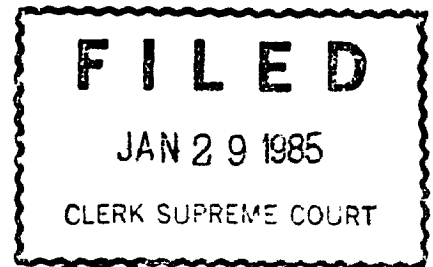


**IN THE COURT OF APPEALS OF IOWA**



**THE SHERATON INN OF CEDAR  
RAPIDS, IOWA,**

Petitioner-Appellant,

vs.

**THE IOWA CIVIL RIGHTS COMMISSION,**

Respondent-Appellee.

Filed January 29, 1985

4-410  
83-1394

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Appeal from the Iowa District Court for Linn County - Ansel J. Chapman,  
Judge.

Petitioner employer appeals from the district court decision on judicial  
review affirming the adverse decision of respondent agency upon a complaint of  
sex discrimination. **AFFIRMED.**

David S. Nelson of Nelson & Nelson, Cedar Rapids, and Jon M. Kinnamon of  
Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Steven M. Foritano, Assistant  
Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

Petitioner employer appeals from the district court decision affirming the adverse decision of respondent agency upon complaint of sex discrimination. The employer asserts that substantial evidence in the record fails to support either the damage award or a finding that discrimination occurred. We affirm.

On or about September 29, 1979, Alan Zazza, the general manager of the Sheraton Inn, offered Pamela Reece the position of manager of Sheraton's Centurion Lounge; she accepted the offer. Pamela was to be paid \$230 per week, and was to begin work as an hourly employee. The record reflects that she was to have the possibility of a raise and supplementary income from bartending. At the time, Pamela was employed full-time at Rockwell Collins at a salary of \$170 per week and part-time at the Stouffer Hotel for a salary of approximately \$100 per week. Her new job as manager was to commence on October 8, 1979, but she was asked to work as an hourly employee during the preceding week in order to learn procedures. She worked a total of 12.8 hours during the training period and worked as a manager for two days before her employment was terminated on October 11. She was subsequently replaced by one Joe West.

In January 1980, Pamela filed a complaint with the Iowa Civil Rights Commission alleging that termination of her employment resulted from sex discrimination. Following a public hearing, the hearing officer issued a recommended decision, finding that the Sheraton Inn had discriminated against Pamela. He awarded compensatory damages for emotional distress, back wages, and court costs. The Commission subsequently adopted the decision with minor clarifications.

In September 1982, Sheraton Inn filed a petition seeking judicial review of the Commission's final decision. The district court ruled that substantial evidence existed in the record to support the Commission's findings and affirmed the decision and order in full. Sheraton Inn appeals from this determination.

Judicial review of the agency's decision is governed by the "substantial evidence" rule of Section 17A.19(8)(f). In accordance with this rule, we determine whether the agency decision is supported by substantial evidence when the record is viewed as a whole. McCrea v. Iowa Dep't. of Transp., 336 N.W.2d 427, 429 (Iowa 1983). The fact that a different conclusion could be drawn from the evidence does not call the Commission's decision into question. McConnell v. Iowa Dep't. of Job Service, 327 N.W.2d 234, 236 (Iowa 1982).

Section 601A.6(1)(a), Code of Iowa 1977 (in effect at the time of the filing of the complaint) provides:

1. It shall be an unfair or discriminatory practice for any:
  - a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

In order to establish a prima facie case of disparate treatment in hiring, the complaint must present substantial evidence:

- (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 the protected group.

Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n., 322 N.W.2d 293, 296 (Iowa 1982). A prima facie case creates a presumption of discrimination. To dispel the presumption, an employer must produce evidence showing "some legitimate, nondiscriminatory reason" for the discharging the employee. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973). The complainant may then prevail in her ultimate burden of proof

by showing that the employer's articulated reason is merely a pretext for discriminatory treatment. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 217 (1981); McDonnell Douglas Corp., 411 U.S. at 804, 93 S. Ct. at 1825, 36 L. Ed. 2d at 679.

We believe there is substantial evidence to support the agency finding that Pamela Reece established a prima facie case of employment discrimination. Testimony reflected that Alan Zazza was concerned about hiring a female manager. He expressed specific concern over her children and possible work conflicts, the handling of men in the bar and her ability to handle any physical confrontations at the bar. Furthermore, Pamela was fired after only a few days of employment. One witness, Joe West, testified that in his opinion she did not have a fair chance to succeed within that time period. West specifically stated, "I do not feel that I could have made successful inroads in any of the operations that I've ever been involved in in the period of time she was given." We believe a reasonable person could conclude that this evidence was sufficient to establish a prima facie case of discrimination.

During the course of the hearing, the respondent presented evidence that there was a legitimate, non-discriminatory reason for terminating Pamela's employment. In his notice of termination, Alan Zazza stated that the reason for termination was Pamela's failure to assist others in the lounge and failure to show initiative and motivation on the job. Additionally, Alan Zazza testified that he had heard complaints from several employees that she refused to help out when the bar was busy. When asked if he had mentioned the complaints to Pamela, he answered, "I'm sure I mentioned to her that it's of importance to lend a helping hand to those employees, when needed." However, the hearing officer cited to several inconsistencies with Zazza's testimony which detracted from his credibility. Specifically, the hearing officer found, "the testimony of Alan Zazza was unworthy of credence, either on the point of warnings to Pamela Reece, or as to

her termination being based on lack of 'get up and go.'" While it is the agency decision, not that of the hearing officer, which is subject to review, "deference is due to hearing officer decisions concerning issues of credibility of witnesses." Peoples Memorial Hosp. v. Iowa Civil Rights Comm'n., 322 N.W.2d 87, 92 (1982). Thus, in spite of Alan Zazza's testimony, we conclude that substantial evidence supports a finding that Pamela met her burden of proving discrimination. Accordingly, we affirm the decision in this respect.

Petitioner argues, in the alternative, that the damages awarded in the instant case were unsupported by the record as a whole. Iowa Code section 601A.15(8) provides:

If . . . the commission determines that the respondent has engaged in a discriminatory or unfair practice, the commission shall . . . issue an order requiring the respondent to cease and desist from the discriminatory or unfair practice and to take the necessary remedial action as in the judgment of the commission will carry out the purposes of this chapter.

"Remedial action" is defined in section 601A.15(a)(8) as including:

Payment to the complainant of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees.

These provisions grant the Commission with considerable discretion in fashioning an appropriate remedy. Foods, Inc. v. Iowa Civil Rights Comm'n., 318 N.W.2d 162, 171 (Iowa 1982). The ultimate purpose is to place the injured party in the position she would have been had there been no injury. Dealers Hobby, Inc. v. Marie Ann Linn Realty Co., 255 N.W.2d 131, 134 (Iowa 1977).

We will disturb an award of damages only upon a showing that it is "unreasonable, arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion" or that it is unsupported by substantial evidence in the record. Iowa Code §§ 17A.19(8)(f), (g) (1983). We cannot say that this standard has been met by the petitioner.

The damages awarded by the agency totaled \$15,537.65. This consisted of an

award for back wages, child care expenses, and emotional distress suffered by Pamela.

In determining the award for back pay, the Commission held that a period of 117 weeks was appropriate. This represents the period running from the date Pamela was to be hired full-time by the Sheraton Inn to the date of the hearing. The Commission further determined that there was a \$60 salary difference between a forty-hour week at Collins Rockwell, and what Pamela would have made at the Sheraton Inn. Thus, the award of back pay was based on a loss of \$60 per week for 117 weeks.

Petitioner argues that this decision is based upon guess, speculation, and conjecture and is unsupported by substantial evidence. We cannot agree. As the hearing officer indicated, the amount of damages were difficult to formulate "since one cannot determine what Pamela Reece would have earned, if not for her illegal termination." However, the fact that the amount of damages are difficult to determine should not preclude an award.

Courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.

Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 857 (Iowa 1973) (quoting Patterson v. Patterson, 189 N.W.2d 601, 605 (Iowa 1971)) (emphasis added). It cannot be said that the Commission lacked a reasonable basis for the award of back pay.

Petitioner complains that the Commission failed to consider that Pamela received raises for her job at Rockwell Collins and that she was also employed for a period of time as a part-time waitress at Stouffer's. However, we cannot say the Commission erred in failing to offset the award of back pay by these increases in income. As the agency indicated, to do so would require an assumption that

Pamela's salary at the Sheraton Inn would have remained stagnant. The evidence reflects that Pamela could have earned extra money from the front desk and banquet work at the Sheraton which might have balanced out her earnings at Stouffer's. It was entirely reasonable for the Commission to conclude that the wages earned at Stouffer's should "not be considered as reducing or enlarging the damage amount." The mere fact that we could draw another conclusion from the evidence does not prevent the agency's finding from being supported by the evidence. Polk County Juvenile Home v. Iowa Civil Rights Comm'n., 322 N.W.2d 913, 915 (Iowa 1982). Accordingly, we affirm the award for lost wages.

Petitioner's remaining claims are that damages should not have been awarded for child care expenses or mental distress. We cannot agree.

Pamela testified that she incurred child care expenses as a result of losing her job at the Sheraton. Her job at the Sheraton only involved working evenings and she could take care of her child during the day. It is unclear from the record who took care of her child during the evenings Pamela worked or what arrangements had been made in this respect. However, it is clear that she had to take her child to a day care center after losing her job at the Sheraton. The additional expense ranged from \$35 to \$43 per week. We believe that this is sufficient evidence to award damages.

We also believe an award of damages was appropriate for emotional distress. Pamela testified at length about the emotional distress she experienced after losing her job at the Sheraton. She was forced to return to her job at Rockwell Collins, which caused her considerable embarrassment. Pamela also stated that she was depressed and that she had just "given up." She indicated that she took it out on her children and was not functioning well at work. Pamela was particularly affected by her son's reaction to the loss of her job and felt that she had failed in his eyes.

Pamela's testimony was not corroborated in any respect, yet this does not preclude recovery. Although her testimony was not particularly strong, the trial judge indicated that it was convincing. Furthermore, we cannot ignore the strong impact the circumstances would have on a normal individual. See Dickerson v. Young, 332 N.W.2d 93, 99 (Iowa 1983) (although express testimony of distress was not strong, physical facts tended to support testimony); see also Seaton v. Sky Realty Co., 491 F.2d 634, 636 (7th Cir. 1974) (humiliation can be inferred from the circumstances as well as established by testimony). Pamela was subjected to the inevitable humiliation and indignity of being fired for discriminatory reasons after only a brief training period and two days of work. An award of damages for emotional distress is entirely appropriate under such circumstances.

AFFIRMED.

All judges concur except Sackett, J., who dissents.

I must respectively dissent from the portion of the majority opinion upholding a damage award based on humiliation and emotional distress. While I agree with the assertion that there need be no accompanying physical injury or corroborative testimony, I do not believe the present state of Iowa law supports such an award under the factual circumstances of this case.

The opinion in the case of Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa Ct. App. 1977), from this court, seems to stand for the proposition that damages may be awarded for humiliation and embarrassment. See id. at 526. However, the circumstances involved in that case certainly support an award for mental distress.

The injuries sustained by plaintiff Holmquist were severe. He had multiple fractures of the right leg and pelvis and ultimately underwent an amputation of his right leg. A severed urethra was also discovered. Although it was disputed by defendants that this occurred in the accident, there was, nevertheless, sufficient proof for the jury to properly consider it.

Plaintiff was confined to bed, flat on his back for six weeks, due to the pelvic fracture. He developed various ulcers which required treatment. He had an ulcer at the cite of the coccyx bone and developed an ulceration of the stump where his leg was removed. The pelvic fracture also caused a difference in weight pressures which resulted in a decubitus ulcer development on the right buttocks and three ulcers on the left ankle. Plaintiff spent five months in bed trying to heal the decubitus ulcer on his right buttock. Ultimately, skin grafting was necessary. The prognosis is that plaintiff will continue to have a series of breakdowns of skin with more decubitus ulcers resulting.

Plaintiff is unable to walk with crutches or braces due to the paralysis and emputation between the hip and knee. With the amputation plaintiff also lost the hope he had enteretained that at some time medical science would find a cure for his paralysis so he could walk again. He has had considerable pain and suffering and mental anguish due to these injuries. There was evidence of a more difficult adjustment for plaintiff after the amputation than after the paralysis.

Id. at 525.

The caselaw in Iowa on this subject is sparse and, therefore, a search of the law of our sister states is helpful to a sound determination of this issue. In the

case of Paxson v. Cass County Road Commission, 325 Mich. 276, 38 N.W.2d 315 (1949), the supreme court found it improper to award damages for any injury to plaintiff's feelings because of a wrongful discharge from his job. Plaintiff worked for one year, then was terminated. He received damages for lost earnings but was not allowed to keep sums awarded for shame, humiliation, etc.

The Supreme Court of South Dakota employs a subjective test in order to determine whether the plaintiff in a particular action is entitled to certain monetary damage amounts for emotional distress. They quote with approval from §905, Restatement, Facts:

(d) "A person who has a cause of action for a tort may be entitled to recover as an element of damages for that form of mental distress known as "humiliation," that is, a feeling of degradation or inferiority \* \* \*." (i) "The length of time during which pain or other harm to the feelings has been or probably will be experienced and the intensity of the distress are the two factors to be considered in assessing the amount of damages. 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."

Bean v. Best, 93 N.W.2d 403, 408 (S.D. 1958). The plaintiff was on a probationary period for one week and on the job for two days. The length of time she could have been subjected to humiliation was limited. There is no evidence to suggest that the actual event of termination was handled unprofessionally so as to suggest humiliation. Based on the Best analysis, an award was not justified or at best not to the extent this jury actioned.

From these cases I believe it can be seen that courts need be careful in upholding awards for humiliation and emotional distress, absent sufficient factual setting. This is to prevent fraudulent claims, especially in cases similar to the one before us where the plaintiff supplied the only evidence, via testimony, that she suffered such damages. Without corroborative testimony or an accompanying physical injury the courts have recognized there needs to be sufficient facts

present to justify an award of this nature. Without such facts, a jury award of monetary damages for humiliation is based, far more likely, on passion, sympathy and/or pure speculation.

Likewise, in the majority's reasoning, they uphold an award for child care expense incurred by the plaintiff because of the loss of her job. What was this (ese) child(ren) doing while its mother worked in the defendant's employ? There is no sufficient showing to support such an award.

I would affirm the decision of the trial court except for damages awarded for humiliation, emotional distress and child care expense.