BEFORE THE IOWA CIVIL RIGHTS COMMISSION

CHRISTY JOHNSON, Complainant,

VS.

KEOKUK MEL CASTING, Respondent.

CP# 05-81-7716

DECISION ON REMAND

On April 12, 1988, the Commission remanded this case to the Administrative Law Judge in compliance with the Order of the Honorable Willis S. Cahill, Judge of the Eighth Judicial District of Iowa. That Order, filed March 9, 1988, remanded this case to the Commission from an appeal in the District Court of Iowa in and for Lee County, Case #CL 925(S)0586.

In his Ruling on Petition for Judicial Review, Judge Cahill has ordered the Commission as follows:

> IT IS THEREFORE ORDERED That the Order of the Iowa Civil Rights Commission issued April 22, 1986, be and hereby is reversed.
>
> IT IS FURTHER ORDERED That this matter be and hereby is remanded to the Iowa Civil Rights Commission for further proceedings consistent with this Ruling and other appropriate statutory and established principles of law. On remand the Commission is instructed to make new findings consistent with this ruling concerning whether Petitioner produced evidence of legitimate, nonretaliatory reasons for discharging Christy R. Johnson. The Commission is further instructed to make additional findings regarding whether Ms. Johnson has established, by a preponderance of the evidence, that the legitimate non-retaliatory reasons proffered by Petitioner were merely pretextual and whether Ms. Johnson has carried her ultimate burden of persuasion with respect to all elements of her retaliation claim under Iowa Code Section 601A.11(2). The Commission should make specific findings with respect to the credibility of witnesses and whether there was a causal connection between Ms. Johnson's participation in protected activities and her subsequent discharge. In addressing the causal connection issue the standards announced in the case of Robinson v. Monsato Co., 758 F.2d 331, 335-336 (8th Cir. 1985), should be applied. The Commission is instructed to consider the whole agency record in making said additional findings.
>
> IT IS FURTHER ORDERED that the costs of this action shall be assessed to the Respondent.

After consideration of the agency record as a whole, and assessment of the credibility of witnesses, the following additional and revised findings of fact and conclusions of law are set forth pursuant to the Order of the District Court.[1]

[1]References throughout this proposed decision shall be as follows:

To the transcript of the hearing "(Tr. __)";

to Complainant's exhibits "(C. Ex. __)";

and to Respondent's exhibits "(R. Ex. ___)".

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACT

The Complainant, Christy Johnson, filed a verified complaint on May 7, 1981, alleging a violation of Iowa Code, Chapter 601A, discrimination in rights protected against discrimination on the basis of sex because she had filed a complaint under that Chapter. The alleged discriminatory act occurred on or about March 23, 1981. Said complaint proceeded to public hearing and Notice was issued on February 4, 1984.

CONCLUSION

The complaint was timely filed, processed and the issues in the complaint are properly before this Hearing Officer and ultimately before the Iowa Civil Rights Commission.

FACT

Keokuk Steel Casting is a division of KAST METALS CORPORATION which is located in Keokuk, Iowa. It is engaged primarily in manufacturing metal castings for heavy duty equipment and has more than four employees. (Tr. 93,177)

CONCLUSION

Keokuk Steel Casting is a person under Iowa Code §601A.2(2) 1981, and is, therefore, subject to Iowa Code §601A. 11(2) 1981, which provides in pertinent part as follows:

> It shall be an unfair or discriminatory practice for:
> ***
> 2. Any person to discriminate against another person in any of the rights protected against discrimination on the basis of .. sex ... by this chapter because such person ... has filed a complaint ... under this chapter...

FACTS

1. Complainant filed an informal complaint with the Commission against Respondent on September 12, 1979, alleging she had been denied a job with Respondent on the basis of sex. A predetermination settlement agreement was entered into on December 10, 1979, in which

Respondent promised her the next available laborer position. Pursuant to that agreement, Complainant began her employment with Respondent on March 4, 1981.

2. James Mallory, Complainant's first supervisor, Gail Schmitz, her next supervisor, Roger Courtney who was superintendent and over both Mallory and Schmitz, and George Adams the personnel manager, were all aware that Complainant had filed a civil rights complaint and was an employee as a result of that complaint. (Tr. 81, 154, 115, 309).

3. Complainant was terminated on April 24,1981, after 37 working days.

4. Complainant began as a laborer, initially working as a grinder operator or finisher on the first shift under the supervision of Mallory. She worked full-time from 6:00 a.m. to 2:30 p.m. at $5.80 per hour. James Mallory, a Black male, quit on March 20, 1981 and on approximately March 23, 1981, Gail Schmitz became Complainant's supervisor. On April 14, 1981, Complainant was transferred from the grinder operator position which was piece work to the inspection of castings which was a flat rate job. On April 24, 1981, at approximately 10:00 a.m., Complainant was transferred to inspection work using the birnell process.

5. Complainant began a sixty day probation period at the time of her hire. This meant that from 0-30 working days, she could not have any rights under the union contract including rights to the grievance procedure; that from 30- 60 working days she could join the union but have no rights to the grievance procedure; and, that from 60-120 working days she could join the union, have certain rights under the grievance procedure. The union was the United Steelworkers of America, Local #3311. Complainant had not joined the union at the time of her termination.

6. The chart below sets forth the events from April 1 to April 24, under the supervision of Schmitz:

Date	Cost Center	Total	UPH*	Notes
April 1	48	7.82	42	
2	48	7.82	44	
3	52	7.82	43	
6	52	7.82	44	Injured arm.
7	52	7.82	48	
8	52	7.73	64	
9	52	7.82	62	
10	52	7.82	67	Schmitz told complainant her UPH was low.
13	52	4.00	64	Probable 3 hours sweeping.
14	Bumped to inspection;			Schmitz said training provided all day; Complainant denies being

		trained.
15	Inspection	
16	Inspection	
17	Inspection	Told to pick up pace by Schmitz; Complainant said she was not receiving castings fast enough.
20		Schmitz said she worked with Complainant; casting fell on leg; taken to hospital with leg injury.
21		Schmitz alerted Complainant she may be bumped and that she needed to improve
22,23		One day on sweeping.
24		Bumped to Birnell/terminated after 2 hours.

*UPH = Units per hour

During the first day on the job, Mallory, Cleaning Room Supervisor, explained to Complainant Respondent's rules and regulations. She was informed that during the first 60 days of employment she would be a probationary employee. The work was not easy. Respondent expected an honest 8 hours of work for 8 hours of pay. Employees were required to ask permission from the supervisors before leaving their work station and were not to talk with coworkers other than at break times. It was also understood that during the probationary period discharge of an employee would be in the sole discretion of the Respondent and not subject to grievance under the union contract. Complainant's work record as grinding operator (finisher) was within the requirement for 30 days. From a production standpoint, it would have been desirable to have her reach a rate of 67 UPH sooner. It was also important that she maintain that rate or exceed it. Whether she would have done so is not in evidence because on approximately her 30th day, she was bumped from the grinder operator position to metal castings inspection. Approximately seven days were spent on inspection of metal castings. During one of those days she injured her leg badly enough that she was taken to the hospital. One day was spent sweeping the plant. On her third and fifth days, she was told she needed to improve. The fifth day was the

day after she went to the hospital with a leg injury. One of the next two days she was put on sweeping the plant. Meyers, the scheduler during the time at issue, stated that it would not be typical to put a probationary laborer in the position of inspector of castings. Phil Beavers who Complainant replaced in the inspection position was requested to help her during her first day on that job. Meyers also said that training from a person, such as was assigned to train Complainant, would not be good training because inspection is a very technical job. (Tr. 294).

7. On April 24, 1981, at approximately 10:00 a.m., Complainant was placed on inspection using the birnell process. Birnelling is a process in which a hand operated machine is used to punch an impression in a casting. That impression is measured to determine the density of the metal through reading a scope. Complainant was instructed by Schmitz on how to perform the job. Schmitz then left and was unavailable until approximately two hours later when she returned to Complainant's station, called her into the office and fired her. Meyers, supervisor over Schmitz, stated that it would be unusual to fire an employee for reasons of poor quality and quantity of work after only two hours on a job. (Tr. 298).

CONCLUSION

A cause of action under Iowa Code section 601A.11(2), the provision prohibiting retaliation, is substantively the same as retaliation under Section 704 (a) of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. Section 20OOe-3(a). The allocation of burden and order of proof in Title V11 suits as set forth in the United States Supreme Court cases of McDonnell-Douglas Cow. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) has been adopted by the Iowa Supreme Court in other employment discrimination cases under Chapter 601A. Linn Cooperative Oil Co. v. Quigley, 305 N.W. 2d 729, 733 (Iowa 1981) (sex discrimination). The sequence of proof and burdens prescribed by the McDonnell-Douglas v. Green and Texas Dept. of Community Affairs v. Burdine cases is also applicable to retaliation claims. Womack v. Munson, 619 F. 2d 1292 (8th Cir. 1980), cert. denied 450 U.S. 979, 101 S. Ct. 1513, 67 L.Ed. 2d 814 (1981); Donnellon v. Fruehauf Corp., 794 F. 2d 598 (11th Cir. 1986); Burris v. United Telephone Co. of Kansas Inc., 683 F. 2d 339 (10th Cir. 1982); Grant v. Bethlehem Steel Corp., 622 F. 2d 43 (2nd Cir. 1980). The complainant must first establish a prima facie case; the employer is then given the opportunity to articulate some legitimate non-discriminatory reason for the alleged acts of reprisal; and lastly, the complainant has the burden of demonstrating that the employer's reasons are a mere pretext for discrimination taken in retaliation for participation in protected activities. Id. at 46. Accord, Ross v. COMSAT, 759 F. 2d 335, 37 FEP Cases 797, 805 (4th Cir. 1985), Womack v. Munson, 619 F. 2d 1291, 1296 (8th Cir. 1980), cert. denied, 450 U.S. 979 (1981). The pretext determination does not require that the complainant establish that the discharge was solely for retaliation, but merely that the discharge would not have occurred but for the retaliation. McIntosh v. Jones Truck Lines, 38 FEP Cases 704, 709 (E.D. Ark. 1984). [Emphasis in original]. To establish a prima faci case, complainant must show that:

1) she was engaged in statutorily protected activity; 2) her employer took adverse employment action (i.e. employee was disadvantaged by an action of the employer subsequent to or contemporaneously with participation in protected activity); and 3) a causal connection existed

between the protected activity and the adverse action. Johnson v. Legal Services of Arkansas, Inc., 813 F. 2d 893, 899 (8th Cir. 1987); Womack v. Munson, 619 F. 2d 1292, 1296 (8th Cir. 1980), cert. denied 450 U.S. 979, 101 S. Ct. 1513, 67 L. Ed. 2d 814 (1981); Donnellon v. Fruehauf Corp., 794 F. 2d 598, 600-601 (Ilth Cir. 1986); Burris v. United Telephone Co. of Kansas. In ., 683 F. 2d 339, 343 (10th Cir. 1982); Grant v. Bethlehem Steel Corp., 622 F. 2d 43, 46 (2nd Cir. 1980).

The first element of the prima facie case--statutorily protected activity--is established by the fact that Johnson filed a complaint of discrimination in employment on the basis of sex with the Iowa Civil Rights Commission and resolved that complaint with a settlement agreement which ensured her of the next available laborer position with Respondent. She was hired pursuant to that agreement.

The supervisory personnel of Keokuk Steel Casting admitted knowing that Complainant was hired pursuant to the settlement agreement resulting directly from the complaint filed with the Commission. Therefore, it is concluded that there was statutorily protected participation by Complainant which was known by Respondent.

The second element of the prima facie case -- an adverse employment action -- is met by the fact that Johnson was terminated from employment. That termination was an action disadvantaging Complainant and that action took place subsequent to participation in the protected activity.

The third element of a prima facie case of retaliation--causal connection between the protected activity and the adverse action -is the most difficult to establish. In the ordinary case, direct evidence of discrimination is unlikely and the evidence Will usually be circumstantial. Discriminatory conduct and intent may be inferred from circumstantial evidence. Mead v. U.S. Fidelity & Guaranty Co., 18 FEP Cases 140, 154 (D. Minn. 1977). Several types of circumstantial evidence have been identified which can support an inference that a retaliatory motive played some part in the adverse treatment: a) after learning of the protected action, the employer treated the employee differently from similarly situated nonprotected employees; b) after learning of the protected activity, the employer treated the employee differently than before the protected activity, including surveillance; c) closeness in time between the employer's knowledge of the protected activity and the adverse activity; d) attempts to conceal the fact that the protected action was known at the time of the adverse action. B. Schlei and P. Grossman, Employment Discrimination Law, 558-559 (2d Ed. 1983).

It is concluded that Johnson participated in protected activity both in her action of filing the complaint and by entering into a settlement agreement to resolve that complaint. There was a closeness in time in that the protected action was known at the time Complainant started work, March 4, and the time Complainant was terminated, April 24, just 37 days later. Furthermore, Complainant was treated differently than similarly situated nonprotected employees. Certainly to spend 5-10 minutes training an employee on a new job and then to be unavailable for two hours after which that employee is fired for not doing her work and for not seeking help from a supervisor is unusual. It is unusual, particularly when the supervisor fires that employee without checking either the quantity or quality of the work done by the employee. It could logically be concluded that if there is a supervisor's meeting that most supervisors would be attending that

meeting and that it could be difficult to find a supervisor during that time. Complainant was not given an opportunity to explain that she could not find a supervisor when a part broke, that she took it for repair herself for that reason.

It was permissible to ask an employee working next to you questions (Tr. 225). Complainant was written up for talking with co- employees--she was considered a distraction by Schmitz it was customary for Schmitz to counsel an employee who was having problems and to try to help them in their performance. If that didn't work, another employee was requested to help. Schmitz did not follow this procedure with Complainant. After two hours on the birnell, without checking either quantity or quality of her work, Schmitz fired Complainant. There was no attempt either to counsel or help Complainant on the birnell. As a matter of fact, part of Schmitz's concern was that a co-employee was helping her.

It is concluded that Complainant was subjected to treatment different from that of nonprotected employees. She was not allowed to receive assistance from coworkers which was routinely provided other employees. She was not given sufficient training time by Respondent's management to understand and implement the fundamentals of the birnell operation. She was not given an opportunity to explain why she had the hand press repaired herself or how the loss of time that took affected her production. She was fired without an actual check as to whether she had done the required number of castings or whether she had done them correctly. It is concluded that two of the types of circumstantial evidence identified which support an inference that a retaliatory motive played some part in the adverse treatment, closeness in time and differential treatment, are established in the record and a prima facie case of retaliation has been established. The burden with respect to establishing a prima facie case is not onerous. Texas Department of Community Affairs v. Burdine, 450 U.S. at 253. It is only necessary to introduce evidence from which an inference can be drawn that Johnson would not have been discharged had she not filed discrimination charges. Jackson v. RKO Bottlers of Toledo, Inc., 35 EPD 34,662.

FACTS

1. The "Change of Status Report" signed by Schmitz, explained Johnson's termination as follows: "Refused to do work assigned and do it correctly after being shown twice." (R. Ex. E)

2. The termination occurred on April 24, 1981, as a direct result of Johnson's performance using the birnell press. At 10:00 a.m. that morning, Schmitz assigned Johnson to the birnell job. Schmitz showed Johnson how to do the work, checked her understanding of the work and left for a supervisor's meeting. When she returned approximately two hours later, she said other supervisors were upset with Johnson because the work was done wrong. She also found Johnson's co-worker, Brad Picton, helping her. Schmitz noted in Johnson's record that supervisor, Warren Revels, had also helped Johnson and that Johnson had "conned" Picton into helping her. Schmitz noted earlier that she had informed Johnson that she would be let go because she could not work for herself when she was having trouble. (R. Ex. D).

3. Schmitz's notes on Johnson started on April 10, 198 1, when she talked with her about the requirements of the job generally. On April 14, 1981, Johnson was bumped to Inspections.

"Bumping" is a union procedure which allows more senior employees to take the jobs of less senior employees under specific conditions. It is a common procedure which occurs frequently. On April 17, 198 1, Schmitz cautioned Johnson that she would have to pick up her pace to stay in inspection and on April 20, Schmitz told Johnson she may be disqualified from inspection because the "quality and quantity of her work was bad." (R. Ex. D).

4. On April 20, Schmitz talked with the "medic" who, according to Schmitz, said Johnson could be considered a hazard to herself because of all her first aid calls. (R. Ex. D).

5. On April 21, Schmitz informed Johnson that she would be bumped. She also told her that her work would need to be improved and to do her own work. (R. Ex. D).

6. Evidently early on the 24th, Schmitz warned Johnson that other employees were complaining about her harassment of them by talking with them when they were on piecework or incentive pay; that she was asking for their help and in general causing a distraction. Schmitz noted that she was approached by union employees about Johnson distracting them. (R. Ex. D).

7. Prior to terminating Johnson, Schmitz consulted with George Adams, the personnel manager. This occurred sometime in April 1981. Adam pulled the Johnson file and learned that Johnson had previously filed a complaint with the Commission and that it had been settled. They discussed giving Johnson some tangible goals to reach and then 'let her go do her job. " Adams also stated that the union president reported to him that Johnson had been propositioning men on the floor, specifically naming Brad Picton. (Tr. 116-117).

CONCLUSION

The order and allocation of proof-set down in McDonnell- Douglas v. Green, for a refusal-to-hire case under the general disparate treatment theory, has been almost universally adopted and applied to retaliation cases. Once the complainant has established a prima facie case, the burden shifts to the employer to articulate some legitimate non-discriminatory reason for the alleged acts of retaliation. Grant v. Bethelem. Steel Corp., 622 F.2d 43, 22 FEP 1596 (2nd Cir. 1980). The burden shifting rule is critical because once a prima facie case is established, a trier of fact presumes that the employer's acts "if otherwise unexplained are more likely than not, based on the consideration of impermissible factors." Furnco Construction Corp. v Waters, 438 U.S. 567, 577 (1978). The employer need not prove the absence of retaliatory motive, but only produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason. Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), cert. denied , 450 U.S. 979, 101 S. Ct. 1513, 67 L. Ed. 814 (1981); Burris v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 34:3 (10th Cir. 1982); See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254- 255, 101 S. Ct. 1089, 1094, 67 L. Ed. 207, 216 (1981). The employer need not persuade the trier of fact that it was actually motivated by the proffered reasons and it is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the employee. Burdine, 450 U S. at 254, 101 S. Ct. at 1094, 67 L. Ed. 2d at 216.
It is concluded that in the case at issue, Keokuk Steel has submitted evidence of legitimate non-discriminatory reasons sufficient to raise a genuine issue of fact as to whether it discriminated against Complainant.

FACTS

1. Johnson started work as a grinder operator (finisher). The recommended units per hour (UPH) on that job was 67. An employee is generally allowed up to 30 days to achieve this level. Courtney, the superintendent, stated that finishing was a very difficult job. (Tr. 150). Johnson's record indicates that she. reached 67 UPH on her 28th day and that her progress was steady. She also worked 3 days on a different cost center, i.e., 48 instead of 52. (R. Ex. A; Tr. 237-238). It was on April 10, the same day Schmitz called Johnson in, that Complainant reached a UPH of 67. Her performance on the 9th was 64, the 8th, 64 and the 7th, 48. The next day, the 13th, it was 64. The contract allows 30 days to qualify for a job. (Tr. 122).

2. Complainant had a perfect attendance record. (C. Ex. 4).

3. Evidence is in conflict as to how long it takes to learn the birnell process. Estimates range from a few minutes to 2-3 weeks. Picton, who worked on the birnell during the time at issue, stated that it took 2-3 weeks to be good at the job and that it takes a couple of days to learn it. He also observed Schmitz instructing Johnson on the birnell and felt that she should have spent more time with Johnson. When Picton started on the birnell process, he was trained for a longer period of time than was Johnson. (Tr. 279-280). The castings weighed 280 pounds. Picton showed Johnson different procedures for various castings. It was standard practice for new employees to ask questions of more experienced employees. (C. Ex. 6). During the time on the birnell inspection, the hand press broke. Johnson looked for Schmitz but could not find her and had to take the tool for repair herself This time, approximately 20-25 minutes, was not taken into consideration in judging the number of castings completed. Schmitz was in a supervisor's meeting at the time. Picton said that Johnson *did as well as far as a new person, male or female," and that they were shipping the castings which she birnelled, therefore, she must have been doing a proper job. (Tr. 283). Although Schmitz stated that another supervisor also helped Johnson that morning, both Johnson and Picton, who worked beside her, deny that to be true. Schmitz admitted that when she returned, she did not check to see if the birnelling had been completed or if it had been done correctly. (Tr. 248, 249, 253-257). The termination occurred approximately 12:15, or two hours after Johnson's assignment to the birnell operation. After Schmitz terminated Johnson, Johnson went to the personnel office to report and question that termination. She talked with Roger Neuman about her treatment by Schmitz. He said he would have to wait until he received the report from Schmitz and that then held get back to her. He never did. (Tr. 40).

4. According to Johnson's "Employee Health Record," she was sent to the Keokuk Area Hospital for contusion of the lower left leg on April 20, 1981. Although Schmitz accuses Johnson of "being a hazard to herself, " she never discussed this with Johnson. Furthermore, Johnson's health record shows only three visits, two for the same injury. It is company policy to record each first aid visit. It is also probable that all visits, particularly for minor problems, are not recorded. (Tr. 104).

5. Johnson denies propositioning the men on the floor as alleged by Schmitz. Schmitz could not recall the names of any of those persons, except Picton. Picton denied that Complainant had

propositioned him. Picton denied he had reported any such acts to the union. Adams said that Keith Cannon, union president, had reported Johnson for being away from her workplace and talking with other employees (Tr. 123-124). Cannon had not heard any reports or complaints against Complainant. (See Affidavit of Bradford K. Picton, Tr. 279, 281-282, 283-284 and 302).

6. Mallory, Johnson's first supervisor, stated that Complainant was a good worker, that he did not have to caution her about being behind in production, that she would not even take her breaks away from her station, and that she did not chat or visit with other employees. Although Schmitz accused Johnson of harassing other employees, she did not recall any names of workers who reported Johnson to her. No witnesses were called to support the accusation. (Tr. 223, 242).

7. Schmitz noted on April 20, that Johnson stood a chance of being disqualified because of the quality and quantity of her work and yet, she was unable to recall what the problems were or if she received any reports from the final inspector as to Johnson's work. (Tr. 241-242).

8. It was established that the supervisor's reports were prepared pursuant to company policy to document conversations between management and employees. It was also established that reports were not always discussed with Johnson.

9. Schmitz was very upset over the fact that she had shown Johnson how to work the birnell, Johnson said she understood, and then Schmitz found out that Picton was helping Johnson. Schmitz said Johnson *conned" Picton into helping her. (Tr. 246). Picton said he helped Johnson willingly, that such action is common practice with new employees. Schmitz did, however, give the reason for terminating Johnson as: "Refused to do work assigned and, to do it correctly. (Tr. 249-257). This reason was refuted by the evidence. Schmitz was unable to identify any instances of refusal by Johnson to work. Schmitz did not check the correctness of the pieces of casting Johnson worked on with the birnell test.

CONCLUSION

When the respondent carries its burden of production and produces admissible evidence of a legitimate non-retaliatory reason for an adverse employment action, the presumption raised by the employee's prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Burdine, 450 U.S. at 255, 101 S. Ct. at 1094-1095, 67 L. Ed. at 216. The burden always remains with the complainant who is then given an opportunity to demonstrate that the employer's proffered reasons are a mere pretext for discrimination taken in retaliation for participation in protected activities. Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), cert. denied, 450 U.S. 979, 101 S. Ct. 1513, 67 L. Ed. 2d 814 (1981); Grant v. Bethelem Steel Corporation, 622 F. 2d 43, 46 (2nd Cir. 1980).

The record leading to termination started when Schmitz, a white female, became Complainant's supervisor. After her first talk with Complainant on April 10, Schmitz repeatedly warned Complainant as to her performance. Complainant was warned of her performance on the day she reached the standard UPH of 67. Nevertheless she was told her UPH was low. Monday the 13th, she was apparently taken off grinding for half a day and put on sweeping. The next day she was bumped to inspection, a very technical job according to the scheduler, Meyers, who said that it

would not be typical to assign a probationary laborer to that job. After three days as inspector, Complainant was told to pick up the pace. She told Schmitz that she could not because she wasn't receiving the castings fast enough. The following Monday she went to the hospital because a casting "fell" on her leg. On Tuesday she was alerted that she may be bumped again. Either Wednesday or Thursday she was assigned to sweeping and on Friday she was called in and warned again and then put on the birnell, a new job, for two hours.

A review of the record results in a definite impression that Schmitz set up Johnson for termination and that it was done because Johnson had filed a sex discrimination suit against her employer. The notations winch were progressive were not credible in view of the other evidence. On the day Johnson reached the required standard she was called in the office. The testimony that Johnson was a hazard to herself was not supported by the evidence. The references that Johnson harassed other employees by talking with them while they were working was not supported by the evidence. In fact, they were even contradicted by the evidence. The accusations that Johnson was propositioning co-workers was contradicted by the only person named. Cannon and Picton were both credible witnesses.

After a few minutes of instruction on a new job and only two hours of working on a new job, Johnson was terminated without a check of either the quantity or quality of that work. The reasons for termination are not credible. The evidence does not support the fact that Johnson *refused" to do the work, nor that what she did do was done incorrectly.

Respondent originally stated that the incident of the birnell inspection on April 24, 1981, was the reason for Johnson's termination. This was also the reason given at the job service hearing. At this Hearing, Respondent attempted to rely on different reasons, i.e., performance as a grinder operator, harassing co-workers, propositioning males, and asking for help from co workers. That these additional reasons were felt necessary lends support to the conclusion that the reason given for termination was pretextual to disguise illegal discrimination. See Williams v. City of Montgomery, 33 FEP Cases 1801 (M.D. Ala. 1982); Andre v. Bendix Corp., 34 FEP Cases 1339 (N.D. Ind. 1984).

It is noted that a complainant is not shielded from legitimate termination because a charge of discrimination is filed. See Brown v. Ralston Purina Company [114 EPD §7665] 557 F.2d 570, 572 (6th Cir. 1977). It is also noted that an employer may not use what theoretically may be a legitimate cause for termination as a pretext for what is in reality retaliation against an employee for engaging in activity protected under the Civil Rights Act. Jackson v. RKO Bottlers of Toledo, Inc., 34, 782.

On the record before the Commission, it is concluded that Johnson would not have been terminated if she had not filed a sex discrimination complaint against Keokuk Steel, an activity protected under Chapter 601A. Johnson's allegations of retaliation are supported by a preponderance of the evidence. Johnson has proved that Keokuk Steel Casting's proffered explanation was pretextual and unworthy of credence. it is concluded that Keokuk Steel Castings violated Iowa Code section 601A. 11, when it terminated Johnson.

Signed this 14th day of September, 1988.

IONE G. SHADDUCK

Administrative Law Judge

DECISION ON REMAND

ON September 23, 1988, the Iowa Civil Rights Commission, at its regular meeting, adopted the Proposed Decision on Remand of the Administrative Law Judge, IONE G. SHADDUCK, issued on September 15, 1988. That Proposed Decision, attached as the Commission's Decision on Remand, shall be submitted to the Iowa District Court for Lee County.

SIGNED this 4th day of October, 1988.

RUBY ABEBE, Chairperson

Iowa Civil Rights Commission