2d 1003, 1018, 20 Fair Empl. Prac. Cases 29, 40 n.20 (lst Cir. 1979).

21. The evidence produced must be sufficient to raise "a genuine issue of material fact as to whether Respondent discriminated against the Complainant." Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989)(citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1094, 67 L.Ed. 2d. 207, 215-16 (1981)). The nondiscriminatory reason proffered "must be specific and clear enough for the [Complainant] to address and legally sufficient to justify judgment for the [Respondent]." Wing V. Iowa Lutheran Hospital, 426 N.W.2d 175,178 (Iowa Ct. App. 1988).

22. It has been found that Respondent Henkel failed to offer evidence which stated the reasons for the discharge of Complainant Burton with sufficient clarity and specificity for Complainant Burton to address. See Findings of Fact Nos. 28-31. Therefore, Respondent Henkel has failed to meet its burden of producing evidence of a legitimate non- discriminatory reason for Complainant Burton's discharge.

23. In addition to its failure to state reasons for Complainant's discharge with sufficient clarity and specificity, there are other reasons to conclude that Respondent Henkel has failed to rebut Complainant's primafacie case. Respondent's evidence failed to raise "a genuine issue of material fact as to whether Respondent discriminated against the Complainant." When the Supreme Court of the United States made reference to the standard "a genuine issue of material fact," it was undoubtedly aware that it was making reference to a standard which has long been applied in resolving motions for summary judgment under Federal Rule of Civil Procedure 56. The equivalent rule in Iowa is Iowa Rule of Civil Procedure 237.

23. There are, of course, differences between deciding a case after public hearing and a motion for summary judgment. The motion for summary judgment is a *pre-trial* motion designed to

weed out "paper cases and defenses" by compelling an adversary party "to come forth with specific facts which constitute competent evidence showing a prima facie claim or defense."Gruener v.City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971). If the evidence Submitted demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," summary judgment will be granted. Iowa R. Civ. Pro. 237(c).

24. When a sufficiently supported motion for summary judgment is made, the party resisting the motion cannot rely upon "mere allegations or denials of his pleading, but his response ... must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. Pro. 237(e). See Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971). It is at this point where the burdens faced by a Respondent seeking to rebut a Complainant's prima facie case and a resisting party opposing a motion for summary judgment are very similar, if not identical. Neither can rely on pleadings or argument of counsel.*Compare* Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed. 2d.207,216n.9 (1981) (answer or argument of counsel will not rebut prima facie case) *with* Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971)(party opposing motion cannot rely on pleadings). Both are required to set forth specific facts; *Compare* Loeb v. Textron, 600 F.2d 1003, 1011-12, 20 Fair Empl. Prac. Cases 29, 35 n.5 (lst Cir. 1979)(vague, general averments of good faith not sufficient to rebut prima facie case) *with* Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971)(generalities are insufficient to resist motion).

25. A party opposing a motion for summary judgment, like a Respondent attempting to rebut a prima facie case of discrimination, is attempting to show that a genuine issue of material fact exists. Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971). See Conclusion of Law No. 21. Since a party opposing a motion for summary judgment cannot rely on what someone has reported to a witness in order to establish that a genuine issue exists for trial, Gruener at 580, it would seem logical to conclude that a Respondent attempting to rebut a prima facie case also cannot rely on such evidence. Under similar reasoning, conclusions and beliefs are also insufficient to rebut a prima facie case. See Id.

26. Therefore, it may be concluded that Respondent failed to rebut Complainant's prima facie case for two additional reasons. First, the evidence presented by it relies on what someone has reported to a witness and not on the witness' personal knowledge. See Finding of Fact No. 27. Second, the reasons given constitute conclusions and beliefs and not the kind of facts which would be sufficient to rebut a prima facie case. See Finding of Fact No. 30.

Even if Respondent Henkel Met Its Burden of Production. Pretext Has Been shown:

27. Even if it had been concluded that Respondent Henkel had articulated, through the production of evidence, a legitimate, non-discriminatory reason for Complainant Burton's discharge, Burton has demonstrated that the "smart aleck" reason was was a pretext for discrimination by showing that, in light of all the evidence, this reason was not worthy of credence. See Finding of Fact No. 33. Complainant Burton has met his burden of persuading the Commission that intentional age and race discrimination has occurred. Credibility and Testimony:

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

Compensation:

29. The Commission has the authority to make awards of backpay. Iowa Code § 601A.15(8)(a)(1) (1989). In making such awards, interim earnings and unemployment compensation received during the backpay period are to be deducted. Id. The Complainant bears the burden of proof in establishing his damages. Diane Humburd, CP # 03-85-12695, slip op. at 32-33, (Iowa Civil Rights Comm'n Sept. 28, 1989)(citing Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Id. at 34-35, 37 (citing e.g. EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.&. 1976), *affd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied,* 434 U.S. 920 (1977)). This the Complainant has done. See Findings of Fact No. 38- 40, 45. The burden of proof for establishing either the interim earnings of the Complainant or any failure to mitigate damages rests with the Respondent, although the Complainant may, as the Complainant has done here, choose to provide evidence of interim earnings he is willing to concede. Diane Humburd, CP # 03-85-12695, slip op. at 35- 37, (Iowa Civil Rights Comm'n Sept. 28, 1989)(citing e.g. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir Phillips, Ross, Inc., 420 F. Supp. at 924)). See Finding of Fact No. 46.

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

31. "Iowa Code section **601A.15(8)** gives the Commission considerable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A." Hy-Vee Food Stores. Inc. v. Iowa Civil Rights Commission, No. 88- 934, slip op. at 47 (Iowa January 24, 1990). The Iowa Supreme Court has approved two basic principles to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Id. at 45. "it suffices for the [agency] to determine the amount of back

wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. (Quoting with approval Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973)).

Mitigation of Damages:

32. In order to meet its burden of proving that Complainant failed to mitigate his damages, Respondent must establish:

> (1) that the damages suffered by the [complainant could have been avoided, i.e. that there were suitable positions which [complainant] could have discovered and for which he was qualified; and (2) that [complainant] failed to use reasonable care and diligence in seeking a position.

EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980).

33. Respondent Henkel did not meet this burden of proof for any period prior to April 30, 1989. See Findings of Fact No. 42-44. Complainant should not be paid for the six months in 1984 where he was not available for work due to illness. See Findings of Fact Nos. 42, 45. Schlei & Grossman, Employment Discrimination Law: Five year Cumulative Supplement 530-31 & nn.30,40 (2nd ed. 1989); Schlei & Grossman, Employment Discrimination Law 1450, (2nd ed. 1983).

Damages for Emotional Distress:

34. In accordance with the statutory authority to award actual damages, the Iowa Civil Rights Commission has the power to award damages for emotional distress. Chauffeurs Local Union 283 v. Iowa Civil Rights Commission, N.W.2d 375,383 (Iowa 1986)(interpreting Iowa Code§601A.15(8)). The following principles were applied in determining whether an award of damages for emotional distress should be made and the amount of such award.

35. **"[A]** civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990).

36. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974) (housing discrimination case). Although such evidence may be considered, see Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988), "[h]umiliation can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d at 636 (quoted with approval in Blessum v. Howard County Board, 245 N.W.2d 836, 845 (Iowa 1980)). Even slight testimony of emotional distress, when combined with evidence of circumstances which would be expected to result in emotional distress, can be sufficient to show the existence of distress. See Dickerson v. Young, 332 N.W.2d 93, 98-99 (Iowa 1983).

37. When the evidence demonstrates that the complainant has suffered emotional distress proximately caused by discrimination, an award of damages to compensate for this distress is appropriate. Marian Hale, 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984)(citing Nichols, Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview, 32 Drake L. Rev. 273, 301 (1982-83)). The Complainant did suffer substantial emotional distress resulting from discrimination.

38.

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

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

39. The amount of damages for emotional distress will depend on the facts and circumstances of each individual case. Marian Hale. 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984). Past Commission decisions have referred to the consideration of various factors in awarding damages for emotional distress. Id. Upon examination of the Commission's cases, and the authorities cited therein, it is concluded that the two primary determinants of the amount awarded for damages of emotional distress are the severity of the distress and the duration of the distress. See Cheri Dacy, 7 Iowa Civil Rights Commission Case Reports 17, 24-25 (1985); Marian Hale. 6 Iowa Civil Rights Commission Case Reports 27, 29 (1984).

Interest:

40. The Iowa Civil Rights Act allows an award of actual damages to persons injured by discriminatory practices. Iowa Code § 601A.15(8)(a)(8) (1989). Prejudgment interest is a form of damages. Dobbs, Hornbook on Remedies 164 (1973). It "is allowed to repay the lost value of the use of the money awarded and to prevent persons obligated to pay money to another from profiting through delay in litigation." Landals v. Rolfes Company, No. 88-1638, slip op. at 19 (Iowa April 18, 1990). Pre-judgment interest is properly awarded on an ascertainable claim. Dobbs, Hornbook on Remedies 166-67 (1973). The amount of back pay due Complainant at any given time has been an ascertainable claim since the time of his termination. See Findings of

Fact No. 38-47. Emotional distress damages are not ascertainable before a final judgment. See Dobbs, Hornbook on Remedies l65 (1973).

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

Attorneys Fees:

42. The Complainant having prevailed, he is entitled to an award of reasonable attorney's fees. Iowa Code § 601A.15(8)(1989). If the parties cannot stipulate to the amount of these fees, they should be determined at a separate hearing. Avala 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).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, John Mack Burton, is entitled to judgment because he has established that his discharge by Respondent Wallace Sykes and the Respondent Contract Cleaners, Inc., which has since merged into Henkel Corporation which is now liable, was based on his age and his race in violation of Iowa Code Section 601A.6 (1981).

B. The Complainant's motion for default judgment against Respondent Wallace Sykes is granted.

C. Complainant Burton is entitled to a judgment of seventy-eight thousand nine hundred fifty-three dollars and sixty-eight cents ($78,953.68) in back pay for the loss resulting from his discharge.

D. Complainant Burton is entitled to a judgment of five thousand dollars ($5,000.00) in compensatory damages for the emotional distress he sustained as a result of the discrimination practiced against him by the Respondents.

D. Interest at the rate of ten percent per annum shall be paid by the Respondents to Complainant Burton, on the back pay awarded herein, commencing on the date payment would have been made if Complainant had remained in his employment with Contract Cleaners, Inc. and continuing until date of payment.

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

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

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

H. Respondents shall file a report with the Commission within 90 calendar days of the date of this order detailing what steps they have taken to comply with paragraphs C through E inclusive of this order.

Signed this the 18th day of June 1990.

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

NOTE: This case was settled after the proposed decision was issued, but prior to the Commission meeting at which this decision would have been considered.