

**BEFORE THE IOWA CIVIL RIGHTS COMMISSION**

**MICHAEL RICHARDSON, Complainant,**

**VS.**

**AMERICAN CAN COMPANY, DES MOINES, IOWA and GREENWICH, CT.,  
Respondent.**

**CP# 09-83-10966**

THIS MATTER, a complaint filed by Michael Richardson (Complainant) with the Iowa Civil Rights Commission (Commission) charging American Can Company of Des Moines, Iowa and American Can Company of Greenwich, Connecticut (ACC or Respondent) with discrimination in employment on the basis of race, came on for hearing in Des Moines, Iowa on the 2nd day of April 1987 before Hearing officer Ione G. Shaddock. Complainant was represented by Rick Autry, Assistant Attorney General. American Can Company of Des Moines, Iowa, was represented by John R. Phillips and Wendy Everett Ogden, Attorneys at Law. American Can Company of Greenwich, Connecticut was represented by Robert M. Hartwell, Attorney at Law.

Any rulings on motions reserved will be ruled on in this proposed decision. Any rulings on objections reserved are hereby denied.

The issues in this case are as follows:

Issue I - Did the Commission violate its duty to make a prompt investigation?

Issue II -- Was American Can Company's reason for terminating Michael Richardson based on race?

Issue III -- If Richardson's termination was based on race, what remedy is appropriate?

**FINDINGS OF FACT**

1. The Complainant, Michael Richardson, timely filed verified complaint CP#09-83-10966 on September 19, 1983, charging American Can Company of Des Moines, Iowa and Greenwich, Connecticut, with discrimination in employment on the basis of race.

2. The complaint was amended on July 17, 1984, to change the date of termination from August 22 to August 23.

3. Investigation was completed on November 19, 1985, probable cause was found on November 22, 1985, conciliation attempted but failed and Notice of Hearing was issued on November 4, 1986.

4. Richardson started work for American Can Company in Des Moines on July 26, 1983 as a quality control tester. Richardson is a Black person and was the only Black person in the quality

control department. His immediate supervisor was Nancy Favilia and his department head was Kevin Cook. Neither appeared as witness although interviews with each one by the investigator were introduced as evidence. (See Complainant's Exhibits 31 and 32).

5. Richardson was placed on probation for 30 days as is a union requirement at ACC. A performance report was done regularly by his immediate supervisor.

6. Richardson was a college graduate with a major in chemistry. He had worked in quality control at Firestone for several years prior to his job with ACC.

7. Richardson's job with ACC was working with saran, plastic bags to measure materials to make sure they would not burst under pressure. He used the microscope and two machines--the Ohmart and the Winzen.

8. Richardson's first report dated 8-1-83, was good. His second report, dated 8-12-83, indicated he had a lack of confidence and was having some problems with the microscope and Winzen. His third report, dated 8-16-83, indicated a lack of progress, a need for improvement in attitude toward work, problems with the Winzen after a review of the procedure, and comments by coworkers and supervisors that he is "arrogant." The report indicates that these matters were discussed with Richardson and that if there was no improvement, he would be "let go". Richardson admitted that the reports reflected the termination discussion except for the specific Winzen data. (see complainant's Exhibits 27, 28, 29, 30).

9. On 8-23-83, Richardson was terminated because of "performance/cooperation." He was stunned because he thought he had turned things around.

10. On 8-24-83, ACC hired Kevin Mersch, a white person, to replace Complainant.

11. For the 28 days of work with ACC, Complainant received \$1465.04. He also received unemployment. (See Complainant's Exhibit 35). He was hired by AVCO on November 7, 1983 where he earned the following: 1983, \$2024.43; 1984, \$15,455.07; 1985, \$15,546.72; 1986, \$16,583.04; 1987, \$5,395.33. He also worked part-time at Sears where he earned \$1526.07 in 1983.

12. Complainant admits that no one made racially derogatory remarks to him at ACC nor was race mentioned in the termination meeting.

13. The Des Moines plant of ACC employed approximately 320 people. The company is an industrial supplier for flexible packaging. The saran department is one of several departments.

14. A college degree is not a requirement for the quality control tester positions.

## **CONCLUSIONS OF LAW**

ISSUE I - Did the Commission violate it's duty to make a prompt investigation?

Respondent has moved for dismissal based on the allegation that the Commission has violated its duty under Iowa Code §601A. 15(3)(a) to 'make a prompt investigation.' Respondent claims that its substantial rights have been prejudiced because all of the key witnesses for Respondent are no longer available to provide testimony in this matter. As a general rule of law, statutes directing the mode of proceeding of public officers, relating to time and manner, are directory. Maquoketa Valley Community School District v. Maquoketa Valley Education Assoc., 279 N.W.2d 510, 514 (Iowa 1979). If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown. Taylor v. Department of Transportation, 260 N.W.2d 521, 522-23 (Iowa 1977). In the case at issue, Respondent has not shown prejudice. It appears the witnesses could have been found and their testimony taken. In addition, interviews taken by the investigators were introduced in evidence and statements made by the key witnesses were entered into evidence. Respondent's motion to dismiss on the basis of a Commission violation of duty is denied.

ISSUE II - Was American Can Company's Reason for Terminating Michael Richardson Based on Race?

1. The complaint was timely filed, processed and the issues in the complaint are properly before the Hearing Officer and ultimately before the Commission.

2. American Can Company, is an "employer" and "person" as defined in Iowa Code §601A.2(2) and (5)(1983), and is therefore subject to Iowa Code §601A.6 and does not fall under any of the exceptions of §601A.6(5). The applicable statutory provision is as follows:

1. It shall be an unfair or discriminatory practice for any:

a. Person to ... discharge any employee, or to otherwise discriminate in employment against any ... employee because of...race ... of such ..... employee, unless based upon the nature of the occupation.

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3. The United States Supreme Court set out the basic allocation of burden and order of presentation of proof in a case alleging discriminatory treatment in McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973). In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1093, 67 L.Ed. 2d 207, 215 (1981), the Court summarized that burden and order from McDonnell as follows:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. at 802, 5 FEP Cases, at 969. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the

defendant were not its true reasons, but were pretext for discrimination. -Id. at 804, 5 FEP Cases at 907.

This basic allocation of burdens and order of presentation of proof was adopted by the Iowa Supreme Court in Linn Cooperative Oil Co. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981).

4. The complainant carries the initial burden of offering evidence adequate to create an inference that actions by a respondent were based on a discriminatory criterion which is illegal under the law, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843 (1977). In evaluating the evidence to determine whether the complainant has succeeded in establishing that inference, which is referred to as a "prima facie" case, the commission and the Iowa Court have relied on McDonnell Douglas. The criteria established in McDonnell Douglas, however, were specific to a qualified applicant of a protected class who applied for a job and was rejected despite the qualification. Since then the Supreme Court has made it clear that the McDonnell Douglas criteria were to be neither "rigid, mechanized, or ritualistic." Furnco Const. Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978). Courts have been flexible in adopting the criteria to other types of cases.

5. In cases of termination, a prima facie case can be established by proving the following:

- a. membership in a protected class under the statute;
- b. employed by respondent and wished to continue in that job;
- c. termination; and
- d. that similarly situated employees who were not members of the protected class were treated differently.

In the case at issue, Richardson is a black person and therefore a member of a protected class. He was employed by Respondent and wished to continue in his job. He was terminated. The first three elements of the prima facie case are clearly established in the record. If any element of the prima facie case fails, then the Complainant will not prevail under the disparate treatment theory of discrimination set out in McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 802 (1973). The fourth element, therefore, is the crux of this analysis. The Complainant must show that nonblack employees who were similarly situated were not terminated or were subject to less severe evaluation.

It is noted that the Iowa Supreme Court has used different elements to establish a prima "facie case: a) membership in a group protected by the statute, b) qualified for job from which discharge occurred, c) despite qualifications, was terminated, and d) after termination, employer hired a person not in complainant's protected and class or retained persons with comparable or lesser qualifications who are not in the protected group. Trobaugh v. Hy- Vee Food Stores, Inc. 392 N.W.2d.154,156 (Iowa 1986).

The first element is the same. The second element, unless it is assumed the person was qualified on the basis of being hired will cause analysis problems if the respondent's reasons are based on performance on the job. The Hearing Officer takes exception to the use of that portion of the fourth element which provides for the hiring of a person not in complainant with similarly situated employees who were not terminated. The important result of establishing a prima facie case is the inference, that if the actions of the respondent remain unexplained, that such actions were based on discriminatory criteria.

6. Did ACC treat Richardson differently than similarly qualified control testers (QTC)? Complainant urges that he was the first QTC terminated for poor performance while on probation, that he was the first black QTC, that his work history belies the claim that he couldn't get along with others; that the microscope was a subjective test and prone to inconsistency; that the evaluation of white employees was more lenient than his own. Respondent urges that Richardson was not qualified to do his work despite his background which would suggest he could learn the procedures and perform accurately; he was not performing the duties of a QTC; that his evaluations and the written memos regarding were not proven to be fabricated or inaccurate; that Richardson admitted that they were accurate that his supervisor helped him to improve his performance; that no evidence was submitted that ACC had an improper motive or intent to discriminate against Richardson on the basis of race.

7. The 30 day probationary period applied to all new employees under the union contract. The "New Employee Progress Report" form was used for all employees. The comments were similar for employees consistent by evaluator. Respondent was consistent in giving a good first report. The second report tends to point out potential areas that can be improved. The third report tends to give a prognosis of success. The facts that Richardson was the only black tester and the only probationary tester to be terminated are not in and of themselves sufficient to prove different treatment. The Hearing officer finds little credence in the allegation of "arrogance" as a reason for termination, however, there is no evidence that other similarly situated employees had poor performance and were not terminated.

Assuming arguendo that Richardson had established a prima facie case, ACC would then be required to articulate a legitimate nondiscriminatory business reason for the treatment of complainant They would have been successful in articulating that reason. ACC has provided evidence of legitimate business reasons for the termination. They have shown that Richardson did not perform up to standards required of a quality control tester, whereas other employees similarly situated did perform up to standards. The Complainant would then have the burden of proving that by a preponderance of the evidence those reasons were not the true reasons or the reasons lacked credence and that ACC intentionally terminated Richardson because he is a black person. The evidence shows that not only did Favilia, his immediate supervisor, help Richardson, but she requested Pierich who had worked with Richardson at Firestone to help him with his problems. Richardson admits that he was having some problems and that his supervisor discussed these problems with him. mere suspicion of discrimination is insufficient to support a finding of discrimination. ' Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133 (Iowa 1973). Whether or not a prima facie case of discrimination had been shown, the Complainant has failed to bear his burden under the differential treatment theory.

Therefore, the record does not reveal facts to support a finding of discrimination and the complaint should be dismissed. On the basis of this conclusion, Issue III need not be considered.

### **RECOMMENDED DECISION AND ORDER**

1. The Complainant, Michael Richardson, has failed to establish a violation of the Iowa Civil Rights Act by allowing illegal employment discrimination based on race.
2. This case, CP# 09-83-10966, shall be dismissed.

Signed this 28th day of July, 1987.

IONE G. SHADDUCK

Hearing Officer

### **FINAL DECISION AND ORDER**

The Iowa Civil Rights Commission has received and reviewed the Proposed Findings of Fact, Conclusions of Law, Rulings, Recommended Decision and Order of Hearing officer Ione G. Shadduck dated July 29, 1987.

On August 28, 1987, the Iowa Civil Rights Commission, at its regularly scheduled meeting, adopted the Hearing Officer's Proposed Decision as its own Findings of Fact, Conclusions of Law, Rulings, Decision and Order.

Signed this 28th day of August, 1987.

John Stokes, CHAIRPERSON

### **ORDER**

On September 15, 1987, the Commission received a letter from Complainant requesting that his case be reopened. The Commission considered the letter as an application for rehearing pursuant to Iowa Code section 17A. 16(2). The application was timely filed. At their regularly scheduled meeting held September 25, 1987, the Commissioners did not grant the application, therefore, as of October 5, 1987, Complainant's application for rehearing shall be deemed denied.

IT IS SO ORDERED that on October 5, 1987, Complainant's application for rehearing is deemed denied.

John Stokes, COMMISSIONER

IOWA CIVIL RIGHTS COMMISSION

Copy to:

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Commissioners

Inga Bumbarly-Langston, Exec. Dir.