

BEFORE THE IOWA CIVIL RIGHTS COMMISSION

VICTORIA L. HAMER, Complainant,

VS.

UNITED PARCEL SERVICE, INC., Respondent.

CP# 09-84-12057

THIS MATTER, a complaint filed by Victoria L. Hammer (Complainant) with the Iowa Civil Rights Commission (Commission) charging United Parcel Service, Inc. (Respondent or UPS) with discrimination in employment on the basis of sex came on for hearing in Ottumwa, Iowa on January 12, 1988, continuing on January 13, 14, February 2, 3 and in Des Moines on March 8, 1988, before IONE G. SHADDUCK serving as Hearing Officer. Complainant was represented by Rick Autry, Assistant Attorney General and H. Edwin Detlie, private attorney. Respondent was represented by Albert L. Harvey and Rebecca Boyd Parrot, Attorneys at Law.

On January 8, 1988, Respondent filed a motion for summary judgment and memorandum of law in support of that motion. Complainant has subsequently withdrawn any claim of discrimination on the basis of physical disability, therefore, the issue presented in the motion is moot and requires no ruling.

Line 8, page 3 of the transcript should be corrected to change 611A to 601A. 1, line 3, page 707 should be corrected to delete "Hearing Officer" and add "Harvey"; line 23, page 804 should be corrected to delete "evidence" and add *objection."

ISSUE TO BE CONSIDERED:

WAS VICTORIA HAMER TERMINATED FROM HER EMPLOYMENT WITH UPS BECAUSE SHE IS FEMALE?

SUB-ISSUES:

1. Was Hamer not considered for the Washer/Porter Job because she is female?
2. Did unwelcome sexual conduct constitute sexual harassment of Hamer?

After having reviewed the record and briefs of counsel, the Hearing Officer makes the following findings of fact, rulings, conclusions of law, recommended decision and order.

1. The Complainant, Victoria L. Hamer, timely filed verified complaint CP #09-84-12057 with the Iowa Civil Rights Commission on August 27, 1984, alleging a violation of Iowa Code section 601A.6, discrimination in employment on the basis of sex, by Respondent United Parcel Service, Inc.

2. The complaint was investigated, probable cause found, conciliation attempted but failed. Notice of Hearing was issued on September 16, 1987.

3. Hamer started working for UPS on April 4, 1977, as a washer/porter. Sometime in 1980, she became an on-call delivery driver and continued in that position until her termination March 21, 1984. Hamer was terminated for "no call/no show." (T13)

4. It was customary for UPS to call on-call employees between 7 and 8 a.m. on the mornings drivers were needed. (T14) On-call employees provided UPS with phone numbers at which they could be reached. These numbers were posted in the UPS office near the phone (T14).

5. From January 1984 through sometime in March of 1984, Hamer lived with friends, Homer and Robin McBeth, in Oskaloosa. It was McBeths' number which Hamer gave UPS for calls when she was on-call or on lay off. That phone number was 673-3157 (T15).

6. On the weekend prior to her termination, Hamer started to move to a new location. On Friday, March 16, Robin McBeth made arrangements with Northwestern Bell to have Hamer's phone connected. When orders were taken, a two-day installation date was given. The Northwestern Bell records show that Hamer's phone service was completed on Monday, March 19. In the normal course of business, Hamer's number would not have been available until after 9:00 A.M. on Tuesday, March 20. If someone requested the number prior to that time from directory assistance, the response would be that there was no listing for that person. The only way to get the number prior to that time would be to call the business office. If someone obtained the number and called it before the phone was plugged into the jack, the caller would hear a ring and, of course, the receiver would hear nothing. The first recorded call on the Northwestern Bell records was on March 20, 1984, at 4:27 P.M. to Hedrick, Iowa. (R's Exh. DDD) The phone number is given when the order is placed. Therefore, the number would have been given to Robin McBeth.

UPS called the McBeth's number sometime between 8 and 9 A.M. on Monday, March 19. Homer McBeth answered the phone as was customary. He offered to get a message to Hamer and was told that it wasn't necessary. Homer told UPS that Hamer was moving and as far as he knew she didn't have a phone as yet. That evening (Monday the 19th) Homer told Hamer that UPS had called. Hamer then decided to stay at the McBeth's Monday night in case UPS called on Tuesday morning. The only number provided UPS was the McBeth's number.

On Tuesday, March 20, UPS called Hamer's new phone number (673-6473) instead of the number provided them by Hamer, the one at which she could have been reached. UPS documented that calls were made at 6:40 A.M. and 7:20 A.M. This documentation is not credible in that the new number was not available until either 9:00 A.M. on Tuesday or at the time the Northwestern Bell business office opened, both after the times of the alleged calls. It is not plausible that the call to find out the number was made on Monday because UPS would not know whether or not they needed Hamer until Tuesday morning.

On Wednesday morning UPS again tried to contact Hamer at her new phone number. She did stay in her new location on Tuesday night, but did not hear the phone or had not plugged it in the

jack. In any case, she did not receive the UPS call. She had not, however, given UPS her new phone number. That afternoon, March 21, she became concerned because she had not received a call from UPS and also wanted to request Friday off for a court appearance. She then called UPS and was told that she was terminated. UPS would not consider Hamer's reasons for not receiving their calls. The act of termination was final.

7. Employees at UPS were assigned work according to seniority. Utility drivers with the 10% least seniority were considered on-call and were posted on Friday. "Posted" meant that they were put on a weekly schedule on Friday for the following week. This occurred when work was left after the more senior employees were assigned or absent. Each morning after pre-loading it was determined whether or not additional employees were needed and if so, the "on-call" (10%) employees were called according to their seniority dates. (T641) When called they were given an hour to get to work. If they did not receive a call, they were considered on lay-off for unemployment benefits. If it was known on Friday that an on-call driver would definitely be needed on Monday, they would be told on Friday. Otherwise, they would normally be called the morning they were needed. It was not the responsibility of the on-call employee to call in. Hamer was not told on Friday to report on Monday, March 19. (T675) (T168-174)

8. The attempts to reach Hamer were documented on March 20 and March 21. The memos were signed, witnessed and notarized. It is noted that the witnesses did not sign before the notary public. This procedure was not only atypical, but was the only time such procedure was ever followed. Furthermore, Hamer was the only employee ever terminated for absenteeism except for one male terminated after this complaint was served, actually in January 1988. (T294, 518) There were also two additional memos, both to Jerry Millard, center manager, dated 3/21/84. One was handwritten and signed with Carnahan's name, but not by Carnahan (C's Exh. 9). The other was written by Carnahan and signed by him. Both memos recited the same events with some exceptions. (R's Exh. U) It is not in evidence who wrote the memo which, was signed Carnahan, but not by Carnahan. (Exhibit 9).

9. Hamer's schedule for the month prior to the week of termination was:

Week Ending

2-4-84 Disability all week

2-11-84 Disability 1 day; lay off 1 day worked 3 days

2-18-84 Request off 1, worked 4

2-25-84 Request off 1, worked 4

3-3-84 Request off 1, worked 1, lay off 3

3-10-84 Worked 5

3-17-84 Monday lay off, Tuesday worked, Wednesday lay off, Thursday and Friday worked

10. Article 3, Section 3 of the union contract provides in part as follows:

The seniority of an employee shall be considered broken for the following reasons, and the employee shall be considered terminated:

(d) If the employee fails to report to work for three (3) consecutive working days and does not properly notify the company at the beginning of his (sic) starting time on the third (3rd) day.

11. Larry Carnahan, an employee for UPS beginning in 1969, became a supervisor in 1980 and was supervisor during the time at issue. In 1982, Carnahan also documented Hamer's unavailability and then filed "Individual Personnel Reports" on Hamer on 8-25-82, 8-26-82, and 8-27-82. (R's Exh. L, M, N) Carnahan then sent a memo to Ver Steeg, center manager, dated 9-9-82, indicating that he had reached Hamer and told her to be at work on 9-13-82 (R's Exh. O) Hamer did not sign any of the reports and memos nor did Carnahan remember talking with her about them (T493) It is noted that the procedure set forth in Respondent's Exhibit 0, memo that Carnahan had called Hamer and told her to be at work on 9-13-82, was not customary procedure at UPS. (T498)

12. Aaron Ver Steeg, employee of UPS for 18 years (April 64- June 83) was management for about 12 years including center manager at Ottumwa from 1979 to 1983. On August 27, 1982, Ver Steeg, as center manager, sent Hamer a letter informing her that she was considered to have abandoned her job as there was no contact for 5 consecutive working days. It was Ver Steeg that terminated Hamer in 1982 for job abandonment when she failed to report on a specific scheduled work day. He did this without the usual upper level administrative approval. He also agreed to the reinstatement of Hamer. It was not his intention to terminate Hamer, but rather to make her realize the importance of being available for work (T 175). On September 7, 1982, a letter was sent to Hamer by Glen Schmidt, Division Manager, as a Final Warning letter, informing her that an agreement had been reached that she would return to work with full seniority rights. (R's Exh. Q, R, S)

The union contract provided that warning letters were only to remain in the personnel file for nine months. (T 176). Letters actually remain in the file but have no validity after nine months.

13. Article 17 of the union contract provides:

The employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of a complaint against such employee to the employee in writing and a copy of the same to the union

The warning notice as herein provided shall ... not remain in effect for a period of more than nine (9) months from date of said warning notice. (R's Exh. LL).

It is noted that Hamer's warning letter was dated September 7, 1982. (R's Exh. R). This letter specifically states: "This is a Final Warning Letter." The letter of agreement which Respondent declares is not a warning letter is dated September 2, 1982. That agreement provides:

2. I agree to accept a final warning letter in place of the discharge letter. I understand that under the letter the company can discharge me immediately for the same offense. (R's Exh.S)

14. Herschel Farmer, currently the Iowa district labor relations manager for UPS and successor to Taylor the manager during the time at issue, was package division manager when Hamer was terminated. Farmer consulted Taylor on that termination and said that Taylor had considered the 1982 termination in denying the 1984 grievance. Millard was the one that relayed the basis for the termination to Farmer. Millard, however, did not consider the 1982 termination. (T623,668)

15. Hamer's reaction to being fired was "total shock, terror." (T87-88). At the time of termination, she owned four vehicles. Two were repossessed, one she had to sell. She had to give up the house she just moved into and she lived for about four months in her station wagon. (T 89).

16. In 1982, while working for UPS, Hamer earned \$21,110.00 plus \$1113.00 in unemployment benefits. (C's Exh. 3). In 1983, Hamer earned \$15,243.00 plus \$565.00 in unemployment benefits (C's Exh. 4). It is noted that during 1983 and 1984, Hamer missed several weeks because of disability. (T 80) At the time of termination, Hamer was paid \$13.97 an hour (T 12). Hamer also received medical/dental benefits while working for UPS. She also accumulated vacation time. (T 148-149) Counsel stipulated to the accuracy of comparative figures: Steven White, a male UPS employee with the same seniority date, (February 27, 1980) received a salary from UPS of \$31,248.92 in 1984, \$33,983. 10 in 1985, and \$36,095.62 in 1986. (T 224).

17. After her termination on March 21, Hamer applied for unemployment benefits and was granted those benefits in the amount of \$4304.00. (T 35)

18. Since her termination by UPS, Hamer worked for Magna Dry and earned \$373 in 1984. (T 37). In 1985, she earned \$1,074 plus \$766. In 1986, Hamer did not earn enough to require filing a tax return. (T 93). In 1987, she earned \$2,664 from Sherwin-Williams and \$16,811 from Lanter Courier (T 41).

At the time of the Hearing, Hamer was still employed by Sherwin William, although laid off. She was working part time at \$4.50 per hour. She also was working for Lanter and getting paid at the rate of 25 cents per mile plus \$1.00 per hour while on duty, but not driving. She was required to pay for her own expenses and furnish the vehicle.

19. Attorney Detlie, private counsel for Hamer, provided professional services for Hamer in the civil rights suit up to the time of this Hearing in the amount of 75.7 hours. He submitted a supplemental itemization on March 21, 1988, for 68.15 additional hours, plus \$151.00 additional expenses. Eight hours were duplicative of work done by the Assistant Attorney General. (T387)(T 225, C's Exh. 8). Detlie also charged Hamer \$273.00 for representing her before the Department of Job Service.

20. UPS had approximately 2400 employees in the State of Iowa with about 560 delivery drivers. UPS has its eastern district office in Des Moines and approximately 21 delivery centers, including the one in Ottumwa.

21. Employees who are on *layoff" are employees for whom no work is anticipated for the following week. Therefore the "on- call" employees are more likely to be called first. The record for the week ending 3-17-84, showed Hamer "on-call" with "lay-off" crossed off. Actually, she was on lay-off 3-12 and 3-14. The record of the week in question has not been made available. (R's Exh. GG and NN) If Hamer had been on "lay-off" instead of "on- call", her failure to respond would not have been "no call/no show*" according to Farmer, current labor relations manager. (T 838-839) (T642-643). There were no written rules nor union contract provisions requiring on-call drivers to be at their phones. It was understood calls would come in between 7 and 8:00 A.M. if drivers were needed. Drivers who wanted to work would make themselves available. The procedure was to call the next person on the list and if they couldn't get a hold of that one, they'd call the next one and just go down the list.

22. The decision was made to terminate Hamer on March 19, 1984. That is why the memo was sent to Al Taylor on 3-19-84. (T501). Ver Steeg believed Carnahan when he said they were going to "nail Hamer for no call/no show" and felt an injustice was about to be done to Hamer. Discipline at UPS was a 4-step system: verbal warning, written warning, suspension and termination. This procedure was not followed in Hamer's termination.

Finding an on-call employee not at their phone, especially if called just prior to start time, was not unusual. Nor was it unusual to not reach someone three days in a row. (T 190) Ver Steeg never had trouble reaching Hamer after she received the warning letter in 1982. (T 191)

The phrase "no call/no show" means an employee is scheduled for work and doesn't show or call that they cannot show. The responsibility for calling an on-call employee was on UPS.

SUB-ISSUE #I-WASHER/PORTER JOB

1. There were two washer/porter positions, one was for 8 or more hours, the other for 5 hours. Hamer usually worked the full time position. Jerry Murphy held that job during the time at issue and when he had to be off for surgery, January 1984, it was necessary to replace him. (T 107).

2. According to Wendell Gray, union steward, there is no job opening and a bid cannot be posted in case of injury. Management has a right to assign a person to that job. (T 308-309) Management does not have to go according to seniority on such an assignment. Qualification for the job is the important consideration. MILLARD, center manager, however, said he did go by seniority. Hamer was qualified and experienced. Her comparative seniority is not in evidence.

3. The procedure for a driver who anticipates being on call or laid off is to notify the center manager on Friday that they want to have the washer/porter position for the following week. (T 649) It is noted, however, that on March 30, 1984 (after Hamer's termination) Millard sent a memo to Taylor establishing the procedure for assigning personnel to the washer/porter position. (R's Exh. EE)

4. When Murphy had the injury and was off for a considerable period of time, his position was filled by laid-off delivery drivers. The job was not posted. (T 65 1) The job was not up for bids

because the injured employee was on workers compensation with the job held open for his return.

5. Hamer did work as delivery driver for most of the wee in issue except when she was off on disability.

6. On March 24, 1984, Hamer filed a grievance based on a violation of the union contract stating that UPS assigned employees to fill that vacancy with less senior employees. That grievance was denied for being untimely, i.e., Hamer had been terminated on 3-21-88. (R's Exh. W and X), (T 746)

SUB-ISSUE #2 - SEX HARASSMENT

1. Around Christmas time in 1983, Jerry Millard, center manager, advised Hamer that getting pregnant at UPS would cause problems (T 55).

2. In 1981 or 1982, prior to the 180 day limit of this complaint, a co-worker, Merle Overturf, shoved Hamer into a storage area with the lights out. She tried to get out, but the door was being held from the outside. When it was finally opened, three coworkers were standing by the door: Steve Buckley, Charles Popelka and Dick Bates. Hamer did not report the incident to management. (T 59- 66)

3. Drivers were required to wear uniforms. The male drivers had a locker room. The female drivers changed in their restroom. Both were located upstairs over the office area. All drivers started at approximately the same time and, therefore, changed into their uniforms at about the same time in the morning. Males would sometimes try to push the women's door open as they went by. At times, when they heard females coming up the stairs, males would open the swinging door to their locker room while they were changing clothes. They hollered invitations to the females to come and help them. Sometimes when both sexes were going up the stairs, the males would make sexist remarks or whistle. Some males made suggestive movements and sexual remarks during check-in. Hamer reported some of these incidents to Larry Carnahan, supervisor. Nothing was done.

4. Sometime in 1983, while Hamer was loading her truck, Jerry Millard, came in and grabbed her from behind and pushed his body against hers from behind. She screamed and ran out telling Ver Steeg, then center manager, to "get that dirty pervert out of my truck." (T 83-84) Ver Steeg received complaints from female employees about wolf whistles and comments from the males. He also witnessed the incident Hamer cited with Jerry Millard while she was loading her truck. He did not take any action. It is noted that Millard is the person who relayed the basis for Hamer's termination to upper management.

5. Wendell Gray, delivery driver for UPS, did not notice any different treatment of the females; nor did Hamer file any grievances with him while he was union steward.

6. Connie Moss, delivery driver for UPS, stated that most of the guys teased her all of the time, but she didn't believe they did it maliciously. She admitted that they called her "Honey*" and that

is her nickname. She didn't experience any problems with the use of the restroom. It did not have a lock on for years; and, she requested that a lock be installed around 1980-81. Moss was the first female driver at UPS, Ottumwa. She didn't experience any difficulties going up the stairs to the restroom because she always let the men go up first. (T 324) Moss said that males made comments to her about going up and changing clothes together. (T 326) She did not find such comments offensive. (T 327) Moss stated that she felt that her problems meeting the standards were related to her being female. (T 329)

Moss admitted that remarks were made by the nude drivers, but it didn't bother her "all that much," that remarks are made that you have to ignore; that if there was anything said that was out of line, she'd tell them to knock it off-, and that most of the time, they'd knock it off. (T 335-336). She identified Popelka, Haas, and Overturf as guys who would be most involved in the "playfulness." (T 340)

7. Steve Buckley, delivery driver for UPS for about 12 years and a current employee, denies ever putting his arms around Hamer, making comments to her going up the stairs to the restroom. or witnessing anyone else doing so, making or witnessing sexual advances toward Hamer during check in, ever saying anything sexually based to Hamer, hearing any comments about pregnancy, knowing anything about the closet incident, and denies the occurrence of wolf whistles. Buckley admitted he might be considered in a group that "joked around." He also agreed that Overturf and Bates would be included. It is noted that a UPS female clerk was present in the Hearing room and that she was the girl friend of this witness. (T399)

8. Merle Overturf, delivery driver currently and employee of UPS for 23 years, denied whistling and the ability to whistle; denied pushing Hamer in the storage room; admitted being a participant in practical jokes; and generally denied allegations of sexual harassment. (T. 316) It is noted that the wives of UPS employees, Dick Bates, Mike Rayburn and Dwayne Quick, sat in on the Hearing. All were close friends of Overturf. (T 440)

9. When Ver Steeg started as supervisor for UPS, there were no female drivers. He was, in fact, opposed to female drivers. (T 177) Hamer was promoted to driver under Ver Steeg although he was opposed to that promotion. He was under pressure from his supervisor to hire females. (T 215)

Ver Steeg said that he believed the women were getting tired of the male comments and wolf whistles. Ver Steeg admitted that he was opposed to female drivers and allowing females to take pregnancy leave because the males didn't have the same right, that Millard felt the same way and both of them got upset when a female called in sick due to pregnancy. (T 186-189)

Ver Steeg responded to female complaints about male conversations by talking with the males. He remembers talking to Bates, Buckley and Overturf. Nothing was put in their personnel files because Ver Steeg didn't consider the action disciplinary, nor a problem, therefore, it ended there. (T 201-208)

Ver Steeg gave Hamer the name "Silvertongue" because when she became angry, she was quite vocal, and that was usually when male employees were teasing her. (T 210)

10. Cheryl Sandifer, utility driver for UPS for 9 years and currently an employee, had two children during her employment. Except for Ver Steeg, no one commented on her state of pregnancy. A male employee did (Merle Overturf) ask to come in the restroom with her but that happened only once. She didn't report the incident, concluded it was just teasing. Sandifer did remember wolf whistles in the morning and that Hamer had told her about the males putting their arms around her. (T 243) Sandifer was allowed to take layoff without compensation whenever she wanted to as long as there was a junior male that wanted to work. (T 195)

Carnahan recalled remarks made to Sandifer such as: "Geez, you're pregnant again." (T 553) He recalled remarks by females such as "Merle's up to his old tricks again" or "someone is doing something over" but he just didn't have time to be there and watch the operation. He would have reported anything serious.

Carnahan admitted that there may have been complaints by the females about suggestive remarks by the males. His response to the question was "They might have made a remark about it or something like that, but what do you do? Get the guys out of the office where the coffee pot is or away from the coffee pot or what ... " (T 594)

12. Millard denies hearing any sexually-oriented comments to female employees, comments about pregnancy to Hamer, the incident in the truck when Hamer called him. a pervert, etc. (T 654- 655, 659, 660, 670)

13. Richard Bates, employee of UPS for 21 years and currently a driver, doesn't remember any wolf whistles, never observed any sexual advances to Hamer nor remembered any closet incidents, didn't remember locker room incident, nor did he make sexual advances toward Hamer, or hear any comments regarding pregnancy.

14. Charles Popelka, a delivery driver for UPS for 11 years and a current employee, denied any knowledge of the closet incident with Hamer or any sexual words or contact. He denies ever hearing males whistle at Hamer or any of the female employees or making comments about pregnancy.

15. Janice Smith, part-time employee of UPS as washer/ porter, denies having any difficulties relating to the restroom, comments as to pregnancy, hearing any sexual comments. She had been picked up and thrown into the porter closet by a couple of center managers, but did not know anything of the closet incident with Hamer. There were two porter closets, one under the stairway and one in a storage room which was located on the left as you entered the building on the west. She was thrown in the storage room closet and the door was held closed so she couldn't get out. Smith acknowledged that wolf whistles occurred at UPS.

16. Kevin Haas, current driver for UPS and employee for 10 years, denied seeing anyone making sexual advances to Hamer, didn't recall any wolf whistles, denied hearing comments to females from the male locker room or comments regarding pregnancy, has no recall of Hamer being pushed into the closet, was unaware of any incidents of other employees being locked in the storage closet.

17. Glen Schmidt, former division manager including the Ottumwa area (1979-1984), visited the centers about once a month. On those visits, he talked with management and drivers. No female drivers complained to him about being treated differently. He could not remember any case of termination for job abandonment except that of Hamer. Schmidt is the person who terminated Ver Steeg.

CONCLUSIONS OF LAW

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. United Parcel Service, Inc. is an "employer" and "person" as defined in Iowa Code section 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).

3. The applicable statutory provision is as follows:

601A.6 Unfair employment practices.

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

a. Person to refuse to hire, accept, register, classify, or refer for employment, or to otherwise discriminate in employment against any applicant for employment or any employee because of the... sex of such applicant or employee, unless based upon the nature of the occupation...

4. 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 summarizes 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 a pretext for discrimination. Id. at 804, 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)

5. The Complainant carries this 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. In the case at issue, the focus of the evidence centers around the charge of termination based on sex discrimination.

6. Hamer is a female and, therefore, a member of a protected class; she was qualified for her job and wished to continue in that job; she was nevertheless terminated from that job; and, was the only employee terminated for such reasons and treated in that specific way. Hamer has established a prima facie case.

7. The burden of persuasion remains with the Complainant. However, a prima facie case creates a "presumption" of discrimination which, if believed, will require a finding of discrimination. Burdine, 450 U.S.248, 101 S.Ct. 1089. If the employer desires to dispel this presumption, evidence must be produced showing "some legitimate, nondiscriminatory reason" for the challenged action. McDonnell Douglas, 411 U.S. at 803,93 S.Ct. at 1824,36 L.Ed.2d at 668. The employer need not persuade the trier of fact that it was action motivated by the proffered reason.

It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiffs rejection ... (footnotes omitted).

Burdin, 450 U.S.at 254,101 S.Ct. 1094.

8. Respondent terminated Hamer because they Called her as an "on-call" employee three days in a row and were unable to reach her. She was terminated for "no call/no show."

9. Where the Respondent has been successful in meeting the burden of production, the Complainant may then attempt to prove the reasons offered by Respondent were not its true reasons, but were a pretext for discrimination. Burdine, supra; and, McDonnell Douglas, supra at 804. As the Court noted in Burdin, the Complainant may succeed either directly by persuading the Commission that a discriminatory reason more likely motivated the Respondent or indirectly by showing that the employer's proffered explanation is unworthy of credence.

10. UPS did not have a written policy nor a contractual provision in the union contract requiring employees who were in the lower 10 % in seniority (utility drivers) to stand by their phones between 7-8 A.M. in case they were needed. It was assumed that if they wanted the work, they would make themselves available. If it was known that drivers were needed the following week,

they would be scheduled on the previous Friday. On-call drivers were only called during the week if there were last minute absentees or additional work. If on-call employees not scheduled on Fridays did not receive a call during the week, they were considered on lay-off for purpose of unemployment benefits.

Hamer was a utility driver. She was not scheduled on Friday for driving the week of March 19, 1984. Employees on lay- off are employees for whom no work is anticipated for the following week. The on-call employees are most likely the ones to be called. During the seven prior weeks, of the seven utility drivers, Hamer was the only employee on-call for all of those weeks. (R's Exh. GG) Actually, Hamer was on lay-off March 12 and 14. She drove on March 13, 15, and 16. The 16th was the Friday before the series of calls to which there was no response. (R's Exh. NN) As a matter of fact, the record indicates that Hamer worked all of the prior week ending March 10.

It is noted that Respondent submitted the work schedules into evidence for weeks ending 2-4-84 through 3-17-84, but either refused or failed to produce the record for the week ending 3-24-84, the week in issue, even though directly ordered to do so by the Hearing Officer. (See letter dated February 10, 1988, from Attorney Harvey) 240 Iowa Admin. Code 1.3(5) clearly requires the preservation of records by a respondent until a complaint has been finally adjudicated. The fact that the record for the critical week has not been produced into evidence leaves open the possibility that work was not available on the dates Hamer was called. The reason for termination was that she was not available for work which UPS had available (R's Exh. V) The conclusion is that the record requested would have been adverse to UPS.

11. There is conflicting evidence by UPS as to whether or not the 1982 termination/reinstatement was considered in the 1984 termination. The union contract requires at least one written warning notice prior to termination. The contract also Provides that such a warning notice shall not remain in effect for more than nine months. Hamer received a "final warning letter" dated September 7, 1982. Since March 21, 1984, the date of Hamer's termination, was more than nine months after receipt of the final warning notice, the warning notice should not have been considered in the 1984 termination. UPS argues that the letter of agreement of 1982 reinstating Hamer was not a final warning letter. It is agreed, however, the letter of agreement is specifically based on acceptance of a final warning letter. UPS argues further that the provision in the letter, i.e., "I understand that under the letter [final warning letter] the company can discharge me immediately for the same offense, " negates the contractual provision that a warning notice *shall not remain in effect for a period of more than nine (9) months from date of said warning notice." Such an argument is not reasonable under the terms of the contract. Even RICHARDSON, UPS personnel manager, admits there was nothing in the letter of reinstatement that extends the nine month period. (T 756, 834) Termination could certainly occur for *the same* offense without further warning if it occurred within the 9 months. The interpretation given the letter of agreement by UPS would mean Hamer could have a perfect record for 20 years and then be terminated for the Sam offense committed back in 1982 without another warning notice. That is not credible. The 1982 incident should have no bearing on the 1984 incident. As a matter of fact, Hamer's record had been good since the 1982 incident and no additional warnings had been issued, a requirement prior to termination. Neither procedure, that of issuing a final warning notice before termination under the contract, nor the 4-step discipline procedure as set forth by

Carnahan was followed in this situation. Furthermore, Section 1, Article 6, of the contract, specifically provides that the "Employer agrees not to enter into any agreement or contract with their employees ... which in any way conflicts with the terms and provisions of this agreement. Any such agreement shall be null and void." (R's Exh. LL)

It is difficult to reconcile Articles 3 and 17 of the contract. Article 3 - Seniority, Section 3 (d) provides for broken seniority and termination, inter alia, the employee fails to report to work for 3 consecutive days and does not properly notify the employer at the beginning of starting time on the 3rd day. Article 17 Discharge or Suspensions, provides for notice prior to discharge or suspension with noted exceptions which do not include the failure to report for 3 consecutive days without proper notification. It is noted that Article 17 provides that there are other offenses of extreme seriousness[emphasis added] that may result in discharge without a warning letter. If an employee fails to appear for work three days in row and that employee is scheduled to be there, such a failure could be considered extremely serious. If someone is not scheduled to work, they cannot fail to appear for work. The worst Hamer could have been accused of is failure to be by the phone during the call period on Monday. But there is no rule, contract, or written policy that "on call* employees are to be by their phones during the call period. She had been by her phone the prior six weeks. The record shows her on-call and also that she worked.

The second day, Tuesday, she was by the phone and UPS chose to call a different number, one not provided to them by Hamer. The testimony on Tuesday's phone call is not credible, however, since the alleged calls were made prior to 8 A.M. and the telephone company said the phone number would not have been available until 9:00 A.M. Tuesday. There would be no logical reason to request the new phone number on Monday, since they did not know whether Hamer would be needed Tuesday until Tuesday morning.

It is not possible to deduce what really happened on Wednesday morning except that UPS, by their own admittance, called a number not provided them by Hamer. The failure in this instance is merely failure to provide a current phone number hardly an act of extreme seriousness which would result in termination without warning. Hamer voluntarily called UPS on Wednesday afternoon without knowing UPS had tried to reach her that morning and Tuesday morning.

11. On March 19, 1984, after the first attempt to call Hamer, Carnahan wrote a memo to Taylor, labor relations manager, to inform him of his failure to reach Hamer. [Emphasis added]

On March 20, 1984, after the second attempt to reach Hamer, Carnahan wrote a memo to Millard, the center manager, documenting that call. (R's Exh WW) On March 21, 1984, Millard wrote a memo to Taylor, notifying him that an attempt was made to reach Hamer Wednesday A.M. (RIs Exh. PP)

On March 21, 1984, Carnahan wrote another memo to Millard documenting his conversation with Hamer as a result of her call to him on Wednesday afternoon. (R's Exh U)

The uniqueness of this series of memos is that they were signed, witnessed and notarized. The witnesses, however, did not sign before the notary. In 1982, Carnahan wrote a similar series of signed, witnessed and notarized documents reporting on Hamer's absences. It was agreed

generally that such procedure was not customary at UPS and had never been used with any other employee.

The explanation of Hamer's termination as proffered by UPS is not credible. It is concluded that the decision to terminate Hamer was made on or before March 19, 1984, and phone calls were structured in such a way that UPS would have documentation to justify that termination.

12. The next question to be addressed is whether or not that termination was because Victoria Hamer is female. No males were terminated for absenteeism except for the male terminated in January 1988, the time of this Hearing. That termination is not considered comparable under such circumstances. Ver Steeg, management for about 12 years, admitted being biased against female employees. He didn't want them hired and didn't want them to be given pregnancy leaves. There were only 3 female drivers at UPS - Ottumwa: Connie Moss, Cheryl Sandifer and Hamer. Moss acknowledged the sexual remarks by the male drivers but did not consider them offensive. For the most part she would handle such incidents on her own. Sandifer said only Ver Steeg commented on her pregnancy. She did acknowledge one incident of sexual invitation by Overturf and had heard wolf whistles. She was not offended and considered such acts as just teasing.

Employees recognized among the group of "teasers," were Overturf, Popelka, Haas, Bates and Buckley. Witnesses Buckley, Popelka, and Haas were very nervous during the Hearing and less than credible witnesses. Overturf was not a credible witness. Management did not consider complaints by the women as serious and allowed an atmosphere where women could be treated primarily as sex objects, certainly not considered with equality. Moss was given a behind-her-back nickname which was disrespectful. Sandifer was allowed time off whenever she wanted as long as there was a junior male driver available. Hamer and Janice Smith, a part time employee, had both been thrown into a storage closet and held there against their wills. Although Moss, Sandifer and Smith were generally not offended by such acts, Hamer was offended. When Hamer was teased, she became angry and quite vocal. Even when Ver Steeg was aware of incidents, he only talked with the guys but didn't consider the talk as disciplinary nor their actions as problems. Carnahan admitted that there may have been complaints by the women, but "what do you do?" Millard, the other member of management was one of the persons who harassed Hamer. Although many specific acts occurred prior to the statutory 180 days, some acts were continuing and the general atmosphere of sexual harassment did not change until after the filing of Hamer's complaint.

It is concluded that sex was a determining factor in Hamer's termination and that UPS violated Iowa Code Chapter 601A in that termination.

REMEDIES

Iowa Code Section 601A. 15(8) (1983), provides as follows:

8. If upon taking into consideration all of the evidence at a hearing, 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...

The purpose of awarding damages to Complainants injured by unlawfully discriminatory acts is to restore persons to the position they would have been in had the discriminatory act not occurred. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162,171 (Iowa 1982). The Commission has followed the precedent established in Amos v. Prom, Inc., 115 F. Supp. 127 (D.C. Iowa 1953) as to theories on remedies. It has awarded damages for emotional distress in previous discrimination cases. See Wilder v. Wetherbee, 4 Iowa Civil Rights Commission Case Reports 162 (1979); Reece v. Sheraton Inn, #6515; Robinson v. Cunningham, #8629; and Kies v. Ramada Inn, #5780.

The purpose of Chapter 601A is remedial in nature and the Commission is granted a broad range of remedies. Section 601A. 15(8) includes the following provisions:

- (1) reinstatement or upgrading of employees with or without pay...
- (5) Extension to all individuals of the full and equal enjoyment of the advantages, facilities, privileges, and services of the Respondent denied to the Complainant because of the discriminatory or unfair practice.
- (6) Reporting as to the manner of compliance.
- (7) Posting notices in conspicuous places in the Respondent's place of business in form prescribed by the Commission and inclusion of notices in advertising material.
- (8) 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.

Calculating the precise sum which is most appropriate to make complainant whole is difficult. The discretion to fix the amount of such damages is in the fact finder who has witnessed the demeanor of the parties. Seaton v. Sky Realty Company Inc., 491 F.2d 634,637 (7th Cir. 1974). The fact that it is difficult does not relieve the commission of its burden of fashioning a remedy which is commensurate with Complainant's emotional and mental injury. See Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836,845 (Iowa 1980).

In the case at issue, Hamer requests reinstatement to employment at UPS with retroactive seniority, including the right to bid into a route which she would have been able to bid into if she had not been illegally discriminated against, back pay, front pay until she is reinstated, and reimbursement for lost insurance benefits. She also requests reimbursement for attorney fees incurred at the Job Service Hearing, attorney fees for the civil rights complaint, and emotional distress damages.

REINSTATEMENT, BACK/FRONT PAY, MEDICAL COSTS

IT IS CONCLUDED that Hamer should be reinstated to employment with UPS-OTTUMWA with retroactive seniority including the right to bid into a route which she could have bid into had she not been terminated.

IT IS ALSO CONCLUDED that Hamer should be awarded back pay beginning March 20, 1984, and continuing until her reinstatement, as ordered, takes place. Unemployment received and interim earnings should be deducted from any back pay. The rate of back pay should be based on her own record in conjunction with White's record as projected during the subsequent years. Interest at the statutory rate from the date of filing the complaint until paid in full should be awarded.

IT IS FURTHER CONCLUDED that Hamer shall be reimbursed for insurance-covered actual costs paid and not reimbursed since termination.

Counsel are ordered to submit a stipulation as to back pay. Counsel shall also stipulate to reimbursed actual medical costs. The ordered stipulations are due in the office of the Hearing Officer 15 days prior to the Commission meeting at which this proposed decision will be considered.

ATTORNEY FEES

Attorney fees for the Job Service hearing are denied. The Commission should refrain from ordering attorney fees for work done before another governmental agency. Attorney fees for work on this case will be considered after the final Commission decision.

DAMAGES FOR EMOTIONAL DISTRESS

The authority for the award of damages for emotional distress is found in Iowa code section 601A.15(8) which empowers the Commission "to take the necessary remedial action as in the judgment of the Commission will carry out the purposes of this chapter." More specifically subsection 601A. 15(8)(a)(8) provides that "remedial action" includes but is not limited to:

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.

Such damages are essential to restore an individual unlawfully discriminated against to the position in which that individual would have been had the discrimination not occurred, the "make whole" philosophy and policy of the Commission. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 171 (Iowa 1982). Emotional distress is an injury causing damage. Furthermore, Iowa Code section 60 IA. 18, provides that Chapter 601A shall be construed broadly to effectuate its purposes.

The definition of "actual damages" is "the amount awarded to a complainant in compensation for his [sic] actual and real loss or injury", according to Black's Law Dictionary 352 (5th ed. 1979). In Amos v. Prom, Inc. , 115 F. Supp. 127,132 (N.D.

Iowa 1953), a federal court interpreting Iowa law recognized emotional distress damages as compensatory. In 1986, the United States Court of Appeals, Eighth Circuit, upheld the award of damages for emotional distress under Iowa Code section 601A.15(8)(a)(8). Ridenour v. Montgomery Ward and Company 40 FEP 764, 786F.2d 867. In Chauffeurs, Loc. U. 238 v. Civil Rights Comm' 394 N.W. 2d 375, 382-383 (Iowa 1986), the Iowa Supreme Court agreed with those jurisdictions allowing the award of emotional distress damages by the civil rights commission or its equivalent. Massachusetts Commission Against Discrimination v. Franzaroli 357 Mass. 112, 115, 256 N.E.2d 311, 313 (1970); Zahorian , 62 N.J. at 416, 301 A.2d at 763; Batavia Lodge No. 196, 35 N.Y.2d at 146, 316 N.E.2d at 319-20, 359 N.Y.S.2d at 27; Speer, 29 N.Y.2d at 557, 272 N.E.2d at 884, 324 N.Y.S.2d at 297; Williams v. Joyce, 4 Or. App. at 504-05, 479 P.2d at 524. Contra Zamantakis v. Commonwealth, 10 Pa. Commw. 107, 117, 308 A.2d 612,616-17 (1973). The court stated that such a result "seems only natural because emotional distress is generally a compensable injury, and the language of the statute allows actual damages which are synonymous with compensatory damages". The Court also stated that allowing the award of emotional distress damages is also consistent with the commission's discretion in fashioning an appropriate remedy under section 601A.15(8)." Foods, Inc. 318 N.W. 2d at 171.

The Commission has awarded damages for emotional distress since 1979, with awards ranging from \$500 to \$25,000. The Commission and the Court require the discriminatory acts to be the basis for and connected with the emotional distress. In the case at issue, Hamer was forced to give up her apartment into which she had just moved and to live for several months in her car. This was a direct result of her termination which was an intentional and discriminatory act by Respondent. It is easier to determine an amount of damages for emotional distress when there is evidence of psychological harm by an expert witness, however, there are situations where it is reasonable to conclude that emotional distress has occurred just by the circumstances and testimony of the complainant. There was no expert testimony as to Hamer's emotional distress, but because of the circumstance of her unexpected discharge it can reasonably be concluded that Hamer suffered emotional distress. Her demeanor and testimony on the witness stand indicated that she had and still was suffering from those circumstances. It is concluded Hamer should be awarded \$5,000.00 in emotional distress damages.

RULINGS

1. Respondent's Motion to Dismiss is denied.
2. Counsel for Complainant objected to admission of Respondent's Exhibits ZZ, AAA, and BBB under Iowa Rule of Evidence 608B. Since the exhibits are not considered damaging to Complainant's case, they will be admitted subject to the objection.
3. Counsel for Respondent objected to admission of Complainant's Exhibit 10. Pursuant to Iowa Rule of Civ. Pro. 144, Complainant's Exhibit 10 is admitted subject to the objection.

RECOMMENDED DECISION AND ORDER

1. United Parcel Service, Inc. violated Iowa Code section 601A.6 (1983) in terminating VICTORIA L. HAMER because of her sex.
2. IT IS ORDERED that UPS shall cease and desist from discriminatory or unfair practice against female employees.
3. IT IS FURTHER ORDERED that VICTORIA L. HAMER shall be reinstated to employment with UPS-OTTUMWA with retroactive seniority to include the right to bid into a route which she could have bid into had she not been terminated.
4. IT IS FURTHER ORDERED that Hamer is awarded back pay beginning March 20, 1984 and continuing until she is reinstated. The actual amount of back pay shall be as stipulated by the parties or as determined by the Commission if no stipulation is submitted. Interest shall accrue at 10% per annum from August 27, 1984 until paid in full.
5. IT IS FURTHER ORDERED that Hamer shall be reimbursed for actual costs she paid between March 22, 1984 and date of reinstatement provided such costs would have been paid in her behalf through the UPS insurance plan had she not been terminated.
6. IT IS FURTHER ORDERED that Hamer shall be awarded \$5,000.00 in damages for emotional distress.
7. IT IS FURTHER ORDERED that Hamer shall be awarded attorney fees in an amount to be determined after the final decision is filed.

Signed this 7th day of July, 1988.

IONE G. SHADDUCK,

Hearing Officer

FINAL ORDER

NOW on this 27th day of January 1989, the Iowa Civil Rights Commission, at their regularly scheduled meeting, reviewed and considered the Proposed Order on Remand issued by Ione G. Shadduck, Administrative Law Judge, on October 26, 1988, and adopted it as their own.

DECISION AND ORDER

1. United Parcel Service, Inc. violated Iowa Code section 601A.6 (1983) in terminating VICTORIA L. HAMER because of sex.
2. IT IS ORDERED that UPS shall cease desist from discriminatory or unfair practice against female employees.

3. IT IS FURTHER ORDERED that VICTORIA L. HAMER shall be reinstated to employment with UPS-OTTUMWA with retroactive seniority to include the right to bid into a route which she could have bid into had she not been terminated.

4. IT IS FURTHER ORDERED that United Parcel Service, Inc., shall pay to Victoria L. Hamer \$43,678.00 as back pay for years 1984-1987, plus interest at 10% annum computed as accruing at the end of each year beginning 12-31-84 for 1984 back pay, etc., and continuing until paid in full.

The Commission reserves jurisdiction to determine additional wages to be awarded beginning January 1, 1988 through date of reinstatement.

5. IT IS FURTHER ORDERED that United Parcel Service, Inc., shall reimburse Victoria L. Hamer for medical expenses incurred in the amount of \$407.25.

The Commission reserves jurisdiction to determine additional medical costs that may be incurred prior to the date of reinstatement.

6. IT IS FURTHER ORDERED that Hamer shall be awarded \$5,000.00 in damages for emotional distress.

7. IT IS FURTHER ORDERED that United Parcel Service, Inc., shall pay to Victoria L. Hamer \$8,083.20 toward her attorney fees.

SIGNED THIS _ DAY OF FEBRUARY, 1989.

RUBY ABEBE, Chairperson

Iowa Civil Rights Commission